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### Normativity and functional cooperation on labour migration

*Norm diffusion in the context of inter-state consultation mechanisms in Asia*

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Pedro de Sena

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Normativity and  
Functional Cooperation  
on Labour Migration

Norm diffusion in the context of  
inter-state consultation mechanisms  
in Asia



UNIVERSITY OF AMSTERDAM

# **Normativity and functional cooperation on labour migration**

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*Norm diffusion in the context of inter-state consultation mechanisms in Asia*

**Pedro M. V. P. de Sena**



Normativity and functional cooperation on labour migration

Norm diffusion in the context of inter-state consultation mechanisms in Asia

## ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor

aan de Universiteit van Amsterdam

op gezag van de Rector Magnificus

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Faculteit der Rechtsgeleerdheid





He was a migrant. He was one of those who had ended up in a place that was not the place where he began.

Salman Rushdie  
*Joseph Anton: A Memoir* (2012)



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I dedicate this thesis to all migrant workers. I can only be humbled by their courage and resilience.

“Men travel from North to South, from East to West, from Country to Country, in search of bread and a better future.”

Ferreira de Castro, *Emigrants* (1928)

## **List of abbreviations**

ADD	Abu Dhabi Dialogue
ASEAN	Association of South East Asian Nations
BLA	Bilateral Labour Agreement
CP	Colombo Process
CPTSU	Colombo Process Technical Support Unit
ESCAP	Economic and Social Commission for Asia and the Pacific
EU	European Union
GCC	Gulf Cooperation Council
GCM	Global Compact for Safe, Orderly and Regular Migration
GDP	Gross Domestic Product
GFMD	Global Forum on Migration and Development
GRCP	Global Meeting of Chairs and Secretariats of Consultative Processes on Migration
ICMPD	International Centre for Migration and Policy Development
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IGC	Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia
ILO	International Labour Organization
IMRF	International Migration Review Forum
IOM	International Organization for Migration
IR	International Relations
IRIS	International Recruitment Integrity System
ISCM	Inter-State Consultation Mechanism
MOU	Memorandum of Understanding
OECD	Organisation for Economic Co-operation and Development

RCP	Regional Consultative Process
SAARC	South Asian Association for Regional Cooperation
SDC	Swiss Agency for Development and Cooperation
SDG	Sustainable Development Goals
SOM	Senior Officials Meeting
TAWG	Thematic Area Working Group
UAE	United Arab Emirates
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime

## CHAPTER 1

# INTRODUCTION

### 1.1. Contextualisation

According to the United Nations (UN) Secretary-General António Guterres, migration is a fact of life, a defining feature of humanity and our world. It is a positive phenomenon enriching societies and economies as long as it is effectively managed. Otherwise, he argues, it generates huge challenges, from tragic loss of life, to rights abuses and social tensions. For him, effectively managing migration and protecting the rights of all migrants requires strengthening international cooperation.<sup>1</sup> Yet, the cooperative framework on migration continues to elude international law.

As any other transnational reality, international labour migration needs to be ruled, managed, governed or regulated, either controlled or liberalised. In any case, it requires the establishment of rules of appropriate behaviour, i.e. norms, framing the actions of the social actors involved in the migratory process, from states to migrants, but also recruitment agents, employers and relevant international organisations, amongst others. There is, then, a place for normativity on labour migration. However, at first and from a legal perspective, the existing international regime<sup>2</sup> on labour migration could be perceived as feeble mostly due to a noticeable tendency

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<sup>1</sup> António Guterres, Secretary-General's remarks at the briefing on the SG Report on the Global Compact for Safe, Orderly and Regular Migration, 16 February 2022, available at <https://www.un.org/sg/en/node/261905> (last access: March 31, 2022).

<sup>2</sup> International legal regime is defined as “a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations”. Stephen D. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’ (1982) 36 *International Organization* 185-186.

to place it in the realm of politics, rather than law, avoiding the binding commitments of international law.

One can posit that some transnational realities have a higher propensity for international legal regimes to develop based on the general idea that states are less willing to assume international commitments in areas perceived as impeaching on sovereignty.<sup>3</sup> In contrast with the development of international regimes on trade, finance or the environment, international migration is one of the remaining transnational domains on which a global regime has yet to be implemented. If this is true for migration in general – the cross-border movement of people irrespective of its purpose – it is more evident when viewed from an international labour migration perspective, i.e. the cross-border movement for purposes of employment in a foreign country. Cooperation in this field faces hurdles most of which are entrenched in states claiming sovereign prerogatives in deciding who is allowed into national (or regional) borders, as well as why and for how long. In this respect, states show a sovereignty-based resistance to international law.<sup>4</sup> Being unwilling to relinquish formal regulatory authority over labour migration to a global supranational authority, states express a strong will to retain their prerogatives to control immigration and to decide on the level of legal protection granted to those who are admitted to live and work in their territory.<sup>5</sup>

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<sup>3</sup> Oona A. Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 72 *The University of Chicago Law Review* 469.

<sup>4</sup> Justin Gest, Carolyn Armstrong, Elizabeth Carolan, Elliott Fox, Vanessa Holzer, Tim McLellan, Audrey Cherryl Mogan, and Meher Talib, 'Tracking the Process of International Norm Emergence: A Comparative Analysis of Six Agendas and Emerging Migrants' Rights' (2013) 19 (2) *Global Governance* 167.

<sup>5</sup> Kathleen Newland, 'The Governance of International Migration: Mechanisms, Processes, and Institutions' (2010) 16 (3) *Global Governance* 334; Martin Ruhs, *The Price of Rights: Regulating International Labor Migration* (Princeton University Press 2013) 16-23.

Despite such reluctance towards international law, one can affirm the existence of a specific legal regime on labour mobility, which however does not instil high levels of adherence.<sup>6/7</sup> The International Labour Organization (ILO) conventions dealing with migrant labour and social security of migrant workers have a limited number of ratifications,<sup>8</sup> whereas the 1990 International Convention on the Rights of All Migrant Workers and Members of their Families (ICRMW) is the least ratified core international human rights instrument<sup>9/10</sup> and has an uneven distribution in terms of ratifications: geographically most ratifying states are from the southern hemisphere, whereas in terms of migration flow they are mostly classified as sending countries.

The genesis of this research is, thus, the awareness of the existence of a paradox: as a transnational domain, actors in labour migration – states, migrants and employers alike – would benefit from the clarity provided by an effective legal regime which requires a strong commitment to international cooperation; however, states are reluctant to cooperate towards such regime if it impinges on their sovereignty. How to solve this conundrum, then?

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<sup>6</sup> Graziano Battistella, 'Migration and human rights: the uneasy but essential relationship' in P. de Guchteneire, A. Pécoud and R. Cholewinski (eds.), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (UNESCO/Publishing and Cambridge University Press 2009) 47; Bernard Ryan and Virginia Mantouvalou, 'The Labour and Social Rights of Migrants in International Law', in R. Rubio-Marin (ed.), *Human Rights and Immigration* (Oxford University Press 2013) 177.

<sup>7</sup> The concept of adherence, which goes beyond the formal criterion of ratification, reflects how committed a state is in conforming its action to an international regime and tries to answer the broad question why states abide by international law. Sarah Elizabeth Kreps and Anthony Clark Arend, 'Why States Follow the Rules: Toward a Positional Theory of Adherence to International Legal Regimes' (2006) 16 *Duke Journal of Comparative & International Law* 331.

<sup>8</sup> Namely ILO Conventions:

- No. 97 (Migration for Employment) (Revised), 1949: 53 ratifications;
- No. 118 (Equality of Treatment of Nationals and Non-Nationals in Social Security), 1962: 38 ratifications;
- No. 143 (Migrant Workers (Supplementary Provisions), 1975: 28 ratifications;
- No. 157 (Establishment of an International System for the Maintenance of Rights in Social Security), 1982: 4 ratifications;
- No. 181 (Private Employment Agencies), 1997: 37 ratifications;
- No. 189 (Domestic Workers), 2011: 35 ratifications.

Source: ILO's NORMLEX - Information System on International Labour Standards (March 31, 2022).

<sup>9</sup> The ICRMW was adopted by General Assembly Resolution 45/158 of 18 December 1990.

<sup>10</sup> 57 ratifications. Source: United Nations Treaty Collection (March 27, 2022).

The call for stronger cooperation on migration, echoed in the UN Secretary-General assessment that “the need for a cooperative framework on migration has never been more apparent”,<sup>11</sup> has been answered with states’ growing engagement in non-legal frameworks, such as ILO’s 1998 Declaration on Fundamental Principles and Rights at Work<sup>12</sup> and the 2018 Global Compact for Safe, Orderly and Regular Migration (GCM). The existence of a multitude of inter-state consultation mechanisms on migration, which will be addressed in detail in the course of this research, is also a relevant symptom of such a trend.

For the purpose of contextualisation, it suffices to say that the tendency to position cooperation on migration outside the realm of international law might be an attempt by states to overcome their unwillingness to assume binding international obligations on labour mobility. The reasons for the preference for political rather than legal frameworks will later be analysed in detail. Ironically, however, even so-called soft law<sup>13</sup> instruments are often credited with exerting a significant degree of normative force notwithstanding its non-binding character. I reckon this would ultimately mean that the push for normativity in migration is so strong that it emerges even if states try to boycott ‘the usual suspects’ of international lawmaking processes: treaties and multilateralism.

This research will, therefore, look beyond international law in the quest for a clearer understanding of normativity in labour migration. In doing so, I will be crossing the boundary

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<sup>11</sup> Global Compact for Safe, Orderly and Regular Migration – Report of the Secretary-General (December 27, 2021) (A/76/642).

<sup>12</sup> “In response to member states’ reluctance to increase legal obligations, a consensus emerged regarding a commitment to fundamental labor rights in the form of a nonbinding, promotional declaration.” Justin Gest et al., *op. cit.* (n. 4) 158.

<sup>13</sup> Soft law can be defined as “those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct”. Andrew T. Guzman and Timothy L. Meyer, ‘International Soft Law’ (2010) 2 *Journal of Legal Analysis* 171, 174.

between law and international relations (IR), contributing to the increasing dialogue between the two social sciences.

Before laying the theoretical foundations for such dialogue, I will briefly present an overview of international law on labour mobility. Such overview provides the backdrop against which non-binding instruments and mechanisms will be assessed.

## **1.2. International law and labour mobility: an introduction**

The international legal regime on labour mobility is apt, despite its low levels of adherence, to establish the standards of behaviour in respect of labour migration, particularly the protection of migrant workers' rights. The effectiveness of such a regime, however, remains to be proven.

Migrant workers are generally protected under the core human rights instruments, namely the international bill of rights, as equals in human dignity. As ascertained by the Committee on Economic, Social and Cultural Rights, the rights enshrined in the International Covenant on Economic, Social and Cultural Rights “apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, *migrant workers* and victims of international trafficking, regardless of legal status and documentation”.<sup>14</sup> Secondly, they benefit from the specific international legal regime on migrant workers' rights,<sup>15</sup> which is built at the global level on the UN's normative work. The ICRMW sets the standards for the treatment of all migrant workers, i.e. those who are to be engaged, are engaged or have been engaged in a remunerated activity in a State of which he or she is not a national.<sup>16</sup> In terms of the work of UN's

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<sup>14</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 20 – *Non-discrimination in economic, social and cultural rights (art. 2, para.2, of the International Covenant on Economic, Social and Cultural Rights)* (2009) (stress added).

<sup>15</sup> Bernard Ryan and Virginia Mantouvalou, *op. cit.* (n. 6) 177-211.

<sup>16</sup> ICRMW article 2(1). P. de Guchteneire et al., (eds.), *op. cit.* (n. 6); Beth Lyon, ‘The unsigned United Nations Migrant Worker Convention: An overlooked opportunity to change the "brown collar" migration paradigm’ (2010)



specialised agencies, ILO's normative framework on migrant workers is particularly relevant.<sup>17</sup> Such a framework includes two general conventions on migrant workers' rights, alongside with conventions on social security rights, on forced labour, and on private employment agencies.<sup>18</sup> Besides the conventions specifically addressing migrant workers, all international labour standards apply to migrant workers unless otherwise stated.<sup>19</sup>

At the regional level, the protection of migrant workers' rights is mostly grounded in the general human rights instruments and mechanisms in place in a particular region.<sup>20</sup> These instruments and mechanisms do not necessarily address the specific issue of migrant workers but, nevertheless, they provide for relevant rights and safeguards applicable to all, including those who seek work in a foreign country. In the Americas and in Africa, the formal instruments and mechanisms of regional human rights systems grant protection to migrant workers. In the Americas, the system is based upon the 1948 American Declaration of the Rights and Duties of Man, the work of the Inter-American Court and the Inter-American Commission on Human Rights and on the Organization of American States' resolutions; in turn, the African system emanates from the 1981 African Charter on Human and Peoples' Rights. In Asia, despite being a region without a formal system for the protection of human

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42 New York University Journal of International Law & Politics 389-500; Bernard Ryan, 'In defence of the Migrant Workers Convention: Standard-Setting for Contemporary Migration', in J. Satvinder (ed.), *The Ashgate Research Companion to Migration Theory and Policy* (Ashgate Publishing 2013) 491-515.

<sup>17</sup> Besides ILO, the World Trade Organization (WTO) also plays a relevant role in terms of regulating the international mobility of workers. Johanna Jacobsson, 'GATS Mode 4 and Labour Mobility: The Significance of Employment Market Access', in M. Panizzon, G. Zürcher and E. Fornalé (eds.), *The Palgrave Handbook of International Labour Migration – Law and Policy Perspectives* (Palgrave Macmillan 2015) 61-94; Joel P. Trachtman, *The international Law of Economic Migration. Toward the Fourth Freedom* (W.E. Upjohn Institute for Employment Research, Kalamazoo 2009) 241-267.

<sup>18</sup> See above (n. 8). On forced labour, Convention concerning Forced or Compulsory Labour 1930 (No. 29) and Convention concerning Abolition of Forced Labour 1957 (No. 105).

<sup>19</sup> ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration, Principle 9(a) (2006).

<sup>20</sup> On regional standards, Javaid Rehman, *International Human Rights Law*, Chapter 19: Rights of migrant workers and their families, 2<sup>nd</sup> edition (Longman 2010) 704-710; Ryszard Cholewinski, 'Human rights of migrants: The dawn of a new era?' (2010) 24 Georgetown Immigration Law Journal 585-615.

rights, the rights of migrant workers have been developed mainly in the context of the Association of South East Asian Nations (ASEAN), notably the 2007 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers and the work of the Committee on the Implementation of such Declaration.<sup>21</sup> In Europe, a juxtaposed system of human rights protection combines the guarantees derived from the Council of Europe's normative and jurisprudential work, grounded on the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, the 1961 European Social Charter<sup>22</sup> and the 1977 European Convention on the Legal Status of Migrant Workers, with those drawn by the European Union (EU), despite the complexities of the Union's immigration policies.<sup>23</sup>

Notwithstanding the existence of the above mentioned international and regional legal instruments safeguarding migrant workers' rights, their effectiveness is impaired by their limited scope and, above all, by the lack of commitment towards the establishment of an international legal framework on labour mobility. This overview does not detail the advantages and shortfalls of the international law instruments in force, which would be outside the scope of my research. However, it serves as a reminder of their existence and potential utility. Unsurprisingly, the international legal regime on labour mobility has been mostly restricted to the field of human rights of migrants, leaving untouched more sensitive subjects like the right to decide admission into national borders and ultimately the existence of a right to migrate.

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<sup>21</sup> Stefan Rother, 'The uneven migration governance of ASEAN', in A. Geddes, M. V. Espinoza, L. H. Abdou and L. Brumat (eds.) *The Dynamics of Regional Migration Governance* (Edward Elgar Publishing 2019) 186-204.

<sup>22</sup> Articles 18 and 19 address specifically migrant workers.

<sup>23</sup> These policies are centred on the relaxation of internal borders – tributary of the ideas of internal market and free movement of people, including workers – and a stronger external border. The policy objectives on migration from third-countries, formulated in the 1999 Tampere Conclusions, envisage a comprehensive approach addressing political, human rights and development issues through partnerships with countries of origin, the fair treatment of third country nationals, particularly long-term residents and their family members, and a more efficient management of migration flows. Gina Clayton, *Textbook on Immigration and Asylum Law*, 5<sup>th</sup> Edition (Oxford University Press 2012) 178-201.

### 1.3. Norms and normativity: conceptualisation

My research is about norms – norms on labour migration – and their creation processes; their nature inasmuch their content. For the purpose of terminological clarity, I use a long-standing definition of norm as “a standard of appropriate behaviour for actors with a given identity”.<sup>24</sup> A note of caution is advised though, as this definition does not necessarily refer to legal norms. It has a broader scope since multiple social systems – social, religious or political – create norms by ascribing specific behaviours to their members.

Building on the definition of norm, I use the term normativity with the rather narrow meaning of the ability to create norms. In this sense, the term does not entail any judgment based on a value predicament. Instead, it highlights the procedural aspects of norm creation processes, i.e. the mechanisms either formal or informal of generating standards of conduct for states or other relevant actors, whether those norms are legal in nature or not. Then, the concept becomes *norm-activity* or normative activity, referring to the normative power or function instead of the outcome of international norm setting processes – the norm itself. The scope of the term acknowledges that “norm-making at the international level has undergone a sweeping pluralization and most of the normative activity takes place outside the traditional international law framework”.<sup>25</sup> This reality can be described either as ‘legal pluralism’ or ‘plurality modes of normativity’, as diverse forms of exercising normative power coexist, some of which originating from outside norm creating frameworks within state mechanisms. Pluralism, in this context,

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<sup>24</sup> Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52(4) *International Organization* 891.

<sup>25</sup> Jean d’Aspermont, ‘From a Pluralization of International Norm-Making to a Pluralization of the Concept of International Law’, in J. Pauwelyn, R. A. Wessel and J. Wouters (eds.), *Informal International Lawmaking* (Oxford University Press 2012) 195.

reassesses long-established dichotomies such as the distinction between law and non-law, formality and informality, and hard law and soft law.<sup>26</sup> Ontologically, I view normativity in its relative dimension and recognize the role allocated to soft law.<sup>27</sup>

Moving towards normativity on labour migration, I subscribe to the view that the creation of international norms on labour migration requires a high degree of cooperation. However, as I will detail later, the state-centric paradigm and the safeguard of national selfish interests<sup>28</sup> is detrimental to the creation of, and adherence to, a strong international labour migration regime. Meanwhile, states endorse collaborative governance mechanisms.<sup>29</sup> The GCM adoption and implementation processes, as well as the engagement in inter-state consultation mechanisms, on which I will elaborate later, are illustrative of a noticeable state preference. It remains to be seen, however, if such preference impacts normativity and how. In due course I will try to provide the answers to these questions.

At this point and for the sake of argument, I posit that transnational legal processes<sup>30</sup> have a possible role in norm-making in labour migration, even if indirect and unintended. If such a role is confirmed it would assume expectedly a political nature, placing its outcome closer to the

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<sup>26</sup> Véronique Champeil-Desplats, 'Law, the plurality of modes of normativity and their interactions' (2019) 16 *La Revue des Droits de l'Homme*, 2-6.

<sup>27</sup> Ulrich Fastenrath, 'Relative Normativity in International Law' (1993) *European Journal of International Law* 305-340.

<sup>28</sup> Anne L. Herbert, 'Cooperation in International Relations: A Comparison of Keohane, Haas and Franck' (1996) 14(1) *Berkeley Journal of International Law* 229.

<sup>29</sup> Collaborative governance refers to "the processes and structures of public policy decision making and management that engage people constructively across the boundaries of public agencies, levels of government, and/or the public, private and civic spheres in order to carry out a public purpose that could not otherwise be accomplished". Kirk Emerson, Tina Nabatchi, and Stephen Balogh, 'An Integrative Framework for Collaborative Governance' (2012) 22 (1) *Journal of Public Administration Research and Theory* 2.

<sup>30</sup> "Transnational legal process describes the theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law". Harold Hongju Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 183-184; Regina Jefferies, 'Transnational Legal Process: An Evolving Theory and Methodology' (2021) 46(1) *Brooklyn Journal of International Law* 311-367.

border of non-law. The fact that the norms on international labour migration originate outside the traditional state-centred legal norm creation processes might withhold them from the perceived advantages of strict normativity, namely predictability, legitimacy, and enforceability.<sup>31</sup> However, it does not signify any depreciation of the normative value of such processes and norms. It means instead that reality is far more complex, with the emergence of new forms of normativity, which might well be as relevant as the traditional ones. In the words of Véronique Champeil-Desplats,

The evolution of normative phenomena is also demonstrated by the emergence of new sources and actors that claim to produce normativity, whose qualification as legal becomes a subject of questioning as well as an issue. These new forms of normativity may be presented as alternatives or parallels and may even be intended to replace the forms of normativity usually produced by states.<sup>32</sup>

#### **1.4. Aim and research questions**

The aim of this research is to study the ‘new forms of normativity’ in order to identify their potential as norm creation processes applicable to labour migration.

The ground for my research is, as mentioned above and as it will be further elaborated in the following chapters, the realisation that the formal norm creation processes associated with international law are unable to prompt a solid international legal regime on labour migration. The acknowledgement of such inability does not lessen the value of the existing international legal norms as they continue to play an important normative function, namely in the protection of migrant workers’ rights. However, the complexity of labour migration requires a more

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<sup>31</sup> Daphné Richemond, ‘Normativity in International Law: The Case of Unilateral Humanitarian Intervention’ (2003) 6 Yale Human Rights and Development Law Journal 54-59.

<sup>32</sup> Véronique Champeil-Desplats, *op. cit.* (n. 26) 2.

effective way of establishing the standards of conduct in this respect. Hence, the underlying basic questions: why not international law and if not international law, then what?

The answer to these questions might be found in the fundamentals of cooperation theory. In the following chapters, I will review such theory and identify the reasons why states engage in cooperation in the first place and the form such cooperation assumes. I will also address existing informal cooperative mechanisms, which can be classified as functional cooperation for the reasons explained in Section 2.3, highlighting their advantages and limitations. This form of cooperation, in which states cooperate through transgovernmental networks, has been deemed relevant in collecting and sharing information, as well as in promoting technical assistance, training, policy coordination and rule harmonisation and enforcement.<sup>33</sup> Their presence has been identified in areas like banking, finance, competition, health, food and social standards.<sup>34</sup>

While their relevance remains to be seen, it is also possible to discern the existence of informal cooperation mechanisms on migration. Since the 1980s, states have been engaging in multilateral cooperation on migration issues outside the political, legal and financial constraints of international organisations. The emergence of inter-state consultation mechanisms (ISCM) – state-led, on-going information-sharing and policy dialogues at the regional, inter-regional or global level for States with an interest in promoting cooperation in the field of migration, comprising global processes on migration, interregional forums on migration bridging two or

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<sup>33</sup> Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004) 131.

<sup>34</sup> Pierre-Hugues Verdier, 'Transnational Regulatory Networks and Their Limits' (2009) 34(2) *Yale Journal of International Law* 113-172; Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43(1) *Virginia Journal of International Law* 1-92; A. Berman, S. Duquet, J. Pauwelyn, R. A. Wessel and J. Wouters (eds.) *Informal International Lawmaking: Case Studies* (Torkel Opsahl Academic EPublisher 2012); Sol Picciotto 'Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism' (1997) 17 (1) *Northwestern Journal of International Law & Business* 1014-1056.

more regions, and regional consultative processes (RCP) covering one region<sup>35</sup> – provided an informal venue and opportunity for states with an interest in common migration patterns to come together, understand each other’s perspectives and identify common solutions.<sup>36</sup> Yet, can these mechanisms have an impact on normativity? Can they act as norm creation processes and instil a stronger legal regime on labour migration? If such an impact exists, how is it expressed?

Based on these insights and doubts, this research tries to answer a main question: can functional cooperation enable normativity on labour migration?

The answer to this question entails a close scrutiny of the above-mentioned ‘new forms of normativity’, particularly RCPs. Thus, the following sub-questions:

- Can functional cooperation mechanisms on labour migration act as norm-makers?
- If so, how do they create norms?
- Can functional cooperation contribute to norm diffusion?

As I said before, I will be looking for normativity in unusual places, trying to fill a legal void with non-legal solutions. At first, this may seem counterproductive: maybe there is no replacement for international law in terms of labour migration regime or maybe there is but it is just of a different nature; maybe the migration-cooperation paradox has to remain unsolved because state interests require so; or maybe migration as a social and economic phenomenon does not have the strength to create new expressions of normativity while being unable to accommodate the traditional ones.

Nonetheless, the relevance of researching normativity on labour migration is multi-fold. Firstly, it provides an insight of the interrelation between law and politics, contributing to the dialogue

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<sup>35</sup> IOM, *Glossary on Migration* (IOM 2019) 115.

<sup>36</sup> Randall Hansen, *An Assessment of Principal Regional Consultative Processes on Migration* (IOM 2010) 11-12.

between law and IR.<sup>37</sup> In doing so, it highlights the importance of new forms of normativity, such as informal international lawmaking that will later be discussed, and the combination of legal and non-legal features they entail. Secondly, it deepens knowledge on inter-state consultation mechanisms on migration, particularly on RCPs. In this respect, the study of RCPs provides an opportunity to fill a void first felt two decades ago but which I believe is still valid nowadays: “although regional processes are increasingly mentioned in policy or academic literature, there are few studies on the workings and achievements of the processes themselves”.<sup>38</sup> More importantly, the research on labour migration normativity can be used to increase the effectiveness of advocacy for migrant’s rights. If the research identifies new ways of establishing standards of behaviour in labour migration, attention should then shift from traditional mechanisms to those that have the ability to produce tangible results in building an effective legal regime. The levels of adherence to the ICRMW when compared to those of ‘softer’ frameworks like the GCM confirm the importance of placing advocacy efforts onto solutions which might rank lower in terms of legality but eventually higher in respect of efficacy.

The overall goal of my research is to identify potential viable alternatives to the shortcomings of international law in shaping national legal orders in a field impinging state sovereignty and national interests, while touching upon the fundamental rights of migrant workers.

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<sup>37</sup> Regina Jefferies, *op. cit.* (n. 30) 318-323.

<sup>38</sup> Amanda Klekowski von Koppenfels, ‘Informal but Effective: Regional Consultative Processes as a Tool in Managing Migration’ (2001) 39(6) *International Migration* 62; Amanda Klekowski von Koppenfels, *The Role of Regional Consultative Processes in Managing International Migration*, IOM Migration Research Series No. 3 (IOM 2001). Other authors concur with this view. For instance, Jobst Köhler asserts that “the literature on RCPs is limited and usually focuses on the broader role of RCPs within regional and global migration governance. There has been no systematic attempt to analyze the question of the impact of RCPs on policies and international relations from the perspective of their internal organization”. Jobst Köhler, ‘What government networks do in the field of migration: An analysis of selected Regional Consultative Processes’, in R. Kunz, S. Lavenex and M. Panizzon (eds.) *Multilayered Migration Governance: The promise of partnership* (Routledge 2011) 69.



## 1.5. Methodology

The aim and questions underlying my research project place it at the borderline of different but related disciplines: law and IR. Its interdisciplinary nature requires a combined methodological approach in which I follow the methods most commonly associated with legal research, while borrowing some useful methods from the social sciences.

Legal scholarship is traditionally influenced by normative analysis of the law, in an effort to understand the best balance of rights and obligations under the framework defined by law. Legal researchers tend to use conceptual analysis, reasoning, rhetoric, and references to the text of the law, aiming at the formation of a legal argument based purely on legal reasoning. Nevertheless, this field of thought has witnessed an increased use of empirical research methods to address a variety of legal questions.<sup>39</sup> This new approach to legal research instils a growing exchange between legal scholars and those in the social sciences, where the former focus on the development and interpretation of legal norms as guidance for human behaviour and the latter try to understand and explain different aspects of human behaviour.<sup>40</sup> From a social sciences perspective, applying normative political theory<sup>41</sup> to migration studies has

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<sup>39</sup> Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research' (2017) 13(3) *Utrecht Law Review* 95-113.

<sup>40</sup> Philip Langbroek, Kees van den Bos, Marc Simon Thomas, Michael Milo, and Wibo van Rossum, 'Methodology of legal research: Challenges and opportunities' (2017) 13 (3) *Utrecht Law Review* 2-3.

<sup>41</sup> Normative theory is an academic discipline that uses specific modes of argument in order to address a specific set of questions, in which prescriptive or evaluative statements are treated as sets of propositions that must be internally consistent and must be defended against opposing views, rather than as subjective opinions whose validity cannot be established through argument. Normative concepts and principles, which establish standards of behaviour (what ought to be done, what is right or wrong), are contrasted with their daily application to identify gaps, contradictions and paradoxes in policy and practice. Rainer Bauböck, 'Normative political theory and empirical research', in D. della Porta and M. Keating (eds.) *Approaches and Methodologies in the Social Sciences: a Pluralistic Perspective* (Cambridge University Press 2008) 41; Christian List and Laura Valentini, 'The Methodology of Political Theory', in H. Cappelen, T. S. Gendler and J. Hawthorne (eds.) *Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016) 525-553.

proved to be a useful method.<sup>42</sup> The interdisciplinary relationship between normative theory and qualitative research provides the conceptual framework and the empirical information needed to better understand migration dynamics, institutions, and policies.<sup>43</sup>

### 1.5.1. Research design

The research design spans over five stages: object determination, conceptualisation, theorisation, empirical research and inference.

- i. First, I establish that the object of my research project is state behaviour in two dimensions: the exercise of normative power and the participation in cooperation. This behaviour can be adopted by the state as a unitary entity or in a disaggregated form, as Anne-Marie Slaughter suggests.<sup>44</sup> In both instances, the research project perceives the state as a rational actor that makes informed, calculated decisions in pursuing its self-interests. This object of study stresses the IR perspective of the research project, which nevertheless shall be intersected with the legal understanding of political processes through legal disciplines like international and constitutional law.
- ii. Additionally, the research requires the definition of structural concepts.<sup>45</sup> I already introduced the concepts of norm and normativity, and the definitions of labour migration and ISCMs. Conceptualisation will continue with the definition of key concepts such as

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<sup>42</sup> The debate on closed societies, which confronted arguments in favour of immigration restrictions with those calling for open borders as a requirement of liberal justice or for free movement as a basic liberty, was an early illustration of normative theory's application to migration issues. Rainer Bauböck, *op. cit.* (n. 41) 41-45.

<sup>43</sup> Ricard Zapata-Barrero, 'Applied Political Theory and Qualitative Research in Migration Studies', in R. Zapata-Barrero and E. Yalaz (eds.) *Qualitative Research in European Migration Studies* (Springer 2018) 88; Ricard Zapata-Barrero and Evren Yalaz, 'Qualitative Methods in Migration Research', in P. Scholten (ed.), *Introduction to Migration Studies* (IMISCOE Research Series 2022) 411-423.

<sup>44</sup> Anne-Marie Slaughter, *op. cit.* (n. 33) 12-15.

<sup>45</sup> Concepts are terms used to classify the social world into categories; they can be seen as corresponding to real categories (positivism) or as ways of representing reality with the ability to explain outcomes (constructivism). Peter Mair, 'Concepts and concept formation', in D. della Porta and M. Keating (eds.), *op. cit.* (n. 41) 177-197.

cooperation, transgovernmentalism and norm diffusion, which will be the partial focus of Chapter 2. This conceptualisation helps to establish the boundaries of the object under scrutiny.

- iii. A subsequent stage involves theorisation. Theories are sets of statements – propositions expressed in language – which allow the representation of all implications of some underlying principles.<sup>46</sup> Based on the working hypothesis, the research links existing middle-range theories<sup>47</sup> of normativity, international cooperation, and norm diffusion to state action in respect of norm creation in labour migration. Whereas I do not aim at theory construction, in Chapter 2 I will assess those that, *prima facie*, have a potential explanatory value for the research project, namely transgovernmentalism and informal international lawmaking.
- iv. In order to provide empirical support to the theoretical conceptualisation, the research project includes the definition and construction of a case study (‘casing’),<sup>48</sup> which establishes the unit of analysis, delimiting the scope of the in-depth empirical investigation.<sup>49</sup> The case study is used to assess whether existing theories account for the processes and outcomes of the selected case (theory-evaluating case study), eventually contributing to an evaluation and refinement of theories (interpretative case study).<sup>50</sup> In this matter, I chose a single case approach despite the risk of selection and confirmation bias, which is neutralised by the use of a strong theoretical framework, the inclusion of alternative explanations and the use of

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<sup>46</sup> Christian List and Laura Valentini, *op. cit.* (n. 41) 13.

<sup>47</sup> A middle-range theory is one that works across a limited number of contexts or seeks to explain only certain aspects of a phenomenon. *Glossary*, in D. della Porta and M. Keating (eds.), *op. cit.* (n. 41) 352.

<sup>48</sup> Case studies are praised for their detailed knowledge of processes, considered as particularly useful for the discovery of social mechanisms. Donatella della Porta, ‘Comparative Analysis: case-oriented versus variable-oriented research’, in D. della Porta and M. Keating (eds.), *op. cit.* (n. 41) 211.

<sup>49</sup> Pascal Vennesson, ‘Case studies and process tracing: theories and practices’, in D. della Porta and M. Keating (eds.), *op. cit.* (n. 41) 227.

<sup>50</sup> *Idem*, 227-228.

multiple types of data.<sup>51</sup> The single case approach intends to gather extensive knowledge about a social phenomenon, which will be used for an in-depth analysis of the hypothesised and theorised causal mechanisms. For this I will borrow techniques from process-tracing<sup>52</sup> and combine them with other methods employed in legal research. As Simone Schroff explains, “process-tracing presumes that a causal mechanism leaves observable traces in those it affects even when the final outcome is the same. This means that it is possible to determine whether a mechanism is relevant by comparing the empirical evidence against the hypothesised empirical traces”.<sup>53</sup> In particular, the existence of causal mechanisms of norm diffusion will be qualitatively assessed,<sup>54</sup> as explained in detail in Sub-section 2.5.2.

- v. Finally, knowledge-based inferences will be made. This final stage intends to uncover and evaluate theoretically specified causal mechanisms that link variables in a comprehensive and temporal explanation of a social phenomenon,<sup>55</sup> in this case norm diffusion in the context of informal cooperation mechanisms on labour migration.

The combined use of interpretative and process-tracing techniques provides the tools for assessing if data gathered from the case study fits in the existing theoretical framework. The preliminary conclusion will be inductively confirmed from relevant documentation produced in the context of the case study, namely ministerial declarations, meeting reports and preparatory material. Confirmation is also inferred from state action. Observable data on state action

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<sup>51</sup> Marianne S. Ulriksen and Nina Dadalauri, ‘Single case studies and theory-testing: the knots and dots of the process-tracing method’ (2016) 19(2) *International Journal of Social Research Methodology* 230-231.

<sup>52</sup> Process-tracing is “a procedure for identifying steps in causal process leading to the outcome of a given depend variable of a particular case in a particular historical context”. Alexander L. George and Andrew Bennet, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005) 176 *apud* Pascal Vennesson, *op. cit.* (n. 49) 231.

<sup>53</sup> Simone Schroff, ‘Linking legal scenarios to empirical data: process-tracing as a methodology in law’ (2018) 9 *Law and Method* 4.

<sup>54</sup> Peter Starke, ‘Qualitative Methods for the Study of Policy Diffusion, Challenges and Available Solutions’ (2013) 41(4) *The Policy Studies Journal* 561-582.

<sup>55</sup> Marianne S. Ulriksen and Nina Dadalauri, *op. cit.* (n. 51) 225.

encompasses statements, reports, new laws, legislative amendments, and bilateral agreements (indirectly) linked with the case study, among other sources. The study of these materials recalls the principles of qualitative discourse analysis.<sup>56</sup> The study of legal and political texts directly or indirectly connected with the case study offers insight on the institutional attitude towards normativity and on norm diffusion. By adopting a discourse analysis approach instead of content analysis, which is generally based on coding of discourse expressions, the research design moves closer to conceptual interpretation prominent in legal scholarship. The in-depth analysis of the case study entails some sort of institutionalism, since it highlights the role of a specific institution in structuring the behaviour of states.

I extensively review the literature relevant for theorisation and conceptualisation, with a special focus on specialised literature on RCPs. The case study entails desk research of public data made available online, as well as occasional information obtained from individuals with direct knowledge of the object of study. The research uses secondary data analysis of literature and other sources, namely migration and population statistics, made available until the end of the first trimester of 2022.

### **1.5.2. Case study: delimitation of scope**

The research design encompasses the purposive selection of the Colombo Process – The Ministerial Consultation on Overseas Employment and Contractual Labour for Countries of Origin in Asia – as the single case study.

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<sup>56</sup> Discourse could be described, in its narrower sense, as a form of language use. But language, duly contextualised, expresses socio-political attitudes that can be the object of qualitative analysis. Migration, as a social phenomenon, generates various genres of discourse and “one of the first theoretical and methodological tasks when studying (migration and others) discourse is to establish what genre of discourse one is analysing.” Teun A. van Dijk, ‘Discourse and Migration’, in R. Zapata-Barrero and E. Yalaz (eds.), *op. cit.* (n. 43) 228, 231.

This selection reflects, first of all, my option in limiting my research to Asia, which can be explained by a combination of objective and subjective factors. First, the social and economic relevance of labour migration in Asia is undeniable, as it will become evident in Chapter 3 when I analyse its main characteristics. The continent's diversity in terms of economic, demographic, and developmental characteristics provide the supply and demand factors required for a steady flow of migrant workers, either intra- or inter-regionally. Asia is also an interesting object of study from an international law perspective due to the absence of a formal human rights system and the low adherence to labour migration regime based on legally binding instruments.<sup>57</sup> Perhaps not surprisingly, RCPs have flourished among Asian countries. The coexistence of these two factors – an aversion to formal international law and a tendency towards informal cooperative mechanisms – paves the way to hypothesise about a direct relation between the two. Secondly, a more personal reason for electing Asia as an object of study is the fact that I lived and worked in Asia for more than two decades. Not only did I obtain direct knowledge of the legal and political frameworks on regional labour migration but also, more significantly, I became aware of the plight of so many millions of workers that need to search for a better life in another country.

The adoption of the above-mentioned regional approach automatically involves a delimitation of the potentially relevant ISCMs, which are those composed by Asian countries (intra-regional) or where Asian countries, as a group, relate with other regional blocks (inter-regional).<sup>58</sup> Since the research question is on labour migration, only two ISCMs have the potential to be the case study due to their thematic scope: the Colombo Process and the Abu Dhabi Dialogue.

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<sup>57</sup> Ryszard Cholewinski, 'Migration for Employment', in R. Plender (ed.) *Issues in International Migration Law* (Brill/Nijhoff 2015) 71-72.

<sup>58</sup> A synopsis of active ISCMs in Asia is provided in Section 3.3, below.

I selected the Colombo Process for its homogenous composition, which facilitates the comparison among different variables. As this RCP solely brings together countries of origin, any detectable difference in state action cannot be explained due to states' interests deriving from the categorisation as countries of origin or destination. Yet, the diverse characteristics of its member countries provide enough diversity for the inference of the reasons states cooperate on labour migration and how diffusion operates in different national environments. The fact that, besides being a RCP representing more than 25 per cent of migrants worldwide, it has relevant activity in the adoption and implementation processes of the GCM is an additional reason for the Colombo Process being selected as the case study.

## **1.6. Thesis structure**

The chapters to come present a theoretical and empirical analysis of state action regarding cooperation on labour migration: Part I (Chapters 2 and 3) includes the theoretical framework and provides the regional background for the empirical research done in Part II (Chapters 4 and 5), while Part III (Chapter 6) presents the conclusions of the research.

In Chapter 2, I introduce the broader framework of cooperation theory in international relations, addressing the mainstream theoretical approaches, as well as specific mid-range theories, like transgovernmentalism, with high explanatory value for the type of cooperation under scrutiny. In so doing, I explore relevant concepts such as transgovernmental networks, informal international lawmaking and norm diffusion, reflecting on the increased hybridisation of lawmaking at the international level. I conclude this chapter with a summary of the most relevant aspects of the theoretical framework adopted for the research project.

Chapter 3 focuses on labour migration and sets the background for the regional approach adopted in my research. It starts with a reflection on some theoretical aspects of international

cooperation on labour migration. First, I elaborate on the ideal conditions for international cooperation on labour migration to occur, paying particular attention to the possibility of considering migration as a public good. Then, section 3.2 provides the empirical background on labour migration in Asia, identifying its structural factors and stressing the importance of its regional dimension. Chapter 3 concludes with a synopsis of the inter-state consultation mechanisms on migration active in Asia other than the case study, which will be addressed in detail in the following chapter.

In Chapter 4, I conduct an in-depth analysis of the Colombo Process as the single case study. I conduct an overview of its genesis, historical evolution, key areas of activity and outcomes, as well as the rules governing its operation. The chapter concludes with a critical discussion of those aspects I deem more relevant. This is the opportunity to clarify the role of the International Organization for Migration (IOM) in establishing and promoting an informal approach to labour migration and to shed light on the confluence of agendas between the IOM and the Colombo Process.

In Chapter 5, I conduct an analysis of the role of the Colombo Process in the adoption and implementations processes of the GCM, in order to verify if a norm diffusion process is present. First, I identify the norm with the potential to be diffused, making use of the concept of norm cluster. The interaction between the Colombo Process and the GCM, both in its drafting and implementation stages, will be discussed in Section 5.2. The chapter concludes with the analysis of the principle of free employment as a sub-norm included in the GCM. I will explain the content of such principle and the reasons why I consider it provides an example of a norm diffusion process in the context of a functional cooperation mechanism on labour migration.



In Chapter 6, I conclude my research by reviewing the main arguments advanced in the previous chapters and presenting my conclusions. Being aware of the limited scope of this research project, I preview some topics for future research on the role of informal mechanisms in the betterment of an international labour migration regime.

## PART I

# TOWARDS A COMPOSITE IMAGE OF COOPERATION ON LABOUR MIGRATION

## CHAPTER 2

### THEORETICAL FRAMEWORK

Political scientists and IR scholars have long debated international cooperation, particularly the scope of its definition, its modalities, and the ideal conditions for its emergence and success. The present chapter starts with a definition of international cooperation, before presenting an overview of the main classical theories that explain the phenomenon. Besides the mainstream IR theoretical approaches, this chapter uses mid-range theories that will later be useful for framing the case study: transgovernmentalism, originated within IR scholarship, and informal international lawmaking, which presents a legal perspective of the same reality. Finally, diffusion theory will also be surveyed.

The theoretical framework will be complemented with an analysis of the specificities surrounding international cooperation on labour migration, which will be included in Chapter 4 in the context of functional cooperation on labour migration in Asia.

#### **2.1. International cooperation**

The theoretical analysis of international cooperation departs from the assumption that states determine their behaviour in global politics consciously. Hence, when facing a transnational issue, i.e. a reality transcending national boundaries or interests, states elect a specific course of action after evaluating their relevant interests, as well as the costs and benefits of existing options for their international political behaviour. In doing so, states weight the repercussions

of *unilateralism* (the decision to act alone, irrespective of other states' interests), *conflict* (the option for acting against the interests of other states), *cooperation* (the preference for tackling issues through the interaction with other interested parties, coordinating the interests of the different states involved), or *inactivity* (the option of not addressing the problem at all).

Cooperation is chosen when inactivity is not an option due to the urgency in tackling the issue and isolationism, via either unilateralism or conflict, is impossible or unfeasible: it is impossible when the intrinsic transnational nature of the problem demands the intervention of more than one state in finding a solution; it is unfeasible when the costs of non-cooperation outweigh the benefits obtained from it. Once states opt for a cooperative approach, they engage in a dialectical interaction with other states in search of a common course of action. The result of this interaction is a compromise: the behaviour of the state is necessarily different from that it would have adopted alone; it is a conscious and intended adjustment of the political action of the state in international politics.

The determining factor for change in state behaviour is to obtain advantages exceeding the costs of non-cooperation. Ultimately, states seek the benefits, otherwise unobtainable, from the diffusion of costs and the exponentiation of advantages provided by the sharing of action with other stakeholders. States cooperate to obtain specific gains, which might be political, economic, diplomatic, humanitarian, or of any other nature: when states cooperate it is because cooperation improves the joint welfare of the negotiating states in some way.<sup>59</sup> However, not all states obtain the same gains, either quantitatively or qualitatively. Firstly, what a gain is would depend on the interest of the state, and most of the time they diverge from state to state; the gains obtained through cooperation need not be the same in magnitude or kind for each state,

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<sup>59</sup> Peter M. Gerhart, 'The Triangulation of International Intellectual Property Law: Cooperation, Power, and Normative Welfare' (2004) 36 Case Western Reserve Journal of International Law 6.

but they are mutual.<sup>60</sup> Secondly, cooperation may yield asymmetric or no joint gains: “[t]he fact that states ‘cooperate’ does not necessarily translate into joint gains, and it certainly does not necessarily mean that gains are jointly divided in a way that would meet a common standard of fairness.”<sup>61</sup>

Grounded on these insights, I use the term ‘international cooperation’ in the course of my research as the strategic adjustment of state behaviour to the interests of other states through a collaborative process. This definition is tributary of Robert Keohane’s postulate that cooperation occurs “when actors adjust their behavior to the actual or anticipated preferences of others, through a process of policy coordination”.<sup>62</sup>

## 2.2. Cooperation theory

IR theories provide a conceptual framework for the political interaction of actors, particularly states, in the global sphere based on different factors, namely power, interests, and identity.<sup>63</sup> Within such a framework, cooperation theory explains *why* states choose cooperation, theorising on the emergence of cooperation, its motivations, and its extent and durability.

Among a multiplicity of theories that could be summoned to theoretically frame my research, I find it useful to start with the mainstream IR theoretical approaches of realism and liberalism. They provide a dichotomy between the traditional views of state action based on power that are

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<sup>60</sup> Helen Milner, ‘International Theories of Cooperation among Nations: Strengths and Weaknesses’ (1992) 44(3) *World Politics* 468.

<sup>61</sup> Peter M. Gerhart, *op. cit.* (n. 59) 7.

<sup>62</sup> Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 1984) 51-52. I do not fully adopt Keohane’s definition because, in my view, policy coordination is just one of the possible outcomes of international cooperation. Instead, I use a nuanced definition stressing the means to achieve an end. As A. Betts explains, cooperation can be pursued through different ways: through coordination (states adjust the means by which they achieve a given end – how they do something collectively) or through collaboration (states adjust the end that they are working towards – what they do collectively). Alexander Betts, *Forced Migration and Global Politics* (Wiley-Blackwell 2009) 80.

<sup>63</sup> Stephanie Lawson, *Theories of International Relations: Contending Approaches to World Politics* (Polity Press 2015) 11.

detrimental to cooperation and those that focus on state interest in cooperating in the international arena. Constructivism, a theoretical approach that sometimes is seen not as a theory of international relations but rather as an analysis of the way in which theories are produced – a ‘metatheoretical enterprise’,<sup>64</sup> is also credited with providing suitable explanations for international cooperation and will also be presented. The theoretical pluralism granted by the diversity of IR mid-range theories is striking and contributes for a blurred view of cooperation. The choice of the most suitable theoretical approach for the analysis of international cooperation can adopt different intellectual perspectives. It is, thus, biased as it reflects a consciously adopted research agenda. I chose transgovernmentalism as a possible theoretical approach to explain international cooperation on migration, keeping in mind its intersection with different expressions of functionalism in IR scholarship.

### 2.2.1. Realism

Realism<sup>65</sup> builds a theory of state behaviour in international cooperation based on some assumptions about international relations:

Firstly, states are the main actors in world politics. Secondly, states’ key concern is survival and self-help and they can be conceived as rational, self-interested power maximizers. Thirdly, states are concerned with relative gains vis-à-vis other states. Fourthly, states are only functionally differentiated on the basis of their capabilities. Fifthly, anarchy (as the absence of world government) is the key ordering principle in the international system.<sup>66</sup>

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<sup>64</sup> *Idem* 155.

<sup>65</sup> Richard Ned Lebow, ‘Classical Realism’, and John J. Mearsheimer, ‘Structural Realism’, in T. Dunne, M. Kurki and S. Smith (eds.), *International Relations Theories: Discipline and Diversity*, 3<sup>rd</sup> ed. (Oxford University Press 2013) 59-75; 77-91.

<sup>66</sup> Alexander Betts, *op. cit.* (n. 62) 22.

Accordingly, international relations are perceived as a stage for power demand: states act in the international arena – diplomatically, militarily, or economically – to consolidate or enhance their relative position in the international system of nation-states, i.e. to increase their relative power.<sup>67</sup> The concept of relative power reflects the idea that a state’s strengthening is reflected in the weakening of another state, even if the losing state did not lose any power in absolute terms.

There is a natural tendency for neo-realists to disregard cooperation as a suitable form of state interaction since “international anarchy fosters competition and conflict among states, inhibiting their willingness to cooperate even when they share common interests”.<sup>68</sup> However, there are some areas of international politics where states do cooperate and the quest for power might also explain why states do so. According to a realist approach to international relations, states engage in explicit cooperation because they want to achieve more power or because they are already powerful enough and they want to slow down the unavoidable erosion of their hegemonic power. In this account, “a powerful state will gain from cooperation in two ways: from the direct benefits of the cooperation and from slowing down the process through which it loses power. These gains may well make the relative gains from cooperation greater for the powerful country, even if the direct gains of cooperation are evenly divided”.<sup>69</sup> Relative gains, therefore, are instruments to consolidate or improve the existing balance of power.

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<sup>67</sup> James F. Hollifield and Tom K. Wong, “The Politics of International Migration: How can we “Bring The State Back In”?”, C. B. Brettell and J. F. Hollifield (eds.), *Migration Theory: Talking Across Disciplines*, 3<sup>rd</sup> edition, (Routledge 2015) 248-249.

<sup>68</sup> Kim Ae Jung, ‘Cooperation and Game Theory in International Relations’ (2007) 11(2) *國際公共政策研究* 112. According to this author, “[t]he realists’ understanding of cooperation among states is closely linked to their emphasis on the structure of international system. A certain structure encourages certain behavior, and an anarchic structure usually works against achieving cooperation”.

<sup>69</sup> Peter M. Gerhart, *op. cit.* (n. 59) 14.

The paradigm for cooperation for neo-realists is its imposed form.<sup>70</sup> The change of state behaviour might not occur through a collaborative process but rather be the mere exercise of a hegemonic position. For neo-realists, imposed cooperation occurs when a state has achieved a threshold of power enough to assume a hegemonic position (*hegemonic stability theory*) which gives it the ability to provide a global public good unilaterally (*benevolent leadership model*) or coerce others into doing so (*coercive leadership model*).<sup>71</sup> However, if cooperation is imposed by a powerful state on others, “what at first glance appears to be international cooperation will, in reality, be the self-interested actions of a great power”.<sup>72</sup>

Neo-realism sees international cooperation with scepticism and does not provide much space for it in its view of world politics: “because states are primarily concerned with relative gains, international cooperation, which is generally oriented toward the pursuit of mutual gain, is of little interest to states”.<sup>73</sup> The focus on relative gains will decrease the feasibility of cooperation since the gain for one state will tend to be seen as a loss by another and the losing state won’t have the incentive to cooperate.<sup>74</sup> Conflict is likely.

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<sup>70</sup> *Imposed cooperation* is often the result of hegemonic leadership in international relations, occurring when the stronger party in a relationship forces the other side to alter its policies and, simultaneously adjusts its own policies, attempting to realise mutual gains. It is distinguishable from *explicit cooperation*, which entails a bargaining or negotiating process, and *tacit cooperation*, which simply involves a convergence of the actors’ expectations. Helen Milner, *op. cit.* (n. 60) 469; Kim Ae Jung, *op. cit.* (n. 68) 110-111.

<sup>71</sup> Alexander Betts, *op. cit.* (n. 62) 20-25, 82-83. According to Betts, “[i]n the benevolent [Hegemonic Stability Theory] model, a large state bears the cost of providing a global public good because it has a sufficiently large unilateral interest to provide the good. (...) In the coercive [Hegemonic Stability Theory] model, the hegemon will use its power to coercively induce other states to undertake a given action or to contribute to the provision of a global public good”. *Idem* 83.

<sup>72</sup> *Idem*. On a different note, “the notion of cooperation imposed by a stronger player may seem anomalous, but as long as mutual policy coordination to realize joint gains occurs, then it is cooperation by our definition.” Helen Milner, *op. cit.* (n. 60) 470.

<sup>73</sup> Alexander Betts, *op. cit.* (n. 62) 82.

<sup>74</sup> Robert Powell, ‘Absolute and Relative Gains in International Relations Theory’ (1991) 85(4) *The American Political Science Review* 1303.

### 2.2.2. Neoliberalism

The realist view of cooperation in international relations is challenged by liberalism, particularly liberal institutionalism also referred to as neoliberalism. This set of theories acknowledge the possibility for evolution from anarchy to cooperation; they assert “that shared economic interests create a ‘harmony of interests’ among states which in turn generate a demand for international institutions and rules that states will voluntarily agree to follow”.<sup>75</sup> For liberal institutionalism, even in the absence of hegemony and outside the quest for power, cooperation exists. States are not solely concerned with security and power and there are other areas in which there is plenty of room for collaboration among states. According to this perspective, the opportunities for cooperation are enhanced by the decentralisation of state functions, within the state as well as internationally, which makes the state less unitary and paves the way for other actors in international politics. Therefore, international institutions have emerged as new relevant actors in world politics, with the ability to constrain egocentric state behaviour and promote cooperation, assuming simultaneously an autonomous role in international affairs.

Another key proposition of liberalism is that states act in the international arena in order to obtain the maximum amount of individual absolute gains and are indifferent to the relative gains achieved by others. While the focus of realists on relative gains emphasises the prospects for conflict, the liberalist perspective strengthens the prospects for cooperation: whether cooperation results in a relative gain or loss is not very important to a state in neoliberal institutionalism so long as it brings an absolute gain.<sup>76</sup> This shifts the outcomes of cooperation, which no longer results in an unbalanced correlation between winners and losers but, instead, provides for a win-win situation where cooperation offers opportunities for mutual gains

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<sup>75</sup> Anne L. Herbert, *op. cit.* (n. 28) 226.

<sup>76</sup> Robert Powell, *op. cit.* (n. 74) 1303.



according to each state's own interest. The dynamics of contemporary world affairs increases the interdependence among states in a multitude of areas, which creates a common interest – a sum of self-interests – in collective action, instead of isolation. Therefore, the satisfaction of self-interest, more than the drive for power, is the leitmotif for state behaviour, according to liberal thought.

The fact that all participants can obtain individual advantages from the cooperative ventures increases the attractiveness of international cooperation. However, explicit cooperation risks defection when its subject matter refers to the provision of a certain type of public goods (global public goods), the benefits of which extend to all states irrespective of whether they contribute to provision and are not diminished by another state's enjoyment of those benefits. In this case, defection is tempting since states can freely benefit from goods provided by others. No individual state has an incentive to bear the transaction costs of providing global public goods when it might end up bearing all or a higher share of the provision's costs. States would be better off if they shared the costs of providing but their egoistic response is to avoid responsibility. Defection ("cheating") is, thus, "the greatest hindrance to cooperation among egoistic states".<sup>77</sup> According to liberal institutionalism, international institutions, either formal or informal, may facilitate cooperation by creating the structural environment within which states can more easily be assured other states will honour their commitments. The institutionalisation of cooperation raises the political costs of defection and enhances the long-term perspective of state interests. The repeated interactions international institutions create "reduces the incentives for a state to free-ride or defect because it means that it will be forfeiting potential longer-term gains".<sup>78</sup> Additionally, institutions may contribute to reducing

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<sup>77</sup> Kim Ae Jung, *op. cit.* (n. 68) 113-114.

<sup>78</sup> Alexander Betts, *op. cit.* (n. 62) 85.

the transaction costs of cooperation by institutionalising states' coordination of activities. Finally, institutions promote cooperation by facilitating "issue-linkage, combining issues within international bargaining in a way that facilitates side-payments across issues. By including more issues and so state interests in bargaining, the possibilities for mutual gain become greater".<sup>79</sup>

### 2.2.3. Constructivism

It is widely accepted that states pursue the safeguard of their preferences and intentions, i.e. their interests, in world politics. Different schools of thought frame the nature of such interests and the process through which they are formed. Constructivists focus on the role of ideas and identity in shaping those interests.<sup>80</sup> In short,

Constructivist scholars reject the dominant assumption in international relations theory that the interests of states and other actors are formed apart from interaction in society. They claim that identity formation is relational and prior to interest formation. Interests are defined both in material and non-material terms. Therefore, constructivists study the role that culture, institutions and norms play in shaping identity and influencing behavior.<sup>81</sup>

For neorealism and neoliberalism, international cooperation is perceived as a venue to measure the success in promoting a pre-existing interest of the state, which will eventually lead to the attainment of relative or absolute gains. For constructivism, however, cooperation is vested with a dual nature: it is a process to coordinate state behaviour with other states sharing a common interest in a specific subject matter; but it is also a contributing factor to the formation of the interests that lead, in the first place, to the cooperative joint effort. According

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<sup>79</sup> *Idem*. See also Sandra Lavenex and Flavia Jurje, 'Issue Linkage in International Migration Governance: Trade Agreements as Venues for "Market Power Europe"?' (2013) 11 nccr Working Paper 1-37.

<sup>80</sup> Jennifer Sterling-Folker, 'Competing Paradigms or Birds of a Feather? Constructivism and Neoliberal Institutionalism Compared' (2000) 44(1) *International Studies Quarterly* 97-119.

<sup>81</sup> Jutta Brunnée and Stephen J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 *Columbia Journal of Transnational Law* 20-21.

to this conceptual framework, state interests are not pre-existing or immutable and “cooperative behavior is dictated neither by the systemic distribution of relative power nor by cost-benefit analysis made in terms of material interests”.<sup>82</sup> The diffusion of ideas, occurring in a relational process, helps the formation of the identity of the state and, in turn, identity determines behaviour. Hence, interests and behaviour are determined through the combination of different factors, occurring at different times and places. Firstly, state interests are an outcome of the interaction of state and non-state actors taking place within the state itself. Adding to this internal phase, state interests and behaviour are also shaped externally, when the state interacts with other interested parties in the international sphere. This means that while states cooperate they are still in the process of forming the interests that lead to cooperation in the first place. The consequence of this ‘circular’ reasoning is the perception of state interests as a dynamic concept, a mutable social construction influenced by argumentation, ideas, and norms. Hence, constructivists emphasise the role of shared ideas as an ideational structure constraining and shaping state behaviour, as well as the inter-subjective dimension of knowledge.<sup>83</sup>

The constructivist view on state interests, particularly on how they are formed, broadens the focus of the study of international cooperation. Since the interests leading to cooperation change over time according to the exchange of ideas, the platform for such an exchange becomes more flexible, capable of accommodating different interests. In this context, states coexist in a social relationship and their choices are partially dependent on the response of the other. Through cooperation states become also more permeable to alternative perceptions

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<sup>82</sup> Chansoo Cho, ‘Explaining Cooperation among Illiberal States: A Social Constructivist Challenge’ (2010) 8(2) *The Korean Journal of International Studies* 245.

<sup>83</sup> Dale C. Copeland, ‘The Constructivist Challenge to Structural Realism: A Review Essay’ (2000) 25(2) *International Security* 189.

supplied by other actors, irrespective of whether these are other states, individuals, epistemic communities (i.e. networks of professionals with recognised expertise and competence in a domain or issue-area<sup>84</sup>), or other non-state actors. The normative and ideational context within which states cooperate enhances the importance of ideas, knowledge, argument, and persuasion.

One of the most significant contributions of constructivism to cooperation theory is, then, the analysis of the formative stage of states' interests. This analysis focuses on the determination of the relevant factors and conditions under which different actors assume their roles in the adjustment of state behaviour. As Ted Hopf notes,

Constructivism shares neoliberalism's conclusion that cooperation is possible under anarchy, but offers a very different account of how that outcomes emerges. (...) A constructivist approach might begin by investigating how states understand their interests within a particular issue area. The distribution of identities and interests of the relevant states would then help account for whether cooperation is possible.<sup>85</sup>

#### **2.2.4. Critical overview**

Cooperation is a relational concept. The relational element of the suggested definition – the adjustment of state behaviour in the context of the interaction between states – brings together two or more actors, their interests and actions. Therefore, theoretical explanations that overlook this dimension cannot provide a suitable answer for the existence of international cooperation as it happens nowadays. The focus of neorealist theories on the egocentric strive for power ends up giving cooperation its weakest form, if there is any cooperation at all. States

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<sup>84</sup> Peter M. Haas, 'Introduction: epistemic communities and international policy coordination' (1992) 46(1) *International Organization* 3.

<sup>85</sup> Ted Hopf, 'The Promise of Constructivism in International Relations Theory' (1998) 23(1) *International Security* 189.

engage with their counterparts in the process of trying to obtain relative gains and power. However, interaction is not cooperation: the interaction of a hegemon, acting as such, with other states might result in an adjustment of state behaviour (of either state) but, in this case, the adjustment of state behaviour is not the result of a compromise, it is the exercise of a position of power. Moreover, the emphasis of neorealist theoretical analysis on security issues ('high politics') renders it ineffective to satisfactorily explain cooperative activities occurring in fields usually connoted with 'low politics', like (labour) migration.

Other theories acknowledge better conditions for cooperation. When the state is less motivated to strive for power and this power can be obtained from state interaction concurrently with other states – the concept of absolute gains is essential – the obstacles for a joint effort to accommodate each other's interests are eased since all might benefit from it. Liberal scholarship has used game theory,<sup>86</sup> particularly the Prisoners' Dilemma, to provide a logical explanation for the incentives for cooperation and the costs of defection. However, liberal views on cooperation fall short in explaining the intricacies of the process. Neoliberalism also builds its analysis on the state as a fundamental actor in international relations, a social actor that interacts with other states and organisations. However, for this school of thought this interaction is unable to forge the (self) interests of the state. For neoliberals, when cooperation occurs, states already have their interest determined – a foundational, self-explanatory state interest, in existence prior to social interaction – and their goal is to safeguard them. The shortcoming of this view, as I see it, is primarily the inability to fully incorporate the contributions of cooperation in the formation process of states' interests and behaviour.

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<sup>86</sup> "Game theory is a mathematical method of studying decision-making in situations of conflict, where game theorists study the predicted and actual behavior of individuals in games, as well as optimal strategies". Kim Ae Jung, *op. cit.* (n. 68) 114.

This shortcoming was addressed by constructivists, according to which states act – and cooperate – based on their identities forged in the course of social processes. The interaction among states and with other actors, together with the exchange of ideas it facilitates, are determinant factors of state behaviour. Therefore, cooperation can help the formation of state identity and behaviour. The core of constructivist conceptual analysis is the formation of identities, hence the relative oversight of the content of the interaction among states. Constructivism encompasses the relational element of cooperation but seems to disregard the ultimate objective for states to engage in cooperation and to adjust their behaviour. The diffusion of ideas through cooperative processes might shape the state's identity and be an important source of power but constructivism does not provide a clear reason for states to engage in cooperation in the first place.

Traditional IR theories might rank high on explanatory value of international cooperation. However, some of the basic assumptions on which liberal (and to some extent constructivist) views of international relations are based can be questioned. In particular, the rationality of the state; the separation of law and politics; the assumption that there is a public good achievable through state cooperation; the perception that international law, institutions, and organisations are essentially cooperative; that a rules-based system is desirable in itself regardless of the content of the rules; that legal obligations are preferable to political constraints; and that compliance to international law is the same as cooperation. The new political approach to the interplay of states in the international system sees international institutions as places of contestation and power rather than venues to reach cooperative solutions to shared problems.

Consequently, international law, usually seen as the ultimate expression of cooperation, is perceived as a political bargain upon conflicting interests, with winners and losers.<sup>87</sup>

In my view, the evolution of the international system has proven the dilution of the authority of the nation-state as the main actor in international relations. The increased role in international affairs of non-state actors drifts cooperation theory away from explanations centred on atomistic views of state action. International organisations, non-governmental organisations, epistemic communities, multinational companies, are only a few of the ‘new’ actors of international cooperation, with the power to influence collective behaviour, norms and ideas, and ultimately shape state behaviour in the context of international cooperation. They are credited with the transformative power turning them from actors into agents of social change.<sup>88</sup>

Not only has the international system witnessed the increased influence of non-state actors but also a shift in the way the state acts in the international sphere. Its unitary and rational presence has been complemented, if not replaced, by instances of state action undertaken by functionally autonomous sub-units of the state, which adds an extra layer of complexity in theorising international cooperation. Stripped of its unitary vest when acting in a disaggregated manner, it is difficult to link state action to the interests and the will of a unitary state, which is a basic assumption of the realist and liberal schools of thought. The expansion of the concept of agency in international cooperation, encompassing other agents than the state, represents a shift in the state-centric paradigm upon which cooperation theory was built.

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<sup>87</sup> In the words of Ian Hurd, “[a] political approach toward international law begins by recognizing that law is written to advance certain interests at the expense of others. And global governance involves imposing outcomes on people, to the benefit of some and at the expense of others. It takes sides among competing claims and requires that some interests win whereas others lose”. Ian Hurd, ‘The case against international cooperation’ (2020) *International Theory* 11.

<sup>88</sup> Kate O’Neill, Jörg Balsiger, and Stacy D. VanDeveer, ‘Actors, Norms, and Impact: Recent International Cooperation Theory and the Influence of the Agent-Structure Debate’ (2004) 7 *Annual Review of Political Science* 152.

The acknowledgement that international cooperation is occurring at the technical level reflects a 'functionalist logic' that sees the state beyond its unitary expression and focus on the cooperative behaviour of its functional agencies. In political science, particularly in the context of regional integration, functionalism emphasises technical expertise rather than territorial rigidity as a driver for cooperation, assuming that "people are best able to cooperate in areas which directly affect them and in which they share expertise and that such cooperation can evolve organically and without central coordination".<sup>89</sup> Legal functionalism also reflects this preference for function over form, with an impact on the conceivable sources of international law:

In opposition to the positivistic conception of sources of international law, functionalism (...) embraces a dynamic model of law, requiring an open-ended approach to the identification of authoritative decisions, prescriptions or responses in the world community. The authoritativeness of the process and the outcome must be judged by reference to the actors, relationships, and interests involved in each issue context or problem situation, rather than by reference to a preconception based on the "status" of a particular text or the "form" of a particular action.<sup>90</sup>

Based on these insights, functionalism emphasises technocracy as a source of decision-making legitimacy. It favours the inclusion on non-state actors such as epistemic communities in international policy-making processes based on the view that they can deliver apolitical or impartial information and expertise to strengthen evidence-based decision-making.<sup>91</sup> Cooperation should then be transferred, according to this approach, from the state-level to the

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<sup>89</sup> Tobias Theiler, 'International functionalism and democracy' (2022) 28(2) *European Journal of International Relations* 315.

<sup>90</sup> Douglas M. Johnston, 'Functionalism in the Theory of International Law' (1988) 26 *Canadian Yearbook of International Law* 30-31.

<sup>91</sup> Naghmed Nasiritousi, Mattias Hjerpe and Karin Bäckstrand, 'Normative arguments for non-state actor participation in international policymaking processes: Functionalism, neocorporatism or democratic pluralism?' (2016) 22(4) *European Journal of International Relations* 925.



functional level. Similar postulate can be found in other theoretical approaches, namely transgovernmentalism, as I will explain in the following section.

### 2.3. Transgovernmentalism

Among several mid-range theories used to analyse international cooperation in its current expressions, I see transgovernmentalism, a conceptual framework that combines neoliberal and constructivist elements and brings social network theory<sup>92</sup> to the forefront of cooperation analysis, as showing particular explanatory value for my research.<sup>93</sup> The body of conceptual work developed around the multiple aspects of transgovernmentalism justifies using it to frame my research, since it provides a complete framework explaining the interdependencies between the state, functional agencies, and networks in international cooperation. Such a framework will later be useful for the empirical part of my research.

International cooperation is commonly seen under the conceptual dichotomy bilateralism-multilateralism, according to which states cooperate with each other either on a dual (*bilateral*) relationship or through a plural (*multilateral*) relationship. However, preponderance has been given to multilateral cooperation and its paradigmatic expression of negotiation of multilateral treaties, often under the auspices of international organisations. Liberal institutionalism has been the most common conceptual framework adopted to analyse cooperation in its multilateral form.<sup>94</sup> In this neoliberal view, the state *as such* – understood in its unitary model and represented at the highest level – assumes the pivotal role in cooperation: it is the state

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<sup>92</sup> Lieke 't Gilde, *Social Network Theory in International Relations Research: A literature review* (2014) Faculty of Humanities, Tilburg University, available at <http://arno.uvt.nl/show.cgi?fid=133127>.

<sup>93</sup> For a critical analysis of transgovernmentalism as the liberal theory of international relations, see José E. Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12(2) *European Journal of International Law* 183-246.

<sup>94</sup> Kal Raustiala, *op. cit.* (n. 34) 17.

itself that cooperates, often represented by its head of state and government or its ministers. This form of cooperation is intergovernmental in nature.

International cooperation can also assume a decentralised functional form. States cooperate across functional policy areas at subnational level, through specialised agencies or departments. Even if the departing point for this type of cooperation – labelled functional cooperation<sup>95</sup> – is still the notion of sovereignty, it is no longer exercised by a unitary state under its sovereign prerogatives but by some of its functionally distinct parts or subunits.<sup>96</sup> This is perceived in literature as an example of ‘disaggregated sovereignty’<sup>97</sup> exercised through transgovernmental networks.

The preference for cooperation in this institutional setting derives greatly from its relative lower negotiating and implementation costs when compared with traditional settings often associated with higher levels of diplomatic formality.<sup>98</sup> Such preference is also explained by the fact that it does not involve any formal delegation of authority to a supranational entity.<sup>99</sup> As Kal Raustiala points out,

The chosen vehicle for this new line of cooperation (...) is not the traditional liberal internationalist organization and treaty. Instead, it is the adaptable and decentralized network model. These transgovernmental networks are (...) ‘transgovernmental’ because they involve

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<sup>95</sup> Tina Freyburg, Sandra Lavenex, Frank Schimmelfenning, Tatiana Skripka and Anne Wetzel, *Democracy Promotion by Functional Cooperation: The European Union and Its Neighborhood* (Palgrave Macmillan 2015) 11; Shaun Breslin and Jeffrey D. Wilson, ‘Towards Asian regional functional futures: bringing Mitrany back in?’, (2015) 69(2) *Australian Journal of International Affairs* 139.

<sup>96</sup> Anne-Marie Slaughter and David Zaring, ‘Networking goes international: An update’ (2006) 2 *Annual Review of Law and Social Science* 211-212.

<sup>97</sup> Anne-Marie Slaughter, *op. cit.* (n. 33) 266-271.

<sup>98</sup> Christopher A. Whytock, ‘A Rational Design Theory of Transgovernmentalism: The Case of E.U.-U.S. Merger Review Cooperation’ (2005) 23(1) *Boston University International Law Journal* 19.

<sup>99</sup> Neil Craik and Debora Van Nijnatten, ‘“Bundled” Transgovernmental Networks, Agency Autonomy and Regulatory Cooperation in North America’ (2016) 41(3) *North Carolina Journal of International Law and Commercial Regulation* 496.

specialized domestic officials directly interacting with each other, often with minimal supervision by foreign ministries. They are ‘networks’ because this cooperation is based on loosely-structured peer-to-peer ties developed through frequent interaction rather than formal negotiation.<sup>100</sup>

### 2.3.1. Transgovernmental networks

The emergence of transgovernmental networks, which are “informal institutions linking actors across national boundaries and carrying on various aspects of global governance in new and informal ways”,<sup>101</sup> is a product of globalisation, potentiating functional interdependency and functional equivalency, technical complexity, and technological changes.<sup>102</sup> Greater economic and social interdependence increases the need for regulatory coordination and harmonisation in transnational issues. The suitability of networks in addressing the specificities of this process, in comparison to a hierarchical model, has been highlighted in literature, particularly in the fields of sociology of organisations and political science.<sup>103</sup> Like all networks, transgovernmental networks are multipolar grids working on multidirectional relations that provide participants with new dynamics of power, influence, benefits, and challenges. Their creation and operation are justified by some intrinsic properties in terms of *membership*, *structure*, and *binding force*.

*Membership* – The main actors of transgovernmental cooperation are functionally autonomous sub-units of the state. It is a form of international collaboration among agencies or departments of national governments, acting in a disaggregated fashion. Albeit representing the state and promoting its interests, such agencies have the delegated power to shape state behaviour in the

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<sup>100</sup> Kal Raustiala, *op. cit.* (n. 34) 4-5.

<sup>101</sup> Anne-Marie Slaughter and David Zaring, *op. cit.* (n. 96) 215.

<sup>102</sup> Mette Eilstrup-Sangiovanni, ‘Varieties of Cooperation: Government Networks in International Security’, in M. Kahler (ed.), *Networked Politics: Agency, Power, and Governance* (Cornel University Press 2009) 203-205; Kal Raustiala, *op. cit.* (n. 34) 12-15.

<sup>103</sup> Anne-Marie Slaughter, *The Chessboard and the Web: Strategies of Connection in a Networked World* (Yale University Press 2017) 51-52.

external sphere without the direct involvement of those traditionally holding the authority to bind the state at the international level. Transgovernmental networks involve national agencies without international legal personality or status beyond that conferred by their organisation under national law.<sup>104</sup> This is in sharp contrast with intergovernmental cooperation, which is a feud of heads of government and foreign ministries representing the state as a unitary legal entity.

*Structure* – Transgovernmental networks operate in a decentralised manner. Typically, hierarchical structures are absent from these networks and the political decision-enforcement dichotomy, characteristic of international cooperation in its intergovernmental form, is replaced by the capacity of cooperative agents to make decisions and implement them. This decentralised operation method impacts on the decision-making process, which is predominantly consensual, rather than by vote. It should not be assumed, however, that the autonomy enjoyed by government subunits in transgovernmental networks is any kind of usurped power. Instead, the option to entail this type of cooperation, in detriment of the intergovernmental model, seems to be a rational political choice of the state that considers the cost and benefits of the two forms of cooperation.<sup>105/106</sup>

*Binding force* – Transgovernmental networks are informal settings. They do not result from international law instruments nor work according to them. Moreover, decisions made in the course of transgovernmental cooperation are non-binding and do not impose an international

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<sup>104</sup> Pierre-Hugues Verdier, *op. cit.* (n. 34) 120.

<sup>105</sup> Christopher A. Whytock, *op. cit.* (n. 98) 12-16.

<sup>106</sup> Despite these general traits, transgovernmental networks are not structured monolithically: they have different 'modes of network governance', namely self-governance (participant-governed networks), coordination by a participating member (lead organisation-governed networks), and governance by a separate administrative entity, such as secretariats, set up specifically to govern the network and its activities (network administrative organisation). Keith Provan and Patrick Kenis, 'Modes of Network Governance: Structure, Management, and Effectiveness' (2008) 18(2) *Journal of Public Administration Research and Theory* 229-252.

obligation for the state; usually they are not subject to enforcement mechanisms. This later point reinforces the dependency of this type of cooperation on high levels of trust among participants and on their willingness to implement agreements. Trust is seen as an essential element of the shared motivation on which collaborative governance builds upon, with the ability of reducing transaction costs and stimulating learning, knowledge exchange, and innovation.<sup>107</sup>

The characteristics of transgovernmental network cooperation are illustrative of its commonly recognised benefits. Its informality provides the needed flexibility and adaptability to find solutions to problems arising from the fast-changing environment. Their structure is viewed as flexible, scalable and relatively low-cost, when compared to the political and financial resources incurred to implement an intergovernmental organisation under public international law.<sup>108</sup> An additional advantage is technical focus, as they provide the infrastructure for the fast exchange of ideas among like-minded technocrats sharing a common set of principles, values and vocabulary (epistemic communities), a benefit often impaired by the hierarchical structure of intergovernmental cooperation and the involvement of actors, such as diplomats, without the technical expertise required. A final benefit to be considered is their capacity to diffuse rules: transgovernmental networks promote domestic implementation of their output, often shielded from domestic political interference: they “offer several avenues to build the regulatory capacity of member and non-member agencies; these activities simultaneously diffuse agreed regulatory standards and approaches”.<sup>109</sup>

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<sup>107</sup> Kirk Emerson et al., *op. cit.* (n. 29) 13.

<sup>108</sup> Mette Eilstrup-Sangiovanni, *op. cit.* (n. 102) 202.

<sup>109</sup> Kenneth W. Abbott, Céline Kauffmann, and Jeong-Rim Lee, *The contribution of trans-governmental networks of regulators to international regulatory co-operation* (2018) OECD Regulatory Policy Working Papers No. 10 39.

Besides advantages, transgovernmental networks also have some inherent costs and challenges. Their flexibility and informality raise problems in terms of transparency, accountability, and legitimacy.<sup>110</sup> The ‘denationalisation of state functions’<sup>111</sup> entails that some state functions, including the definition of state interest, shift from elected officials to bureaucrats, with attenuated lines of accountability. The concern is that networks reflect technocracy more than democracy. In this case, “the concern is that the interests pursued by networks may be insufficiently responsive to national political priorities and public concerns, a possibility exacerbated by the ability of the network to exclude certain voices and privilege others.”<sup>112</sup> This issue, framed under the principal-agent relationship, has the potential to erode sovereignty, even in its disaggregated expression. The use of sovereign prerogatives is commonly matched by oversight mechanisms stemming from democratic and rule of law principles. However, the delegated authority enjoyed by transgovernmental networks, particularly those with a regulatory function, sits outside those mechanisms. The membership singularity of these networks entails the exclusion of the political representatives of states, which might impair their accountability to national political structures. The lack of acceptable levels of transparency, accountability, and representativeness in policy and lawmaking processes is, in the end, a pathway to arbitrariness.<sup>113</sup>

The characteristics that make networks attractive also make them fragile: their informality exposes them to changes in members’ commitment to participation and to competition from

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<sup>110</sup> Kal Raustiala, *op. cit.* (n. 34) 25; Anne-Marie Slaughter, ‘The Accountability of Government Networks’ (2001) 8 *Indiana Journal of Global Legal Studies* 360-366.

<sup>111</sup> Tina Freyburg et al., *op. cit.* (n. 95) 3.

<sup>112</sup> Neil Craik and Debora Van Nijnatten, *op. cit.* (n. 99) 500.

<sup>113</sup> Tesseltje de Lange and Pedro de Sena, ‘Your Income Is Too High, Your Income Is Too Low: Discretion in Labour Migration Law and Policy in the Netherlands and Macau’ (2020) 7(2) *The Theory and Practice of Legislation* 140.

emerging alternative organisations and strategies.<sup>114</sup> Additionally, they might be perceived as benefitting powerful actors. Although they typically have a horizontal structure and make decisions by consensus, powerful member states might have the greatest influence on the activity and output of the network,<sup>115</sup> which might induce a hierarchy among states. After all, politics are not excluded from transgovernmental networks, which “are also sites of power, but ones where experts perform the political work, speaking the language of expertise.”<sup>116</sup>

### **2.3.2. Optimal conditions and taxonomy**

Specialised literature has asserted that transgovernmental networks fill the space left available by the absence of formal or more established institutions at the regional or even the global levels;<sup>117</sup> also that transgovernmentalism is likely to be higher when issue complexity, agency autonomy, and antecedent regulatory interactions in interstate organisations are higher.<sup>118</sup> Based on such literature, I can identify the optimal conditions under which transgovernmental networks thrive.

#### *Optimal conditions*

Overall, the main conditions potentiating the function of transgovernmental networks are:

- i) The absence of formal instruments regarding a specific subject matter (indicating the lack of intergovernmental cooperation mechanism in force);

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<sup>114</sup> Jacint Jordana, ‘Transgovernmental Networks as Regulatory Intermediaries: Horizontal Collaboration and the Realities of Soft Power’ (2017) 670 *The ANNALS of the American Academy of Political and Social Science* 249.

<sup>115</sup> Kenneth W. Abbott et al., *op. cit.* (n. 109) 40-44.

<sup>116</sup> Henrique Choer Moraes, ‘International Lawmaking by Transgovernmental Networks: Using Domestic Coordination to Address Asymmetries in Participation’ (2016) 19 *Journal of International Economic Law* 829.

<sup>117</sup> Jacint Jordana, *op. cit.* (n. 114) 259.

<sup>118</sup> Kal Raustiala, *op. cit.* (n. 34) 32.

- ii) The existence of homogeneous preferences among cooperative actors, which are enhanced if the number of actors is limited (a preference heterogeneity problem exists when states cannot agree on cooperation due to fundamentally different preferences);
- iii) The small extent of disagreement among actors about the preferred outcome of the cooperative process (functional cooperation is preferred when the level of compromise required from all actors is small, either directly or from crossed processes of cooperation, i.e. when cooperation deals with simple coordination problems);
- iv) The need for an urgent response to a problem (the formal and hierarchical structure of intergovernmental cooperation can be an obstacle to a fast response);
- v) The subject matter of cooperation is uncertain, highly technical, and/or unrelated to areas where sovereignty issues are more present ('high politics');
- vi) The will to prevent enforcement problems, i.e. to exclude uncommitted states or prevent defection from cooperation (enforcement problems exist when individual actors have incentives to defect from an agreement);
- vii) The actors involved have a high degree of autonomy to engage in cooperation and, once started, to make autonomous decisions within;
- viii) There are common public goods attainable through cooperation, which creates an incentive for participants to contribute to the cooperative effort.

### *Taxonomy*

Among the several criteria to classify transgovernmental networks – structure, governance, object, and purpose – I consider that the criterion of outcome has particular explanatory value.



According to their outcomes, transgovernmental networks have been classified as information, enforcement, and harmonisation networks.<sup>119</sup>

Information networks bring together national government officials to exchange information and to collect and distil best practices. Enforcement networks' purpose is to facilitate the extraterritorial enforcement of one country's laws through cooperation. Harmonisation networks aim at ensuring that different national norms conform to common standards, reaching policy and legal convergence.

Although implicit in Slaughter's typology of harmonisation networks, it is possible to identify regulatory networks as a fourth category of transgovernmental network as a specialised type, mostly grounded on participation. Pierre-Hugues Verdier defines (transnational) regulatory networks as "informal multilateral forums that bring together representatives from national regulatory agencies or departments to facilitate multilateral cooperation on issues of mutual interest within the authority of the participants".<sup>120</sup> Networks of national regulators might combine some, or even all, of the purposes of the different types identified above. Regulatory networks can promote information sharing, harmonisation and compliance; they have an implicit or explicit legislative mandate to promote the adjustment of national laws, often disguised as technical adjustments.<sup>121</sup> Although not authoritative rule-makers, they can create norms to be implemented by its members or even by third parties. These are regulatory intermediaries that "create outputs that enhance their members' capacities to implement rules in their domestic environments."<sup>122</sup>

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<sup>119</sup> Anne-Marie Slaughter, *op. cit.* (n. 33) 19-20.

<sup>120</sup> Pierre-Hugues Verdier, *op. cit.* (n. 34) 118.

<sup>121</sup> Tina Freyburg et al., *op. cit.* (n. 95) 15.

<sup>122</sup> Jacint Jordana, *op. cit.* (n. 114) 247.

## 2.4. Informal international lawmaking

The existence of transgovernmental networks with a norm-setting mandate is commonly acknowledged in political science literature. Their nature, characterisation, and function have been studied mostly from a functional institutionalism perspective, focusing on the type of entity they are and their role in the international system. However, their normative activity requires an ontological shift – one that sees the same reality under different lenses – towards understanding the role these networks have in the legal system and their impact on international law. I use informal international lawmaking as a mid-range theoretical framework to address transgovernmental networks from a legal perspective.<sup>123</sup>

Informal international lawmaking is comprehensively defined as

[t]he cross-border cooperation between public authorities with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (*process informality*), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies (*actor informality*)) and/or which does not result in a formal treaty or other traditional source of international law (*output informality*).<sup>124</sup>

This definition shares the main characteristics of transgovernmental regulatory networks. It brings together the concept of cross-border cooperation between public authorities characterised by process, actor, and output informality.

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<sup>123</sup> Other legal approaches could be used, namely International Public Authority and Global Administrative Law. Philip Dann and Marie von Engelhardt, 'Legal Approaches to Global Governance and Accountability: Informal International Lawmaking, International Public Authority, and Global Administrative Law Compared' (2012), in J. Pauwelyn et al. (eds.), *op. cit.* (n. 25) 106-121; Benedict Kingsbury, 'The Concept of 'Law' in Global Administrative Law' (2009) 20(1) *The European Journal of International Law* 23-57.

<sup>124</sup> Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept' (2012), in J. Pauwelyn et al. (eds.), *op. cit.* (n. 25) 22. This definition resembles the concept of transnational legal processes mentioned above (n. 30).

In legal terms, these characteristics raise some uneasy questions in characterising the nature of informal international lawmaking and the status of its instruments. A question might be the formation of state consent to be bound by international law at the functional level; and also the validity of normative instruments adopted in circumvention of domestic or international formalities for the enactment of legal norms.<sup>125</sup> More relevant for a legal analysis, however, is the clarification of the nature of the guidelines, standards, declarations, and MOUs adopted by transgovernmental networks: are they legal instruments and can they create legal norms? The answer to this question will locate the output of informal lawmaking through regulatory networks either within the realms of law or politics.

It seems unquestionable that actor and process informality prevent regulatory networks from having the legal power to issue formal international legal instruments. An informal mechanism does not possess the legal capacity to negotiate and enact a treaty, which is reserved to those entities competent to bind the state and must follow legal and constitutional procedures. However, normativity goes beyond the traditional acts of international law. Other acts have the ability to restrict, govern or compel action even if they don't constitute self-obligating or imperative legal acts.

I consider a previously established classification of legal acts particularly useful when applied to informal international lawmaking. Based on speech act theory, Dick Ruiter and Ramses Wessel classify legal acts into seven categories: exclusively declarative; self-obligating; purposive; imperative; hortatory; expressive; and assertive legal acts.<sup>126</sup> They exclude informal lawmaking from the creation of self-obligating and imperative legal acts, i.e. those imposing obligations on

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<sup>125</sup> Hannes Lenk, 'How Soft Law saved the EU's Foreign Investment Policy' (2021), CLEER Conference on Informality in EU External Relations Law.

<sup>126</sup> Dick W.P. Ruiter and Ramses A. Wessel, 'The Legal Nature of Informal International Law: A Legal Theoretical Exercise' (2012), in J. Pauwelyn et al. (eds.), *op. cit.* (n. 25) 171-173.

one or more persons, including the author of the legal act. This power to end the freedom of choice between to take or not to take a certain course of conduct shall lay with those constitutionally competent. However, informal international legal instruments can determine action in more subtle ways, by means of incitements, purposes, attitudes, or propositions. Exclusively declarative legal acts can establish the validity of some facts; hortatory legal acts can incite addressees to adopt a certain positive or negative action; purposive legal acts can establish certain goals for action; attitudes about facts can result from expressive legal acts.<sup>127</sup> In all these instances there are no obligations imposed, but the legal acts in question shape the addressee's self-determination by providing justifications for action or inaction.

Transgovernmental regulatory networks assemble authoritative opinion from professionals on a specific subject matter, gathering expertise and knowledge. This fact makes them suitable to be a source – a secondary source at least – of international law, as long as no other prevailing sources have produced norms regulating the same reality. Regulatory networks have, thus, the capacity to create legal norms, under the restrictions mentioned above, whereas informal international lawmaking can adopt valid legal instruments.

It is difficult to draw a clear line separating law from non-law. The conceptualisation of the normative role of regulatory networks and informal lawmaking might expand the concept of international law in order to encompass weaker expressions of normativity, stripped of imperativity. Consequently, the scope of normativity in international law would not be a clear-cut case but rather a continuum, spanning from strict rights and obligations to loose standards of conduct advanced by epistemic communities.

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<sup>127</sup> *Idem*, 173-174.

This postulate benefits from the debate on the concept, nature, and legal effects of soft law in the international legal order.<sup>128</sup> However, it avoids classifying the outcome of informal international lawmaking as hard or soft law by positioning it within the realm of law irrespective of its hardness or softness. The ideas of ‘plurality of modes of normativity’<sup>129</sup> and of continuum of normativity in international law can justify the subtle nature of informal international lawmaking output as law. The result is stretching normativity towards the border between legal and social norms, between law and politics. Some scholars, however, question the need for such expansion. In the words of Jean d’Aspremont, “it remains open to question whether, in attempting to capture these new forms of international norm-making, legal scholars necessarily need to leave open the possibility of a pluralization of their concept of international law”<sup>130</sup>.

Whether considered a legal act or a legal fact, the output of regulatory networks might have some legal effects, namely:

- Be explicitly incorporated into domestic legal systems;
- Act as interpretation or guidance;
- Be a legal fact to be relied on by another party (and form the basis of estoppel, good faith, or legitimate expectations claim, as well as constitute evidence of customary international law);
- Have a permissive effect (if a state acts according to a guideline or recommendation, even without being legally binding, it cannot breach the law); and

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<sup>128</sup> *Inter alia*, Gregory C. Shaffer and Mark A. Pollack, ‘Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance’ (2010) 94 Minnesota Law Review 706-799; Kenneth W. Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54(3) International Organization 421-456; Oana Stefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (Wolters Kluwer 2013); Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing 2016); Bryan H. Druzin, ‘Why does Soft Law Have any Power Anyway?’ (2016) Asian Journal of International Law 1-18.

<sup>129</sup> See section 1.2 above.

<sup>130</sup> Jean d’Aspremont, *op. cit.* (n. 25) 195.

- Be a material source of law, i.e. an inspiration for the creation of another legal norm of international or domestic law.<sup>131</sup>

A preliminary conclusion is the acknowledgement of an increasing hybridisation of lawmaking at the international level. Besides traditional international law, other expressions of normativity emerge from transgovernmental networks that erode the dichotomies of formal and informal, binding and nonbinding and put in jeopardy the state's monopoly of creating domestic and international law. One must recognize that "classic lawmaking by statutory law enacted and passed by parliament as the prototype of a legitimate lawmaking body gets more and more accompanied by other modes of rule-making with other types of rules, other rule-making bodies, and other forms of sanctions."<sup>132</sup>

## 2.5. Norm diffusion

One of the abovementioned potential legal effects of informal international lawmaking is acting as a material source for the emergence of legal norms through norm diffusion mechanisms.<sup>133</sup> A theoretical overview of such mechanisms is then needed to better assess the role of transgovernmental networks and their output in terms of norm diffusion.

Policy decisions in one state are systematically conditioned by the international context, especially by the ideas, norms, and policies displayed or promoted by other states. Diffusion – defined as "any process where prior adoption of a trait or practice in a population alters the

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<sup>131</sup> Joost Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?' (2012), in J. Pauwelyn et al. (eds.), *op. cit.* (n. 25) 155-157.

<sup>132</sup> Gunnar Folke Schuppert, 'New Modes of Governance and the Rule of Law: The Case of Transnational Rule Making', in M. Zürn, A. Nollkaemper and R. Peerenboom (eds.) *Rule of Law Dynamics in an Era of International and Transnational Governance* (Cambridge University Press 2012) 95.

<sup>133</sup> 'Diffusion mechanism' can be defined as "a systemic set of statements that provide a plausible account of why the behaviour of A influences that of B". Dietmar Braun and Fabrizio Gilardi, 'Taking 'Galton's Problem' Seriously: Towards a Theory of Policy Diffusion' (2006) 18(3) *Journal of Theoretical Politics* 299.

probability of adoption for remaining non-adopters”<sup>134</sup> – entails a relationship of at least two actors, the one being influenced and the one exercising a decisive influence, either directly or indirectly. It also entails a comparison: in order to affirm that a state was influenced in adopting a norm or policy, one has necessarily to compare the outcome with the *status quo ante* to identify the relevant changes in state action. This comparison assumes that state policies are determined not only by internal factors but also by the interrelations or interdependencies between and among states. The notion that states and societies are not independent units of observation, which should be taken into consideration in comparative analysis, is labelled Galton’s Problem.<sup>135</sup> It rises the “question whether an observed invariance among societies (populations) is the result of growth either from common origins, through borrowing and/or diffusion, or from independent evolution and development in domestic processes”.<sup>136</sup>

As a process, diffusion is conducive to “the spread of all kinds of things, from specific instruments, standards, and institutions, both public and private, to broad policy models, ideational frameworks, and institutional settings”.<sup>137</sup> International norms, i.e. widely institutionalised standards of appropriate behaviour that shapes the preference of states, can also spread among states.

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<sup>134</sup> David Strang, ‘Adding Social Structure to Diffusion Models: An Event History Framework’ (1991) 19(3) *Sociological Methods & Research* 325.

<sup>135</sup> The Galton’s Problem dates from 1889, when Sir Francis Galton critically assessed a paper in statistical cross-cultural analysis by Sir Edward Taylor. Galton pointed out that valid inferences could not be established without considering the interdependence of the sample societies with external factors, thus ascertaining the nonindependence of countries in social sciences observations. Dietmar Braun and Fabrizio Gilardi, *op. cit.* (n. 133) 299; Herbert Obinger, Carina Schmitt and Peter Starke, ‘Policy Diffusion and Policy Transfer in Comparative Welfare State Research’ (2013) 47(1) *Social Policy & Administration* 112; Detlef Jahn, ‘Globalization as ‘Galton’s Problem’: The Missing Link in the Analysis of Diffusion Patterns in Welfare State Development’ (2006) 60 *International Organization* 401-431.

<sup>136</sup> Daishiro Nomiya, ‘The Demise of Comparative Sociology?: Some Considerations under the Age of Globalization’ (2007) 16 *International Journal of Japanese Sociology* 36.

<sup>137</sup> Fabrizio Gilardi, ‘Transnational diffusion: Norms, ideas, and policies’, in W. Carlsnaes, T. Risse and B. Simmons (eds.), *Handbook of International Relations* (Sage Publications 2012) 454.

Norms have a tripartite structure: problem, value, and behaviour. As Carla Winston explains,

First, a norm presupposes a *problem*, which is the issue to be addressed. Second, the norm includes a *value*. It is the enjoyment or attainment of something “good” or the avoidance of something “bad” and, as such, gives moral weight to the problem. Third, a norm enjoins a particular *behavior*: the action to be taken to address the given problem that allows the actor to better express or practice the value.<sup>138</sup>

This conceptual structure is relevant to understand that states sharing the same problem and/or values tend to adopt the same or similar behaviour, by fully adopting the original norm or by doing so partially, changing it purposefully or accidentally in the course of adoption. Following a constructivist approach, one can say that norms are social facts deriving from states’ socialisation. Therefore, the instances where this process occurs, such as networks, are essential for the creation of shared values among states that make norm diffusion possible. These “common norms provide actors with similar views on which courses of action are appropriate and which are not, and therefore lead them basically think in the same way”.<sup>139</sup>

Parallel to norm structure, it is pertinent to look at their dynamics, i.e. the process by which norms develop and spread. In this respect, Martha Finnemore and Kathryn Sikkin identified a ‘norm life cycle’ comprising three stages: norm emergence, norm cascade, and norm internalisation.<sup>140</sup> In the first stage, a norm entrepreneur<sup>141</sup> takes the initiative to persuade others

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<sup>138</sup> Carla Winston, ‘Norm structure, diffusion, and evolution: A conceptual approach’ (2018) 24(3) *European Journal of International Relations* 640.

<sup>139</sup> Dietmar Braun and Fabrizio Gilardi, *op. cit.* (n. 133) 310.

<sup>140</sup> Martha Finnemore and Kathryn Sikkin, *op. cit.* (n. 24) 895-905.

<sup>141</sup> A ‘norm entrepreneur’ (or ‘norm-maker’) is “an actor that has a strong commitment to a particular norm or set of norms, a will to advocate these norms to bring about normative change, and possesses normative power, i.e. a capacity to change normative convictions of others”. Annitta Björkdahl, ‘Towards a Reflexive Study of Norms, Norm Diffusion and Identity (Re)Construction: The Transformative Power of the EU in the Western Balkans’ (2012) 18(1) *Cantebury Law Review* 82.



of the benefits of a specific norm.<sup>142</sup> At this phase, organisational platforms are required, so that norm entrepreneurs can better promote their norms. Once a norm has been accepted by a critical mass of actors it reaches a tipping point, whereby the remaining actors agree to adopt the norm, thus allowing the norm to cascade. After that, norm internalisation occurs: “norms acquire a taken-for-granted quality and are no longer a matter of broad public debate.”<sup>143</sup>

### 2.5.1. Diffusion mechanisms

An underlying idea of diffusion theory is that actors react differently to the information gathered through diffusion mechanisms. Diffusion is thus sensitive to exogenous and endogenous factors. While exogenous factors determine the type of diffusion mechanism in place and the way information is processed, the internal political, economic, social, cultural, or institutional characteristics of the receiving country also play a role in how diffusion occurs. This conditional nature of diffusion leads to different results in two different states when facing the same problem and making the same decision. The internal determinants of diffusion are then ideology (a preference for some values), political insecurity (the fear of losing power), the effectiveness of the norm (based on evidence from external experiences), and the institutional constraints (the existence of actors with veto power, i.e. with the ability to determine the process of adopting a norm).

These factors are reflected in the different types of diffusion mechanisms, which can be grouped in four broad categories: *coercion*, *competition*, *learning*, and *emulation*.<sup>144</sup>

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<sup>142</sup> Norm emergence can be decomposed into different moments, namely agenda setting, consolidation of support, institutional approach, negotiation, adoption, and commitment. Justin Gest et al., *op. cit.* (n. 4) 161.

<sup>143</sup> Martha Finnemore and Kathryn Sikkink, *op. cit.* (n. 24) 895. Women suffrage is illustrative of the entire norm life cycle: how an idea of some pioneer suffragists gained momentum and became a universal norm.

<sup>144</sup> Fabrizio Gilardi, *op. cit.* (n. 137) 460; Jonathan Jacob Ring, *The diffusion of norms in the international system* (PhD Thesis, University of Iowa 2014); Luyet Stéphane, *Policy Diffusion: An Agent-Based Approach* (PhD Thesis, University

*Coercion* – The process through which a state adopts a norm because it is compelled by a hegemon, namely a powerful state or an international organisation. Coercion operates typically by conditionality as a bargaining strategy of reward: in order to access certain advantages provided by the hegemon, national governments must comply with given policy requirements. Through coercion, an actor makes another actor do something it would not do on its own accord. Such is the case of access to financial assistance by international financial institutions or accession to the European Union being dependent on structural domestic legal reforms; also the signing of preferential trade agreements being dependent on human rights improvements or the threat of trade sanctions to advocate for laws and law enforcement to protect certain populations like victims of trafficking and forced labour.<sup>145</sup> Coercion is thus a process whereby pressures from powerful actors make nonconformist policies costly. Among the diffusion mechanisms, coercion is the one that affords less choice to countries and can be seen as a case of ‘norm proselytism’. To some authors “strictly speaking coercion is not a diffusion mechanism, since it emphasizes top-down pressures rather than the horizontal interdependencies that are at the core of [the] definition of diffusion”.<sup>146</sup>

*Competition* – The process through which a state adopts a norm because it wants to attract certain goods, either materialistic (material rewards) or idealistic (social status) and obtain relative advantages vis-à-vis other states. The typical example is the race to the bottom in social protection, labour rights, tax policies and other domestic regulations to attract investment. The

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of Lausanne 2011). These categories are often named differently and accompanied by or subdivided into additional diffusion mechanisms, such as bounded learning, competitive interdependence, cooperative interdependence, common norms, taken-for-grantedness and symbolic imitation. Dietmar Braun and Fabrizio Gilardi, *op. cit.* (n. 133) 304-314.

<sup>145</sup> Darshan Vigneswaran, ‘Migrant protection regimes: Beyond advocacy and towards exit in Thailand’ (2020) 46(5) *Review of International Studies* 663-665.

<sup>146</sup> Dietmar Braun and Fabrizio Gilardi, *op. cit.* (n. 133) 309.

action of one state is then conditional on the policies of other states, as policymakers anticipate or react to the behaviour of their competitors.

*Learning* – The process through which a state adopts a norm using the experience of other states to estimate the likely consequences of a similar norm. Typically, states copy norms from states where the norm was successful, even if the conditions in both states are not identical. In learning, norm adoption costs are reduced by learning from others' experiences. Through a rational learning process, "actors are assumed to choose policies after updating their beliefs about the policy effects by looking at the experience of others, which is then used to update prior beliefs and eventually orient action".<sup>147</sup> A good example would be banning polluting vehicles from cities or the adoption of indoors smoking bans, where most states wait to see the economic impacts on those pioneering the norm.

*Emulation* – The process through which a state adopts a norm because it is something that all states ought to do, because that is the appropriate behaviour. States adjust their behaviour driven by reputational reasons linked to the prestige of the norm, or simply because they think they have an obligation to do so. Some human rights norms, like the prohibition of torture, would fall under this type of diffusion mechanism, also referred to as 'taken-for-grantedness'.

Common to all diffusion mechanisms, there are some features that are necessary for a diffusion process to take place: *stimulus*, *object*, *medium*, *actors*, and *outcome*. These are elements that, although analytically separate, act together to determine the process' existence and effectiveness. They are integral parts of the diffusion process, as it requires not only a norm to be disseminated but

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<sup>147</sup> *Idem*, 306.

also the right objective and subjective conditions for that to happen.<sup>148</sup> Some practical examples shall help elucidate the role of each of these elements.

*i. Stimulus* – First of all, a diffusion process requires a trigger or stimulus that is able to generate the emergence of a new norm, which is often an event or an innovation entailing the desire for changes in the *status quo*. These events can be as diverse as the broadcast of images of a massacre in a war zone, the mass flow of refugees and migrants into Europe, the adoption of a UN resolution on, for instance, women’s rights, or Greta Thunberg’s Global Climate Strike.

*ii. Object* – Whereas the stimulus entails an aspiration for change, it needs to be capable of originating new answers for the issues at play. In other words, the trigger event ought to have a catalytic effect in the emergence of a new norm, which is the object of the norm diffusion process. The images of Alan Kurdi, the three-year-old Syrian boy who drowned on 2 September 2015 in the Mediterranean Sea along with his mother and brother, were pungent enough (stimulus) to start a call for stronger refugee protection in Europe based on principles of international solidarity and human rights (the norm).

*iii. Medium* – Besides a strong stimulus and a suitable object, diffusion processes depend on the existence of an adequate, tangible or intangible, architecture that facilitates the transfer of information about the initial event. In other words, it needs the right environment through which it can be done. Such medium could be an institutional setting promoting socialisation amongst states, like the UN and the EU, as well as epistemic communities.<sup>149</sup> As previously acknowledged in literature, “[b]ecause a state’s political identity emerges not in isolation but in

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<sup>148</sup> Etel Solingen, ‘Of Dominos and Firewalls: The Domestic, Regional, and Global Politics of International Diffusion’ (2012) 56 *International Studies Quarterly* 632.

<sup>149</sup> According to Dietmar Braun and Fabrizio Gilardi, “[n]etworks of professionals have been argued to be a powerful channel for the development of a common definition of appropriate practices”. Dietmar Braun and Fabrizio Gilardi, *op. cit.* (n. 133) 310; Tobias Lenz, ‘EU normative power and regionalism: Ideational diffusion and its limits’ (2013) 48(2) *Cooperation and Conflict* 216-217.

relation to and in interaction with other groups of states and international non-state actors, the concept of socialization may be useful in understanding how the international society transmits norms to its members”.<sup>150</sup> The medium can also refer to different realities like the existence of a functioning and accessible information technology infrastructure. One has to admit that a castaway in a desert island would not have much opportunity to learn about and internalise new ideas or practices thriving somewhere else.

*iv. Actors* – Moreover, diffusion processes require the active engagement of social agents – states and non-state actors alike – affected positively or negatively by the trigger event. They need to be willing to exchange information about the trigger event, with some of those agents playing the role of norm entrepreneurs or ‘norm makers’, while others act as ‘norm takers’. Policy activism provide broad examples of social agents engaging in diffusion efforts, such as Nobel Peace Prize laureates Malala Yousafzai (the right of all children to education), the International Campaign to Abolish Nuclear Weapons (a treaty-based prohibition of nuclear weapons), and Maria Ressa and Dmitry Muratov (the safeguard of freedom of expression as a precondition for democracy and lasting peace). The role of states and international organisations is also considerable in terms of norm diffusion, as exemplified by Germany’s attitude towards fiscal austerity during the European financial crisis and subsequent national bailouts.

*v. Outcome* – Lastly, the outcomes are the tangible changes in state practice resulting from the diffusion process. The key element here is the causality of the outcome (‘resulting from’), being necessary to establish the connection between the outcome and a specific diffusion mechanism. This means that causal mechanisms, i.e. the pathway or process by which an effect is produced,

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<sup>150</sup> Thomas Risse and Kathryn Sikkink, ‘The socialization of international human rights norms into domestic practices’, in Thomas Risse, *Domestic Politics and Norm Diffusion in International Relations: Ideas do not float freely* (Routledge 2017) 125.

or a purpose is accomplished,<sup>151</sup> ought to be identified. Peter Starke argues that “[t]he first challenge for diffusion studies is thus to judge whether what looks like an effect of diffusion across cases – e.g., a ‘wave’ of policy changes – did not simply come about either due to independent domestic or internal causes, a common external shock or pure chance”.<sup>152</sup>

### 2.5.2. Causality

The core of diffusion research is to establish a relationship between two variables going beyond correlation. One can observe changes in state practice associated or correlated with a certain stimulus or with some actors’ actions. However, such correlation does not necessarily mean that those changes are caused by diffusion. There is, thus, a substantive difference between correlation and causation.

Within the social sciences, cause can be defined as the events or conditions that raise the probability of some outcome occurring (under *ceteris paribus* conditions).<sup>153</sup> Therefore, the quest for diffusion causation is a probabilistic endeavour, rather than deterministic, i.e. it is not required to determine with certainty that an event is necessary and sufficient to an outcome. Instead, it suffices to establish that such event increases the probability of incurring a certain outcome. A challenge remains, however: how to prove that?

Social scientists have advanced multiple methods to assess causal relationships, either quantitatively or qualitatively.<sup>154</sup> The analysis of such multitude of methods is outside the scope

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<sup>151</sup> John Gerring, ‘The Mechanismic Worldview: Thinking inside the box’ (2007) 38(1) *British Journal of Political Science* 178, *apud* Peter Starke, *op. cit.* (n. 54) 565.

<sup>152</sup> Peter Starke, *op. cit.* (n. 54) 565. The fact that a pattern may look like diffusion though it is not driven by diffusion and has alternative explanations is called ‘spurious diffusion’. Dietmar Braun and Fabrizio Gilardi, *op. cit.* (n. 133) 299, 305-306.

<sup>153</sup> John Gerring, ‘Causation: A Unified Framework for the Social Sciences’ (2005) 17(2) *Journal of Theoretical Politics* 167, 169.

<sup>154</sup> Peter Starke, *op. cit.* (n. 54) 561-579; Dietmar Braun and Fabrizio Gilardi, *op. cit.* (n. 133) 300-304, 314-316; Amitav Acharya, ‘How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian

of this research project. Nonetheless, the employment of process-tracing as the chosen methodology is due precisely to its ability in establishing causal relationships.<sup>155</sup>

I adhere to Tobias Lenz's qualitative, choice-oriented approach to assess diffusion empirically.<sup>156</sup> His three-step test was originally created in the context of EU and regionalism studies, but it can be generalised to other geographic and political contexts.<sup>157</sup> It assumes that policymakers in one country will invariably, sooner or later, encounter problems that have already been addressed somewhere else. The adapted causality test for norm diffusion follows three steps:

*Step 1:* To reconstruct policymakers' decision process at critical junctures, given a particular problem.

This step identifies the range of potential decisions that policymakers could have taken, as well as the constraints on policymakers' choices. Identifying the choice range and specifying the potential alternative can be done either inductively through political debates preceding a decision, or deductively from theory which, being "itself a product of previous 'experience', often provides us with stylized alternatives given a particular problem".<sup>158</sup>

*Step 2:* Assessment of correlation between the source of the original norm and the actual outcome.

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Regionalism (2004) 58 *International Organization* 253; Federica Russo, 'What Invariance Is and How to Test for It' (2014) 28(2) *International Studies in the Philosophy of Science* 159.

<sup>155</sup> See Sub-section 1.5.1, above.

<sup>156</sup> Tobias Lenz, *op. cit.* (n. 149) 220-223.

<sup>157</sup> Laura Allison-Reumann summarises Lenz's test: "This test suggests that the causality of norm diffusion can be proved by asking if a context would be different if the actor under consideration did not exist (he refers to the EU specifically). If the answer is yes, then there is an argument for a causal relationship. The causal relationship is further understood by establishing the causal mechanisms for change". Laura Allison-Reumann, 'The Norm-Diffusion Capacity of ASEAN: Evidence and Challenges' (2017) 32(1) *Pacific Focus* 10.

<sup>158</sup> Tobias Lenz, *op. cit.* (n. 149) 221.

This step involves conducting correlational analysis between both ends of the eventual diffusion process, mapping similarities. According to Lenz, “if correlation exists, we have prima facie evidence of (...) diffusion. If it does not, (...) diffusion is unlikely to have matter. However, correlation might be spurious, and it reveals nothing about the type of (...) diffusion that might have been at play”.<sup>159</sup>

*Step 3:* Confirmation of norm diffusion through process-tracing and the elimination of alternative explanations.

The final step entails controlling for alternative explanations, based primarily on a functional null hypothesis. Whereas empirical studies often depart from the so-called alternative hypothesis – the idea that there might be an association between a specific factor and a certain outcome within a population – it is necessary to confront it with the possibility of the outcome being independent from the factor being considered. The outcome might have occurred due to other reasons. The confirmation of diffusion “is done by looking at the empirical within-case implications of (alternative) causal mechanisms linking one or several independent variables with an outcome, which implies close attention to issues of timing, sequencing, and causal conjunction”.<sup>160</sup>

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<sup>159</sup> *Idem*, 222.

<sup>160</sup> Peter Starke, *op. cit.* (n. 54) 572 (quotes omitted).



## 2.6. Concluding remarks

The theoretical framework included in this chapter provides the basic conceptualisation and theorisation for addressing the research question. While cooperation theory can explain the dynamics of states' behaviour in the international system, it is still pretty much embedded in ideas of formalism associated with diplomatic negotiations at state level. Yet, states cooperate on a daily basis in more flexible and informal ways on a broad range of policy areas.

For the theorisation of this reality, I elected two theoretical approaches able to shed light on the conditions and consequences of functional cooperation: transgovernmentalism and informal international lawmaking. Both approaches have epistemic communities as their object of study but while the former is grounded in the IR tradition, the latter brings a legal perspective to their functioning. By bringing them together, I aim to contribute to bridging the gap between these two schools of thought, while demonstrating the richness of this the object of study.

The previous sections highlight the importance of transgovernmental networks as institutional venues of socialisation, enabling the international dissemination of ideas and policy paradigms, as well as policy coordination and joint decision-making.<sup>161</sup> In this respect, I hypothesised that those networks might have a normative function, which may impinge upon the monopoly of international lawmaking states still enjoy. A possible indirect way of having a normative effect is the spread of norms in the context of functional cooperation. Then, norm diffusion was called on to provide the theoretical background for the study of such a hypothetical function. Section 2.5 analysed the diffusion theory underpinnings, making the necessary distinctions between the different diffusion mechanisms and elements, aiming at establishing the conditions for the

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<sup>161</sup> Diane Stone, 'Transfer Agents and Global Networks in the 'Transnationalization' of Policy' (2004) 11(3) *Journal of European Public Policy* 545-566.

upcoming empirical research. I deem the establishment of a causal relationship within a diffusion process a particularly relevant aspect of this theoretical framework. I addressed this problem by adopting a qualitative approach, based on a previously designed causality test. It will be used in the empirical stage of my research project to validate the hypothesis that functional cooperation can enable norm diffusion, specifically on labour migration issues.

Against this background, I can argue that cooperation and diffusion theories are useful for framing the functioning of inter-state consultation mechanisms on migration, paving the way for a better understanding of the Colombo Process as my case study.



## CHAPTER 3

### **LABOUR MIGRATION AND FUNCTIONAL COOPERATION IN ASIA**

The research project now shifts its attention onto labour migration. While the theoretical framework included in the previous chapter addressed cooperation in general, this chapter has a narrower scope as it focuses on cooperation on labour migration. It complements the previous theorisation by inquiring the reasons why states cooperate on this issue and establishes the theoretical conditions for that to happen. I will demonstrate that migration in general entails some idiosyncrasies constraining the way states cooperate, which might be detrimental to traditional multilateralism but conducive to other forms of cooperation, namely functional cooperation. Those idiosyncrasies are reinforced in the field of labour migration since it intertwines political and legal aspects with economic factors, as it will become evident in the course of the following chapter. It is relevant to grasp the multi-faceted nature of cooperation on labour migration to better understand my case study and the importance functional cooperation might assume, particularly in Asia.

The regional approach adopted in my research project contributes for further narrowing the scope of the chapter. I consider it important to provide, through relevant indicators, the factual context in which migration cooperation unfolds in Asia and to determine the main characteristics of regional labour mobility. Such characterisation matters for understanding the existing forms of international cooperation on labour migration in Asia and their prospects.

Consequently, the chapter presents a synopsis of the inter-state consultation mechanisms active in Asia irrespective of their thematic focus, as examples of regional functional cooperation mechanisms other than the case study. Such synopsis does not intend to analyse in detail those

consultation mechanisms but rather serve as a reference point for the in-depth analysis of the Colombo Process conducted in Chapter 4 and, eventually, stimulate the readers' interest for future research.

### **3.1. International cooperation on labour migration: the power of asymmetries**

The role of nation-states is paramount in international labour migration. Within the existing geo-political structure, the international cross-border movement of people for employment occurs inexorably between states. Despite the existence of other relevant actors influencing migration policymaking, states are still the main agents of labour migration normativity and politics.<sup>162</sup> They have the transformative power to implement specific norms and regimes, exercising a high degree of agency in migration processes.

States, as explained in the previous chapter, might act alone or cooperate, i.e. choose unilateral action or engage in different types of cooperative endeavours according to a rational self-assessment about their interests and the best way to safeguard them. Generally speaking, this is true in a broad spectrum of subjects but not so obvious on migration. In fact, different scholars question the feasibility of efficient international cooperation on (labour) migration and its limited range.<sup>163</sup> The doubts surrounding international cooperation in this field are so profound that the ultimate question might simply be: “does international cooperation on migration exist?”<sup>164</sup>

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<sup>162</sup> Alexander Betts, ‘Introduction: Global Migration Governance’, in A. Betts (ed.) *Global Migration Governance* (Oxford University Press 2011) 5.

<sup>163</sup> Alan O. Sykes, ‘International Cooperation on Migration: Theory and Practice’ (2013) 80(1) *University of Chicago Law Review* 320. Randall Hansen, for example, acknowledged that “cooperation in the area of migration is not natural; indeed, it is exceptionally difficult”. Randall Hansen, ‘Making Cooperation Work: Interests, Incentives, and Action’, in R. Hansen, J. Koehler and J. Money (eds.), *Migration, Nation States, and International Cooperation* (Routledge 2011) 14.

<sup>164</sup> Jeannette Money and Sarah P. Lockhart, *Migration Crises and the Structure of International Cooperation* (The University of Georgia Press 2018) 12.

Undoubtedly, there are tangible examples of international cooperation on labour migration. They span from a multitude of bilateral readmission or labour market access agreements in the broader context of trade agreements to the adoption and implementation of the GCM, as well as less formal expressions of cooperation like the participation in dialogue mechanisms. However, international cooperation on labour migration is shaped by the subject's idiosyncrasies. Eventually more than in other types of mobility, labour migration is at the crossroad of strong political and economic factors, which might explain the absence of a coherent multilateral institutional framework regulating states' responses in this subject matter.<sup>165</sup>

The ideal conditions for cooperation to occur require a convergence of state interests and a shared need to solve a problem requiring a joint effort. In labour migration, however, the traditional dichotomy between sending and receiving states shows a cleavage between two sets of state interests, as sending and receiving countries' interests diverge in fundamental ways mostly due to the profound and inherent asymmetries between them.<sup>166</sup> First, labour supply and demand dynamics cause relevant economic asymmetries on labour flows. In countries of origin, economic, social and demographic conditions create a high demand for jobs abroad with a significant and constant supply of undifferentiated workers. On the other hand, job opportunities are usually scarce in countries of destination due to labour market access restrictions. The attractiveness of high wage differential between origin and destination countries makes demand easily matched with a constant supply of workers, even in booming

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<sup>165</sup> Alexander Betts, *op. cit.* (n. 162) 7. I concur with Rey Koslowski's assessment: "there has not been sufficient cooperation on international labor migration to produce an international migration regime primarily due to the structuring of economic and political interests". Rey Koslowski, 'Global Mobility Regimes: A Conceptual Framework' (2011), in R. Koslowski (ed.) *Global Mobility Regimes* (Palgrave Macmillan 2011) 6.

<sup>166</sup> Randall Hansen, *op. cit.* (n. 163) 17. I acknowledge that this dichotomy is not always true, as many states are simultaneously countries of origin, destination or transit. However, I assume it for the sake of argument.

economies like the Gulf countries, where demand is high due to demographic and labour force imbalances.<sup>167</sup> Besides these economic factors, legal asymmetries are also relevant. In the words of Graziano Battistella, legal asymmetries concern the different norms about exit and entry:

While relative little obstacles are encountered in the process of leaving the country of origin, legal and political barriers to enter the countries of destination can be very steep. Entry and exit are considered asymmetrical processes, the first been recognized as a right of every person while the later is subject to conditions established by legislative or executive decisions of the country of destination.<sup>168</sup>

The existing legal conditions for leaving a country<sup>169</sup> and entering another for work creates a blockage that favours countries of destination. They are able to better exercise power in admitting those migrants they see more suitable to their national interests, as entrance into the country acts as a control point. Countries of origin do not have an equivalent mechanism to control exit and even those instruments at their disposal, like age, gender or country bans, are considered ineffective and easily circumvented, as demonstrated by the persistence of irregular emigration.<sup>170</sup>

Lastly, countries of destination's policies have a substantially higher impact on migrants than those adopted by countries of origin. Not only in terms of access to the labour market, but also in terms of the level of legal protection migrants have outside their country of origin. Albeit

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<sup>167</sup> Pedro de Sena, 'Recruitment fees, indebtedness and the impairment of Asian migrant workers' rights', in T. de Lange, W. Maas and A. Schrauwen (eds.) *Money Matters in Migration: Policy, Participation, and Citizenship* (Cambridge University Press 2021) 100-101.

<sup>168</sup> Graziano Battistella, 'Governing Migration through Information: Pre-Departure Orientation Programs among the Countries of the Colombo Process' (2018) 3 *Mondi Migranti – Rivista di studi e ricerche sulle migrazioni internazionale* 7.

<sup>169</sup> According to article 12(2) of the ICCPR, "everyone shall be free to leave any country, including his own".

<sup>170</sup> Richa Shivakoti, Sophie Henderson, and Matt Withers, 'The migration ban policy cycle: a comparative analysis of restrictions on the emigration of women domestic workers' (2021) 9(1) *Comparative Migration Studies* 13; Pedro de Sena, *op. cit.* (n. 167) 102.

relevant, emigration policies – spanning from skills certification and pre-departure information to capping recruitment fees and the abovementioned bans – are not the most significant determinant in workers' migratory projects. This can be perceived as a political asymmetry that ought to be combined with differences in the relative diplomatic bargaining power of countries of origin and of destination in the international arena. Moreover, migration also witnesses a power asymmetry: due to economic and political factors, as well as the relatively low bargaining power of sending states, receiving states are generally able to determine their migration policies in accordance with their own interests, exercising their sovereignty without much consideration for sending states' interests.<sup>171</sup>

These asymmetries or structural imbalances justify the different interests of the two sets of countries. Oversimplifying, one might say that receiving states have an interest in controlling migratory flows, either quantitatively or qualitatively, whereas sending states have an interest in enhancing migratory opportunities for their nationals, also both quantitatively and qualitatively.<sup>172</sup>

The lack of reciprocal interests and the asymmetric nature of the migratory context impacts negatively on the possibilities for cooperation and determines the type of cooperative actions states resort to. In the first case, if cooperating states do not have a common interest in solving a migration related issue then the benefits of cooperation may be unbalanced, benefiting the interests of one of the states while being detrimental to the interests of others. In order to

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<sup>171</sup> Alexander Betts, *op. cit.* (n. 162) 22. The receiving states' power tends to be mitigated by policies adopted at origin in order to prevent the so-called 'brain drain' or to revert its effects by attracting back skilled emigrants ('reverse brain drain'). Nora El Qadim, 'National states in the governance of mobilities', in E. Carmel, K. Lenner and R. Paul (eds.) *Handbook on the Governance and Politics of Migration* (Edward Elgar Publishing, 2021) 234-235. Huw Vasey, 'Deconstructing skills in the stratification of migration governance', *idem* 175.

<sup>172</sup> James F. Hollifield, 'Migration and the Global Mobility of Labor: A Public Goods Approach', in R. Koslowski (ed.), *op. cit.* (n. 165) 222.



overcome this ‘one-way problem’,<sup>173</sup> where some cooperating countries may find themselves worse off, cooperation on migration needs to distribute the joint gains in a way that all cooperating nations are better off than by not cooperating and designed to discourage defection or cheating.

The solution might be, as literature ascertains, the use of ‘issue linkage’<sup>174</sup> ‘tactical issue linkage’,<sup>175</sup> or ‘linkage politics’.<sup>176</sup> Due to the nonreciprocal nature of migration flows,<sup>177</sup> the propensity for cooperation among different state interests can derive not only from migration but also from other areas, such as trade, investment, or development. If, for instance, a receiving state wants to limit the number of migrants from a specific counterpart with no particular interest in controlling departures, it might offer advantages in some products’ access to its markets or an increase in development funds to entice the sending state into cooperation. Through linkage politics it is possible to overcome the lack of convergence of state interests on migration and to negotiate a link between their diverse goals.<sup>178</sup> In the words of Money and Lockhart, “linkage politics is central to bargaining over international migration. So lack of reciprocity reduces the likelihood that cooperation among states will emerge but, by itself, will not prevent cooperation if states can link migration to other issue dimensions in the international bargaining setting”.<sup>179</sup> Moreover, combining migration with other policy areas provides cooperation with the possibility of retaliation as a self-enforcement mechanism, which

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<sup>173</sup> Alan O. Sykes, *op. cit.* (n. 163) 317, 327.

<sup>174</sup> *Idem*, 328; Sandra Lavenex and Flavia Jurje, *op. cit.* (n. 79).

<sup>175</sup> James F. Hollifield, *op. cit.* (n. 172) 235.

<sup>176</sup> Jeannette Money and Sarah P. Lockhart, *op. cit.* (n. 164) 19.

<sup>177</sup> Contrary to other economic flows like trade or investment, migration flows among states are predominantly unidirectional and rarely a migration corridor between two countries has the same rate of emigrants and immigrants at both sides. *Idem*, 16-22.

<sup>178</sup> Randall Hansen, *op. cit.* (n. 163) 10.

<sup>179</sup> Jeannette Money and Sarah P. Lockhart, *op. cit.* (n. 164) 19.

is crucial in avoiding defection. There are, however, some limitations to issue linkage, which I will address later.

In summary, for international cooperation on migration to succeed there is a set of ideal conditions that ought to concur: the existence of a problem in the international system that needs solution; the convergence of the states involved in resorting to cooperation; the devising of an approach to cooperation affording benefits to all the parties; and the existence of mechanisms preventing states' defection.

In general terms, international cooperation entails two sets of costs for the participating states: *transaction costs* incurred in drafting, negotiating, and safeguarding an agreement, as well as with monitoring and dispute settlement; and *compliance costs* deriving from the concessions provided to the negotiating states, i.e. the incentives calculated to elicit participation in the agreement. Such costs vary according to the type of cooperation. Bilateral cooperation generates higher transaction costs, as each state is required to bargain with every other state, while having lower compliance costs, since the incentives are customised to the individual state involved. On the other hand, multilateralism generates lower transaction costs because it involves only one set of negotiations, provides economies of scale in monitoring and dispute resolution, and promotes issue linkage and chances that every offer finds a corresponding match. However, compliance costs are higher, since incentives must be equal to all participants and set at the highest standard in order to be attractive to the states requiring more incentives. In such cases, incentives would be wasted on states that do not require them to participate, a phenomenon termed in literature as 'member surplus'.<sup>180</sup>

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<sup>180</sup> Alexander Thompson and Daniel Verdier, 'Multilateralism, Bilateralism, and Regime Design' (2014) 58(1) *International Studies Quarterly* 15-28.

These general claims may also apply to migration. Most migratory flows only entail bilateral externalities, i.e. problems that involve solely the two ends of a migration corridor and that ought to be solved by them alone, with incentives designed to their own needs. This is due to the fact that migration flows are not bidirectional, since two countries connected by a migration corridor rarely exchange the same number of migrants in both ways. So, usually one is considered a country of origin, while the other a country of destination, with the inherent interests associated with this categorisation.<sup>181</sup> Moreover, migration corridors are often established because of characteristics unique to the countries involved, such as geographic, cultural or linguistic proximity. So, states tend to cooperate only with their direct counterpart, as it would be wasteful to include in the cooperative effort states that are not involved in the migration problem, allowing them to benefit from incentives that do not concern them.<sup>182</sup> These characteristics help explain a noticeable preference for bilateral cooperation on migration issues – a phenomenon identified as ‘migration diversion’, according to which cooperation on migration tends to arise on a bilateral or plurilateral rather than multilateral basis<sup>183</sup> – even if this type of cooperation entails higher transaction costs.<sup>184</sup> Migration diversion might also be a product of the power asymmetry mentioned before, as receiving states, being usually opposed to multilateral forms of cooperation, are in a stronger position in determining the form cooperation takes, either bilateral or multilateral.<sup>185</sup>

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<sup>181</sup> See above (n. 166).

<sup>182</sup> An example would help illustrate this argument: if countries A and B are part of a migration corridor and need to solve a problem specific to it, there is no reason to include country C in their cooperative effort towards a solution, allowing this country to benefit from the agreement reached, for instance facilitated labour market access to country B nationals.

<sup>183</sup> Alan O. Sykes, *op. cit.* (n. 163) 317; 330-332.

<sup>184</sup> Jeannette Money and Sarah P. Lockhart, *op. cit.* (n. 164) 19.

<sup>185</sup> Alexander Betts, *op. cit.* (n. 162) 22.

Multilateralism's prospects would increase, however, if migration could be seen as a public good.<sup>186</sup> In the words of Randal Hansen, "in any sphere, cooperation is most necessary and most likely when the 'good' over which actors cooperate is a public good: a good that is non-rivalrous and nonexcludable".<sup>187</sup> Migration can hardly be considered a public good: while some states might be interested in establishing a 'right to migration' or 'free mobility' under which the free movement of people, particularly workers, would be widely accepted, other states rather use their prerogatives to control such movements, either unilaterally or through international cooperation.<sup>188</sup> The abovementioned asymmetric and unidirectional nature of migration prevents it being considered as a public good, a type of good that is dependent on the combined effort of all states. As Alexander Betts explains,

The costs and benefits of labour migration are at least partly excludable because they accrue almost exclusively to the admitting state, the country of origin, or both, but rarely to a wider group of states. Furthermore, there is little that is non-rival about international migration given that one state's decision to admit a given migrant generally prevents that migrant from simultaneously being admitted to another state at the same time.<sup>189</sup>

This perception can change, however, if the good in question is not migration *as such*, but instead some form of migration that can combine the interests of multiple participants in the

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<sup>186</sup> "Public good is a technical term applied to goods characterized by nonrivalness and nonexcludability. *Nonrivalness* refers to the notion that one individual's (or state's) consumption of the good does not diminish another individual's consumption of that same good. *Nonexcludability* refers to the inability of the provider to exclude any individual (or state) from the consumption of the good." Sarah P. Lockhart and Jeannette Money, 'Migration Cooperation in Asia: The Trans-Tasman Travel Arrangement' (2011), in R. Hansen et al., *op. cit.* (n. 163) 46.

<sup>187</sup> Randall Hansen, *op. cit.* (n. 163) 16.

<sup>188</sup> Annick Pijnenburg, Thomas Gammeltoft-Hansen and Conny Rijken, 'Controlling Migration through International Cooperation' (2018), 20 *European Journal of Migration and Law* 365-371; Stefania Maffei, 'Migration as a human right: pathways of global solidarity at the borders of Europe', in K. Freistein, K. H. Kolleg, B. Mahlert, S. Quack and C. Unrau (eds.), *Imagining Pathways for Global Cooperation* (Edward Elgar Publishing 2022) 71-73.

<sup>189</sup> Alexander Betts, *op. cit.* (n. 162) 25.

migratory process. That seems to be the case of migration that is ‘safe, orderly and regular’.<sup>190</sup> These adjectives seem to express a general consensus of the type of human mobility that is beneficial for all – sending, receiving and transit states, as well as for migrants themselves and their families. The ‘orderly movement of people’<sup>191</sup> could then be the unifying concept acting as the cornerstone of a potential multilateral regime on labour migration, since it implies “respect for the rule of law and state sovereignty, which are fundamental principles in every liberal state”,<sup>192</sup> while leaving open migration opportunities for sending states’ population. This aspect is relevant for the overall argument underlying my research, as one of my hypotheses is that the concept of ‘safe, orderly and regular’ migration might embody a new norm on international migration, which is susceptible to be the object of diffusion mechanisms. I will address these issues later in Chapter 5.

Despite the potential existence of this public good in the realm of migration, states are still unwilling to support a formal international multilateral regime on migration, particularly when involving labour mobility. They search, then, other forms of cooperation that overcome the perceived disadvantages of formal multilateralism. In the words of Randall Hansen,

Although there are few formal, multilateral agreements or associations governing migration, some of the most important work occurs through informal, nonbinding cooperation. It is easy to see why. Policymakers are reluctant to join formal regimes and prefer instead informal ones given the different level of political and financial “investment” that such commitment entails. By contrast,

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<sup>190</sup> As the GCM and target 10.7 of the Sustainable Development Goals advocate.

<sup>191</sup> James F. Hollifield, *op. cit.* (n. 172) 231.

<sup>192</sup> *Idem.*

informal cooperation implies no loss of sovereignty, no up-front commitments, and easy exit.

Paradoxically, thus makes it more likely to succeed.<sup>193</sup>

This type cooperation – functional cooperation<sup>194</sup> – might still be multilateral in nature but its function is distinct. Its main purpose is to engage states in dialogue and information sharing and eventually facilitate other forms of cooperation, namely bilateral cooperation. Therefore, it can rightly be seen as a form of ‘facilitative multilateralism’.<sup>195</sup> Section 3.3, below, gives a first glimpse of this form of cooperation and paves the way for the in-depth analysis of the case study in Chapter 4. First, however, I shall clarify what are the main characteristics of labour migration in Asia.

### **3.2. Labour migration in Asia: main characteristics**

The main drivers of labour migration in Asia are, to some extent, no different from other forms of migration in the region:<sup>196</sup> its vast geographical area encompasses a range of countries with sharp economic, demographic, and developmental differences, which provide the supply and demand factors required for a steady flow of migrant workers.<sup>197</sup> Such differences – expressed, for example, in salary differentials between countries of origin and destination or the coexistence of high unemployment in some countries with high demand for labour in other

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<sup>193</sup> Randall Hansen, *op. cit.* (n. 163) 21.

<sup>194</sup> See Sub-section 2.3.1, above.

<sup>195</sup> Alexander Betts, *op. cit.* (n. 162) 12.

<sup>196</sup> According to IOM, some of the main drivers of outward migration in the region include income inequalities, labour market and income differentials, pursuit of economic and educational opportunities, long-standing conflict, political instability, violence and repression, slow-onset and rapid-onset disasters related to natural hazards and climate change, and population structure. IOM, *Asia-Pacific Migration Data Report 2020* (IOM 2021) 41.

<sup>197</sup> Piriya Pholphirul, ‘South-south labour migration and sustainable development: Implications for Southeast Asian Countries’ (2019) 27 *Sustainable Development* 2-4. The drivers of migration in Asian countries are clearly summarised in Cambodia’s Voluntary GCM Review (2020): “Cambodian workers mostly migrate overseas for labour employment due to poverty, often combined with other push and pull factors including family debts incurred by family capital loans and/or family illnesses, lack of local job opportunities, low wages in home country, low or lack of skills, better overseas employment opportunities, higher wages in destination countries and easy to cross border to seek for jobs at the neighbouring country especially Thailand”.

countries – are at the origin of workers’ personal decisions to migrate. They are also present when states design specific migration policies facilitating the deployment or attraction of migrant workers. The interrelation between structural and individual factors in the decision to migrate is well summarised in a study commissioned by the Asian Development Bank:

Besides structural factors, migration is an individual decision based on perceived costs and benefits. Incomes in source and destination countries along with labor market conditions influence the decision to migrate. In principle, the wider the income gap between source and destination countries the higher the incentive to migrate. However rising incomes in source countries alone can also drive migration as they allow more people to afford the upfront costs of migrating. Persistent unemployment and low availability of employment benefits also help explain such movements since they influence the anticipated net gain from migrating.<sup>198</sup>

According to ILO, in 2019 (pre COVID-19) Asia hosted around one-third of the world’s 169 million migrant workers.<sup>199</sup> The Arab States<sup>200</sup> and Asia and the Pacific sub-regions hosted 48 million migrant workers (24 million each), corresponding to 28.5 per cent of the total. If also considering Central and Western Asia, the number of migrant workers in the region reaches 33.4 per cent. The Arab States alone hosted 14.3 per cent of the total number of migrant workers, followed regionally by South-Eastern Asia (12.1 million; 7.2 per cent), Central and Western Asia (9.4 million; 5.6 per cent), Southern Asia (7.1 million; 4.2 per cent) and Eastern Asia (4.8 million; 2.8 per cent).<sup>201</sup> The Gulf Cooperation Countries (GCC) and member

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<sup>198</sup> Aiko Kikkawa, Raymond Gaspar, and Cyn-Young Park, *International Migration in Asia and the Pacific: Determinants and Role of Economic Integration* (Asian Development Bank 2019) 5 (quotations omitted).

<sup>199</sup> ILO adopts a specific grouping of countries and territories, which do not always coincide with the methodology of other organisations. In ILO statistics, Asian countries are included in three different regions: Asia and the Pacific, Arab States, and Europe and Central Asia. On the other hand, non-Asian countries like Australia and New Zealand are included in the broad sub-region of Asia and the Pacific.

<sup>200</sup> For ILO, the Arab States subregion includes Lebanon, Occupied Palestinian Territory, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, United Arab Emirates, and Yemen.

<sup>201</sup> ILO, *ILO Global Estimates on International Migrant Workers: Results and Methodology*, 3<sup>rd</sup> edition (ILO 2021) 30-33.

countries of ASEAN constitute important destinations in the region, particularly for Asian migrant workers.

Regarding the origin of international migrant workers, in 2019 one-third of all migrant workers originated from Asia, thus becoming the main region of origin for migrant workers. This feature is relevant for my research as my single case study is a cooperation mechanism gathering the main countries of origin in Asia. While the Philippines remained the top Asian country of origin, with more than 1.5 million deployments in 2019,<sup>202</sup> the total number of migrant workers from the ten most important countries of origin in Asia,<sup>203</sup> all member countries of the Colombo Process, reached 4.6 million that year. The outflow of workers from those countries averaged, between 2009 and 2019, almost 4.9 million workers, reaching the highest number in 2015 (5.44 million), followed by 2016 (5.37 million) and 2014 (5.35 million).<sup>204</sup> The figures presented above changed significantly due to the COVID-19 crisis and the mobility restrictions adopted by many countries in the region, which caused a sharp decline in the deployment of migrant workers in 2020 when compared to the previous year. Such decline was noticeable not only in countries of origin like the Philippines, China, Nepal, Pakistan, or Thailand, but also in countries of destination. Saudi Arabia, Japan, South Korea, and Singapore are just a few of the countries of destination that witnessed a steep reduction of the inflow or a decrease in the total number of migrant workers.<sup>205</sup>

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<sup>202</sup> According to the Philippines Statistics Authority, the Philippines deployed 2.2 million workers overseas from April to September 2019. IOM, *op. cit.* (n. 196) 43.

<sup>203</sup> Bangladesh, Cambodia, China, India, Indonesia, Nepal, Pakistan, the Philippines, Sri Lanka, and Vietnam.

<sup>204</sup> Asian Development Bank Institute, Organisation for Economic Co-operation and Development, and International Labour Organization, *Labor Migration in Asia – Impacts of the COVID-19 Crisis and the Post-Pandemic Future* (ADB/IOE/OECD/ILO 2021) 16-17.

<sup>205</sup> IOM, *op. cit.* (n. 196) 43-44.



A relevant facet of international labour mobility in Asia is its intra-regional dimension. Despite Western-centric misconceptions about the inevitability of the South-to-North flow of migrants, migration is multi-directional with most of those flows concerning South-South migration.<sup>206</sup> Asia is a paradigmatic example of South-South migration: in 2017, around 71 per cent of the total number of migrants residing in Asia and the Pacific came from economies within the region.<sup>207</sup> These figures are understandable if one bears in mind that geographical, cultural, linguistic, or religious proximity can reduce the financial and psychological costs of migration,<sup>208</sup> a reality measurable using gravity data: “consistent with standard gravity models of international migration, variables indicating geographic distance and cultural and historical proximity explain cross-border movement at a large margin. As expected, greater bilateral distances record lower migration, while contiguity tends to be associated with more migration”.<sup>209</sup>

An analysis of the most relevant labour migration corridors between Asian countries of origin and the preferred destinations reveals that for all selected countries the top three destinations are located in Asia (Table 1). Nevertheless, one must bear in mind that labour migration dynamics in Asia “are shifting as a result of various factors, including national and regional economic divergences and the impacts of automation and digital technology. Migration flows are turning towards South-East Asia and away from GCC, owing to a multitude of factors

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<sup>206</sup> Jason Gagnon and David Khoudour-Castéras, *Tackling the Policy Challenges of Migration: Regulation, Integration, Development* (OECD Publishing 2011) 61.

<sup>207</sup> Aiko Kikkawa et al., *op. cit.* (n. 198) 2. According to the Asia-Pacific Migration Report 2020, most labour migration from Asia-Pacific countries is South-South, with destinations either within the region or in the Middle East. United Nations, *Asia-Pacific Migration Report 2020: Assessing Implementation of the Global Compact for Migration* (ST/ESCAP/2801) (Economic and Social Commission for Asia and the Pacific 2020) 34.

<sup>208</sup> Aiko Kikkawa et al., *op. cit.* (n. 198) 4.

<sup>209</sup> *Idem*, 10. Gravity, a common tool in international trade analysis, “is a vector of dyadic variables such as distances between capitals, contiguity (shared borders), common official languages, and colonial relationships that attempt to capture the economic and psychological costs associated with international migration”. *Idem*, 8.

including rising growth among some South-East Asian economies. With Asia forecast to account for 50 per cent of global GDP by 2040, this trend will accelerate in coming years”.<sup>210</sup>

The intra-regional nature of Asian labour mobility is a determinant factor for two additional characteristics: labour stratification and gender composition. Asian workers migrate mostly under temporary labour migration programs, which can answer temporary needs of countries of destination,<sup>211</sup> while restricting socio-economic freedom of labour mobility since it ties workers to specific jobs and employers. In Asia, eventually similar to other geographies, “temporary labour migration by foreign workers tends to be predicted on the idea of these migrants as agents of economic development or as a security challenge rather than on their potential as long-term residents or citizens. The frequent reference in law and policy to foreign workers rather than to migrants is indicative of this”.<sup>212</sup> Temporality excludes migrants from safer legal status, such as permanent residency or citizenship and often prevents them having access to family reunification status, which would strengthen the link between migrants and the host society. Moreover, evidence suggests a high concentration of Asian migrant workers in so-called 3D jobs (dirty, dangerous, and difficult). According to the Asia-Pacific Migration Report 2020, in Asian destination countries migrants are concentrated in manual sectors such as construction, manufacturing, and agriculture, as well as the service sector and domestic work, occupations classified as either low- or medium-skilled.<sup>213</sup>

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<sup>210</sup> IOM, *Spotlight on Labour Migration in Asia: A factor analysis study* (IOM 2021) 40.

<sup>211</sup> As ascertained by ILO at the 106<sup>th</sup> Session of the International Labour Conference (2017), “the perceived value of temporary labour migration to countries of destination is its flexibility to meet short-term demand for high- and low-level skills, thus allowing host country labour markets to adjust to shifting economic conditions”. ILO, *Addressing governance challenges in a changing labour migration landscape* (ILO 2017) 12.

<sup>212</sup> Andrew Geddes, *Governing Migration beyond the State – Europe, North America, South America, and Southeast Asia in a Global Context* (Oxford University Press 2021) 59 (quotation omitted).

<sup>213</sup> United Nations, *op. cit.* (n. 207) 35-36.

Table 1

**Annual labour migration outflow from main Asian countries of origin to top three countries of destination (latest available year)<sup>214</sup>**

<b>Countries of origin</b> (Latest available year) Total outflow	<b>Three most important countries of destination</b> (Outflow – Percentage of the total outflow)		
<b>Bangladesh (2017)</b> 996 269	<b>Saudi Arabia</b> (551 308 – 55,33%)	<b>Malaysia</b> (99 787 – 10,01%)	<b>Qatar</b> (89 074 – 8,94%)
<b>Cambodia (2017)</b> 94 056	<b>Thailand</b> (87 909 – 93,46%)	<b>South Korea</b> (5 967 – 6,05%)	<b>Singapore</b> (138 – 0,14%)
<b>India (2016)</b> 520 960	<b>Saudi Arabia</b> (165 356 – 31,74%)	<b>United Arab Emirates</b> (163 731 – 31,42%)	<b>Kuwait</b> (72 402 – 13,89%)
<b>Indonesia (2017)</b> 261 808	<b>Malaysia</b> (88 984 – 33,98%)	<b>Hong Kong SAR</b> (68 103 – 26,01%)	<b>Taiwan</b> (62 823 – 23,99%)
<b>Nepal (2017)</b> 353 984	<b>Qatar</b> (113 504 – 32,06%)	<b>Malaysia</b> (94 292 – 26,63%)	<b>Saudi Arabia</b> (71 884 – 20,30%)
<b>Pakistan (2017)</b> 496 286	<b>United Arab Emirates</b> (275 436 – 55,49%)	<b>Saudi Arabia</b> (143 363 – 28,88%)	<b>Oman</b> (42 362 – 8,53%)
<b>Philippines (2016)</b> 1 590 994	<b>Saudi Arabia</b> (460 121 – 28,92%)	<b>United Arab Emirates</b> (276 278 – 17,36%)	<b>Singapore</b> (171 014 – 10,74%)
<b>Sri Lanka (2017)</b> 212 088	<b>Qatar</b> (56 644 – 26,70%)	<b>Saudi Arabia</b> (37 900 – 17,86%)	<b>Kuwait</b> (37 420 – 17,64%)
<b>Thailand (2017)</b> 114 299	<b>Taiwan</b> (35 199 – 30,79%)	<b>South Korea</b> (12 609 – 11,03%)	<b>Japan</b> (9 196 – 8,04%)
<b>Vietnam (2017)</b> 129 894	<b>Taiwan</b> (66 926 – 51,52%)	<b>Japan</b> (54 504 – 41,96%)	<b>South Korea</b> (5 178 – 3,98%)

*Data source: ESCAP, Labour Migration Outflow Database, Situation Report: International Migration in South and South-West Asia*

<sup>214</sup> Outflow data is based on official administrative records from countries of origin. However, these records in some cases may under-estimate the number of labour migrants, as many migrants leave the country for work without official clearance. In some countries, only low-skilled migrants require official clearance. Data on Afghanistan and China is not available.

This association of migrants with particular types of jobs – reminiscent of Piore’s segmented labour market theory<sup>215</sup> – is also reflected in the gender composition of labour migration outflows: while men migrate to work in construction or agriculture sectors, domestic work is almost exclusive to female migrants. Therefore, the gender composition of specific migration corridors is highly dependent on the type of work available at destination labour markets. While Pakistani or Indian men migrate to the GCC countries to work at construction, Sri Lankan, Indonesian or Filipino women work as domestic helpers in multiple countries in Asia. Therefore, “data on gender composition of labour migration outflows vary significantly; the proportion of women varied from less than 1 per cent in Pakistan, to over 70 per cent in Indonesia”.<sup>216</sup> Despite the growing participation of Asian women in international migration, which can be perceived as a trend towards the ‘feminisation’ of international migration,<sup>217</sup> available official data suggest that most outflows were male-dominated.<sup>218</sup> In 2019, in the different Asian sub-regions there were 39.1 million male and 18.4 million female migrant workers.<sup>219</sup> The Arab States was the region witnessing the biggest gender disproportion (19.9

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<sup>215</sup> Michael Piore, *Birds of Passage: Migrant Labor in Industrial Societies* (Cambridge University Press, 1979). In sum, Michael Piore “postulated the existence of a dual labour market, consisting of a primary segment with stable and well-paid jobs and a secondary segment associated with migrant labour: temporary and poorly paid jobs, little opportunities for progression, and bad working conditions. There is low inter-segment mobility, because secondary segment jobs are shunned by native workers out of social status and relative deprivation motives”. Tesseltje de Lange, Lisa Bentsen and Pedro de Sena, ‘Political economy, law and the regulation of migrants’ workplaces’, in E. Carmel, K. Lenner and R. Paul (eds.) *op. cit.* (n. 171) 292.

<sup>216</sup> United Nations, *op. cit.* (n. 207) 34.

<sup>217</sup> See *inter alia*, Rupa Chanda and Pralok Gupta, ‘Indian Migration to the Gulf: Overview of Trends and Policy Initiatives by India’, in P. Fargues and N. M. Shah (eds.) *Migration to the Gulf: Policies in Sending and Receiving Countries* (European University Institute and Gulf Research Center 2018) 182; N. Baruah and R. Cholewinski (eds.) *Handbook on Establishing Effective Labour Migration Policies in Countries of origin and Destination* (OSCE, IOM and ILO 2006) 19-20; Andrew Geddes, *op. cit.* (n. 212) 61; Graeme Hugo, ‘Women, Work and International Migration in Southeast Asia: Trends, Patterns and Policy’, in A. Kaur and I. Metcalfe (eds.), *Mobility, Labour Migration and Border Controls in Asia* (Palgrave Macmillan 2006) 73. According to Hugo, “one of the key elements in the feminisation of international migration in Southeast Asia has been the fact that more and more women are migrating autonomously and not as the ‘non-decision maker dependants’ of fathers and husbands”. *Idem*, 75.

<sup>218</sup> United Nations, *op. cit.* (n. 207) 34.

<sup>219</sup> ILO, International migrant workers by sex and broad subregion, 2019, *op. cit.* (n. 201) 35.

million men and 4.2 million women) mostly due to the prominence of construction jobs available in the region's labour market.

Gender segmentation has practical consequences in terms of the costs of migration and, consequently, on its level of accessibility. Female migrant workers, particularly domestic workers, tend to pay lower recruitment fees than their male counterparts because their salaries tend to be lower (commissions are variable, calculated in terms of months of salary) and pay recruitment fees through salary deductions. Therefore, women have better access to migration opportunities since they do not need to finance migration upfront, starting their migration process without heavy financial burdens.<sup>220</sup>

Despite the labour segmentation mentioned above, the labour mobility of Asian highly skilled migrants is also worth considering, since it creates specific dynamics and challenges. The competition between countries of destination in Asia and beyond to attract these professionals – for example Filipino healthcare workers and information technology specialists from China or India – changes dramatically immigration policies and the prospects for individual migratory projects.<sup>221</sup> This is recognised in literature:

With rapid globalization and the increasing importance of the knowledge-based economy, governments in the region are indeed competing with each other to attract the best and the brightest talents. These countries have crafted a separate set of policies on a competitive basis to tap the skilled and professional migrants from around the world.<sup>222</sup>

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<sup>220</sup> Pedro de Sena, *op. cit.* (n. 167) 97.

<sup>221</sup> Anthony P. D'Costa, 'Mobility of Indian IT Professionals in the World Economy: Patterns and Future Possibilities', in *Labor Migration in Asia – Increasing the Development Impact of Migration through Finance and Technology* (ADB/OECD/ILO 2018) 71-88.

<sup>222</sup> Mizanur Rahman, 'Understanding Asian Migration Policy', in M. Rahman and A. Ullah (eds.) *Asian Migration Policy – South, Southeast and East Asia* (Nova Publishers 2012) 22.

According to the Asia-Pacific Migration Report 2020, almost 9.5 million tertiary-educated migrants from Asia Pacific countries over age 15 were employed in Organisation for Economic Co-operation and Development (OECD) countries (4.8 million men and 4.7 million women), accounting for half of the total employed population of Asia-Pacific migrants in OECD countries.<sup>223</sup> Albeit not dominant, this type of mobility raises questions about the impact of labour migration on development, addressed under the assessment of human capital flight ('brain drain') on developing countries' economies. The public investment of developing countries in the education of qualified professionals is ultimately to the benefit of developed economies with labour shortages in sectors requiring highly skilled workers. This is illustrated in the context of the COVID-19 crisis by the mobility of health workers (doctors, nurses, and other professionals), which might have a significant negative impact in frail healthcare systems of developing countries: for example, one-third of the total doctors trained in Sri Lanka are practising in the OECD countries; 35 Timor-Leste doctors were reported to be practising in OECD countries, equivalent to 30.7% of the total number of doctors working in Timor-Leste.<sup>224</sup>

In Asia, countries of origin have ambivalent approaches towards the mobility of a skilled workforce. On the one hand, improving human capital is a way of obtaining competitive advantages in the international labour market and several countries have promoted skilled workers' migration, benefiting from higher remittances. This aspect will be addressed in more detail in section 4.6.3, below. The different context in which high-skilled migration occurs is also noticeable in the promotion of regional skilled-labour mobility in the context of regional

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<sup>223</sup> United Nations, *op. cit.* (n. 207) 43.

<sup>224</sup> Viroj Tangcharoensathien, Phyllida Travis, Achmad Soebagjo Tancarino, Krisada Sawaengdee, Yanchen Chhoedon, Safeenaz Hassan, and Nareerut Pudpong, 'Managing In- and Out-Migration of Health Workforce in Selected Countries in South East Asia Region' (2018) 7(2) *International Journal of Health Policy and Management* 137.

economic integration in ASEAN: through the ASEAN Framework Agreement on Services (1995), the Agreement on Movement of Natural Persons (2012), the Mutual Recognition Arrangements of professional services, and more significantly the facilitation of mobility of skilled-labour in the context of the ASEAN Economic Community (2003).<sup>225/226</sup> On the other hand, while promoting their workforce, countries of origin also call for the return of high-skilled migrants in an attempt to improve economic and social development.<sup>227</sup> Besides benefiting from the return of experienced professionals ('brain circulation' or 'reverse brain drain'), literature reports eventual positive impacts of high-skilled migration on countries of origin by incentivising human capital formation:

In contrast to the earlier literature, which emphasized the downside to human capital of high-skilled emigration, newer research suggests that high-skilled emigration could actually increase human capital formation by increasing the perceived returns to education and encouraging current nonmigrants to invest more in education.<sup>228</sup>

There is a close association between (temporary) labour migration and countries of origin's development. The importance of remittance flows to Asia is a visible expression of such link.

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<sup>225</sup> One of the five core elements of the single market envisaged by the ASEAN Economic Community is the free flow of skilled-labour. To achieve this, ASEAN allows a managed mobility and facilitated entry for natural persons engaged in trade in goods, services, and investment. In turn, a key action is to facilitate issuance of visas and employment passes for ASEAN professionals and skilled-labour who are engaged in cross-border trade and investment-related activities. Moreover, another key action is harmonisation and standardisation, which facilitate skills and qualifications recognition through mutual recognition arrangements under the framework agreement.

<sup>226</sup> See *inter alia*, Flavia Jurje and Sandra Lavenex, 'ASEAN Economic Community: what model for labour mobility' (2015) nccr Working Paper No. 2015/02; Aniceto C. Orbeta Jr., 'Enhancing Labor Mobility in ASEAN: Focus on Lower-skilled Workers' (2013), 17 PIDS Discussion Paper Series 14; Maria Veronica G. Caparas, 'Intra-ASEAN labor Mobility: AEC's Continuing Story of Unity in Diversity', in S. C. Y. Ku and K. Kironka (eds.) *Migration in East and Southeast Asia* (World Scientific 2017) 149-169.

<sup>227</sup> Chi Hong Nguyen, 'Development and brain drain: a review of Vietnamese labour export and skilled migration' (2014) 3(2) *Migration and Development* 181-202; Michele Klein Solomon, *International Migration Management through Inter-State Consultation Mechanisms: Focus on Regional Consultative Processes on Migration, IOM's International Dialogue on Migration and the Berne Initiative* (IOM 2005) 2.

<sup>228</sup> Mauro Testaverde, Harry Moroz, Claire H. Hollweg, and Achim Schmillen, *Migrating to Opportunity: Overcoming Barriers to Labor Mobility in Southeast Asia* (The World Bank 2017) 100.

Remittances to Asia have flown steadily since 2000, with countries like Laos and Nepal recording, from 2000 to 2014, increases by 80 and 50 times, respectively. In Bangladesh, Nepal, and Sri Lanka they were between 75 and 90 per cent of international reserves.<sup>229</sup> Between 2016 and 2019, remittances to Asian countries increased by more than 20 per cent, reaching in 2019 approximately USD 315 billion. In Pakistan, for example, international remittances in 2015 almost doubled when compared to 2013. However, due to the COVID-19 pandemic, a significant reduction in remittances to Asian countries was expected, potentially inducing a decline in the gross domestic product (GDP) in those countries where remittances are a significant source of income. In Nepal, for example, the share of remittances in GDP was a mere 2 per cent in 2000 but increased substantially to 21.6 per cent in 2010, 31.4 per cent in 2015, and 27.3 per cent in 2019, being expected to drop to 22.6 per cent in 2020. In Indonesia, Malaysia and Thailand, remittance inflows are expected to fall in 2020 by around 15 per cent.<sup>230</sup> Overall, the impact of the COVID-19 pandemic on remittances is expected to be significant, with data suggesting potential losses of around 20 to 25 per cent relative to the pre-pandemic flows.

The impact of remittances on recipient countries goes beyond their effects on the GDP. It is true that domestic labour markets are directly influenced by migration: it affects the domestic labour demand-supply, by reducing unemployment; it may change the gender composition of the labour market, promoting a higher participation of female workers in economic activities previously performed by male emigrants in countries where migration is male-dominated. Remittances, however, also play a part in changing specific dynamics in labour supply at the household and labour productivity. The decision of a member of a household to migrate entails

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<sup>229</sup> Philippe Hervé and Cansin Arslan, 'Trends in Labor Migration in Asia', in *Labor Migration in Asia: Building Effective Institutions* (ADBI, OECD, and ILO, 2016) 12.

<sup>230</sup> Asian Development Bank Institute et al., *op. cit.* (n. 204) 26-33.



a loss of labour contribution from the departed migrant, forcing the remaining members to change their practices or making it necessary for them to supply labour (the ‘lost-labour effect’<sup>231</sup>). Simultaneously, the inflow of economic resources in the form of remittances (the ‘remittance effect’) might help alleviate poverty through a pure income effect, but it can also reduce productivity, in a mechanism explained in literature as the ‘moral hazard problem of remittances’:

Household members receiving remittances have an incentive to decrease their labour supply in order to remain eligible to receive future transfers. While lost labour might add pressure to work more, remittances reduce this pressure and may even lead household members not to work at all. In fact, the income effect of remittances on the reservation wage is often greater than the original cost of lost labour.<sup>232</sup>

The expression of labour migration in Asia has also significant social costs. It may impact the composition of household and the care function provided therein, particularly in the case of female migrants with children. This ‘care drain’ is at the base of gender-specific migration bans, like those adopted by Sri Lanka in 2013.<sup>233</sup> Also at the individual level, the high prevalence (although difficult to quantify) of irregular migration might increase instances of vulnerability. I concur that “unauthorized migrants can be at risk of poor and abusive working conditions with insecure income. They may also be the victims of traffickers, at risk of poor living conditions

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<sup>231</sup> Jason Gagnon and David Khoudour-Castéras, *op. cit.* (n. 206) 89-90.

<sup>232</sup> *Idem*, 97.

<sup>233</sup> Sri Lanka imposed minimum age restrictions on female domestic workers and banned the migration of women with children under the age of five. Women with children older than five are required to complete a Family Background Report, which involves identifying a ‘proper’ female guardian and attaining spousal consent, which is then subject to government inspections and approval. Richa Shivakoti et al., *op. cit.* (n. 170) 13; Asha L. Abeyasekera and Ramani Jayasundere, ‘Migrant mothers, family breakdown, and the modern state: an analysis of state policies regulating women migrating overseas for domestic work in Sri Lanka’ (2015) 4(1) *The South Asianist* 1-24; IOM, *op. cit.* (n. 210) 29.

and vulnerable to violence and sexual abuse. In the long-term, migrant workers may end up in an unsustainable working life without appropriate human development to run a dignified life”.<sup>234</sup>

### **3.3. Synopsis of inter-state consultation mechanisms on migration in Asia**

The complexity of features shaping labour migration in Asia mentioned above contradicts, in my view, the perception of Asia as a homogenous region and an inexhaustible source of workers destined to migrate to the Global North. I posit that such diversity, reflected in the coexistence of diverse state interests on the matter, might explain the level and type of cooperation taking place in the region. I side with Sandra Lavenex when she says: “Asia is the region in which cooperation on migration is least developed. This is linked to the vast heterogeneity of the continent, the general weakness of regionalism and Asian countries’ limited participation in pertinent international regimes”.<sup>235</sup> A way of countries counterbalancing this reality is to adhere to inter-state consultation mechanisms, eventually as a proxy for stronger mechanisms or regimes.

I turn now to those mechanisms as a first step to grasp the nature of functional cooperation in Asia, which will be the focus of the case study conducted in the following chapter. This section briefly introduces the Bali Process, the Abu Dhabi Dialogue and the Almaty Process according to the date of establishment, clarifying their nature, thematic scope, membership, and key areas of activity.

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<sup>234</sup> Patcharawalai Wongboonsin, ‘Asian Labour Migration and Regional Arrangements’, in K. Tamas and J. Palme (eds.) *Globalizing Migration Regimes: New Challenges to Transnational Cooperation* (Routledge 2006) 205.

<sup>235</sup> Sandra Lavenex, ‘Regional migration governance – building block of global initiatives?’ (2019) 45(8) *Journal of Ethnic and Migration Studies* 1275-1293.

### **3.3.1. The Bali Process – The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime**

The Bali Process is an inter-regional consultation mechanism, established in 2002, aiming at addressing practical issues related to smuggling, trafficking and related transnational crime. It is a forum for policy dialogue, information sharing and practical cooperation to help the region address these challenges. The Bali Process focuses on issues related to trafficking and smuggling; irregular migration; information and intelligence sharing; border management; return and readmission; harmonisation of legislation; asylum practices and management; victim protection and assistance; development aid; and law enforcement.

The Bali Process has 49 members, including countries from four continents<sup>236</sup> and four international organisations,<sup>237</sup> as well as a number of observer countries<sup>238</sup> and international agencies. It is co-chaired by Indonesia and Australia.

The objectives for the Bali Process include:<sup>239</sup>

- The development of more effective information and intelligence sharing;
- Improved cooperation among regional law enforcement agencies to deter and combat people smuggling and trafficking networks;
- Increased public awareness in order to discourage these activities and warn those susceptible;

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<sup>236</sup> Afghanistan, Australia, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, DPR Korea, Fiji, France, Hong Kong SAR, India, Indonesia, Iran, Iraq, Japan, Jordan, Kiribati, Laos, Macau SAR, Malaysia, Maldives, Mongolia, Myanmar, Nauru, Nepal, New Zealand, Pakistan, Palau, Papua New Guinea, Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Sri Lanka, Syria, Thailand, Timor-Leste, Tonga, Turkey, United Arab Emirates, United States of America, Vanuatu, and Vietnam.

<sup>237</sup> UNHCR, IOM, UNODC, and ILO.

<sup>238</sup> Austria, Belgium, Canada, Denmark, European Commission, Finland, Germany, Italy, Netherlands, Norway, Poland, Romania, Russian Federation, South Africa, Spain, Sweden, Switzerland, and United Kingdom.

<sup>239</sup> [www.baliprocess.net](http://www.baliprocess.net) (last access: November 16, 2021).

- The enactment of national legislation to criminalise people smuggling and trafficking in persons;
- Provision of appropriate protection and assistance to the victims of trafficking, particularly women and children;
- Assisting countries to adopt best practices in asylum management.

Charles Harns argues, “the strength of the Bali Process may be credited to the consistency and representation of its leadership; an adequate funding base for meetings, secretariat functions, and for initiating some of the linked follow-up action projects; and an agenda that is both clear and limited in scope”.<sup>240</sup> Its large and diverse membership might be explained by an increasing securitisation of RCPs, associated with the securitised discourse of irregular migration established in Southeast Asia since the 1990s, a trend identified in literature.<sup>241</sup>

### **3.3.2. The Abu Dhabi Dialogue – The Ministerial Consultations on Overseas Employment and Contractual Labour for Countries of Origin and Destination in Asia**

The Abu Dhabi Dialogue (ADD) is an intra-regional consultative mechanism, established in 2008 as a forum for dialogue and cooperation between Asian countries of labour origin and destination. It gathers the Colombo Process member countries (countries of origin) and the countries of destination of the Arabian Peninsula in West Asia – Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates, and Yemen<sup>242</sup> – as well as Malaysia. Regular

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<sup>240</sup> Charles Harns, *Regional Inter-State Consultation Mechanisms on Migration: Approaches, Recent Activities and Implications for Global Governance of Migration* (IOM 2013) 62.

<sup>241</sup> Susan Kneebone, ‘The Bali Process and Global Refugee Policy in the Asia-Pacific Region’ (2014) 27(4) *Journal of Refugee Studies* 613; Sandra Lavenex and Nicola Piper, ‘Regional migration governance: perspectives ‘from above’ and ‘from below’’, in A. Geddes et al. (eds.), *op. cit.* (n. 21) 18; Sébastien Moretti, ‘Contested regionalism in the Asia-Pacific: The case of the Bali Process and the protection of refugees’ (2021) *Journal of Ethnic and Migration Studies* 1-18; Melissa Curley and Kahlia Vandyk, ‘The securitisation of migrant smuggling in Australia and its consequences for the Bali Process’ (2017) 71(1) *Australian Journal of International Affairs* 42-62.

<sup>242</sup> Yemen is not considered a country of destination. Its participation in ADD is due to geographic and geopolitical reasons.

observers include countries like Japan, South Korea, and Singapore, as well as the IOM, ILO, private sector and civil society representatives.

As a state-led regional consultative process, the ADD aims to enable safe, orderly and regular labour migration in some of the world's largest temporary labour migration corridors. Through multilateral dialogue and cooperation on the joint development of labour mobility-related programming, implementation, and reporting, the ADD helps to ensure that Member States develop partnerships for adopting best practices and can learn from one another's experience. Civil society has been invited to contribute to the dialogue, for instance by participating in Senior Officials Meetings, and in recent years to partner in the implementation of some of the programme areas.<sup>243</sup>

The ADD focuses on developing four key, action-oriented partnerships between countries of origin and destination for development around the subject of temporary contractual labour, based on a notion of partnership and shared responsibility:

- Developing and sharing knowledge on labour market trends, skills profiles, workers and remittances policies and flows, and the relationship to development;
- Building capacity for more effective matching of labour supply and demand;
- Preventing illegal recruitment and promoting welfare and protection measures for contractual workers; and
- Developing a framework for a comprehensive approach to managing the entire cycle of temporary contractual work that fosters the mutual interests of countries of origin and destination.

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<sup>243</sup> <http://abudhabidialogue.org/ae/about-abu-dhabi-dialogue> (last access: November 14, 2021).

The ADD adopted three pillars of effective governance to guide the design of its programmes: ensuring the protection of migrant workers; empowering workers to fulfil their goals and aspirations; and affording workers the opportunity to benefit equitably from the outcomes of temporary labour migration.<sup>244</sup> These principles are at the heart of the ADD's commitment to facilitating safe, orderly and regular temporary labour migration.

Stefan Rother notes that ADD's "agenda is similar to the Colombo Process, but has a more pronounced focus on migration and development, thus linking it to the debates in current global processes such as the Global Forum on Migration and Development (GFMD)".<sup>245</sup>

Since 2012, ADD's permanent secretariat is provided by the United Arab Emirates, and before that it was IOM performing that service.

### **3.3.3. The Almaty Process – The Ministerial Conference on Refugee Protection and International Migration**

The Almaty Process is a regional consultative process, established in 2013,<sup>246</sup> aiming to address the multiple challenges resulting from complex migration dynamics and mixed migratory movements in Central Asia and the wider region, in a cooperative and coordinated manner.<sup>247</sup> It brings together four Central Asia and several neighbouring countries: Afghanistan, Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkey, and Turkmenistan. Iran and Pakistan participate as observers.

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<sup>244</sup> *Idem.*

<sup>245</sup> Stefan Rother, *op. cit.* (n. 21) 193.

<sup>246</sup> The genesis of the Almaty Process dates to 2011 and the Regional Conference on Refugee Protection and International Migration in Central Asia, at which the Almaty Declaration was adopted. The Process was officially launched at a second conference, held in June 2013. Cynthia Orchard, 'The Almaty Process: Improving Compliance with International Refugee Law in Central Asia' (2016) 28(1) *International Journal of Refugee Law* 75-76; Charles Harns, *op. cit.* (n. 240) 47-49.

<sup>247</sup> <https://www.unhcr.org/centralasia/en/about-almaty-process>.

The Almaty Process has a broad scope, promoting sustained dialogue and exchange of information on migration issues and on refugee protection challenges such as, but not limited to: asylum; combatting human trafficking; human mobility; human rights of migrants; irregular migration; migrant integration; migrant vulnerabilities; migration management; migration policy and governance; migration trends; refugees and protection. This intra-Asian RCP:

- Promotes dialogue on the challenges of international migration and refugee protection;
- Develops mechanisms to monitor and address irregular migration;
- Fosters a common understanding of causes and consequences of displacement and migration;
- Promotes coherent, comprehensive and differentiated policies for persons on the move;
- Develops project-based actions to enhance State capacity to manage migration and provide refugee protection.<sup>248</sup>

This RCP is organised by the United Nations High Commissioner for Refugees (UNHCR) and IOM, which play an important role in terms of funding, organisational and technical support, and educating and socialising participating state actors.

### **3.4. Concluding remarks**

The insights of this chapter are relevant for the purpose of my research as it is exclusively dedicated to (labour) migration in Asia. It took a step further in the direction of the empirical research of the Colombo Process, moving away from pure theoretical aspects into the specifics of labour migration cooperation in the Asian context.

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<sup>248</sup> [www.unhcr.org/centralasia/about-almaty-process](http://www.unhcr.org/centralasia/about-almaty-process) (last access: November 16, 2021).

The characterisation of labour migration in Asia done in section 3.2 helped elucidating the multiple factors shaping labour migration in the region, which also contribute for the creation of opportunities, or the lack thereof, for cooperation on the matter.

Previously I explained the ideal conditions for cooperation on labour migration to thrive. I recall the idea that cooperation requires a shared interest among states and identify it as one of the more relevant factors leading to an aversion for multilateralism in this field. My argument, sustained in extensive literature, is that states hardly share a common interest in labour migration and, therefore, they lack the incentives to entail in multilateral forms of cooperation. Instead, they resort to bilateral or 'softer' forms of cooperation, in which the cooperation costs are lower. Yet, multilateralism is not necessarily ill fated. I mentioned earlier in the chapter the potential of the notion of 'orderly movement of people' to act as a public good, which might be able to broaden states' interests in labour migration cooperation. The wider those interests are, the easier it is to find a common ground that brings states back into cooperating in this matter. This argument is pertinent to my research project as it might explain why competing countries of origin come together to cooperate on labour migration issues, even if outside a traditional institutional setting. It is also relevant for the identification of a new norm susceptible to be diffused through the socialization venues provided by inter-state consultation mechanisms. Chapters 4 and 5 will shed light over these topics.

This chapter dedicated to labour migration and functional cooperation in Asia has two main purposes. First, to serve as a stepping-stone for the empirical part of my research project, by providing the conceptual frame and the quantitative features of labour migration as it happens in the region. Second, to help revealing a picture of this phenomenon in all of its complexities



and determinant factors. In so doing, it contributes to fulfil the aim of Part I of my research, which is to build a composite image of cooperation on labour migration.

## Part II

# COOPERATION ON LABOUR MIGRATION: FROM IMAGE TO PRACTICE

## CHAPTER 4

### CASE STUDY: THE COLOMBO PROCESS

This chapter analyses the Colombo Process (CP), one of the most active RCPs in Asia, illustrating the efforts towards improving labour migration governance from the perspective of countries of origin. The CP's dynamism and resilience are enough to justify a closer scrutiny of its functioning. A more prosaic reason, however, would be the overwhelming weight of the figures involved: its twelve member countries represent nearly half of the world's population, more than a quarter of the total number of migrants and more than one-fifth of the global GDP.

The chapter aims to clarify the potential contribution of RCPs to the overall labour migration governance system, focusing primarily on their eventual normative function. The search for evidence of such role departs from an analysis of the working methods and achievements of the CP in order to realize the way its institutional setting contributes for the diffusion of norms, as hypothesised in the research design. At this point, I go beyond the characterisation of RCPs, which is common in literature produced during the advent of this type of cooperation mechanisms,<sup>249</sup> and provide a detailed description of the history and functioning of the case study. Such description is in itself a contribution to knowledge about the CP, which has not been the object of much academic research. I provide a comprehensive overview of the CP's

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<sup>249</sup> See, *inter alia*, Randall Hansen, *op. cit.* (n. 36); Charles Harns, *op. cit.* (n. 240); Michele Klein Solomon, *op. cit.* (n. 227); and Amanda von Koppenfels, *op. cit.* (n. 38).

institutional settings, which despite being public information is not easily accessible. By providing this information in a thorough way, this chapter fills a gap in literature on the internal organisation of inter-state consultation mechanisms.<sup>250</sup> It can be, I believe, a useful instrument for future research on the CP and eventually an incentive for a comparative analysis with other RCPs.

However, more important than the description of the CP's historical evolution and operating modalities is the critical assessment of its functioning, which I do in the second part of the chapter. I pay special attention to the political discourse stemming from CP declarations and recommendations, as they illustrate the countries of origin's perspective and priorities. Through the analysis of the mechanism's outcomes, as well as of its member states' actions, I will be searching for traits of normativity in inter-state consultation mechanisms. I deem particularly relevant the understanding of IOM's influence on the CP, which I will discuss later in the chapter, due to its impact not only on the funding and daily operation of this cooperation mechanism, but more significantly on its agenda. This has consequences on the emergence and diffusion of international norms on labour migration, as Chapter 5 will subsequently reveal.

#### **4.1. Overview and historical background**

The Colombo Process – the *Ministerial Consultation on Overseas Employment and Contractual Labour for Countries of Origin in Asia* – is a Regional Consultative Process established in 2003, focused on labour mobility in Asia, particularly addressing contractual labour issues. It consists of twelve member states considered countries of origin: Afghanistan, Bangladesh, Cambodia, China, India, Indonesia, Nepal, Pakistan, the Philippines, Sri Lanka, Thailand, and Vietnam.<sup>251</sup> The CP is a member-driven, non-binding, flexible and informal forum to facilitate dialogue and

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<sup>250</sup> Jobst Köhler, *op. cit.* (n. 38) 69.

<sup>251</sup> Afghanistan and Cambodia joined the CP in 2005 and 2016, respectively.

cooperation on issues of common interest and concern for countries of origin in Asia relating to labour mobility.

The CP provides an explanation of its own work and nature:

The main area of focus is the protection of and provision of services to migrant workers, in particular, protecting migrant workers from abusive practices in recruitment and employment, and providing services to migrant workers in terms of pre-departure orientation as well as post-arrival information dissemination, and the provision of welfare services. Through concerted dialogue, the Colombo Process seeks to optimize the benefits of organized labour migration for [its] member states. This includes the development of new overseas employment markets, increasing remittance flows through formal channels, reduction of transaction cost for labour migration and enhancing the development impact of remittances. In addition, the CP provides a platform to pursue initiatives aimed at capacity building, data collection and inter-state cooperation. This includes institutional capacity building and information exchange to meet labour migration challenges; growing cooperation with destination countries in the protection of migrant workers and access to labour markets; and enhancing cooperation and dialogue among countries of origin.<sup>252</sup>

Following a trend witnessed since the establishment of the first RCP in the mid-1980s,<sup>253</sup> several countries of origin in Asia acknowledged the existence of a shared interest in the establishment of dialogue and cooperation mechanisms among themselves, in order to better

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<sup>252</sup> Colombo Process, *Operating Modalities – Introduction* (2016).

<sup>253</sup> RCPs made their debut in 1985 with the establishment of the Inter-governmental Consultations on Migration, Asylum and Refugees Policies in Europe, North America and Australia (IGC). Bernhard Perchining and Marion Noack, *Regional Migration Dialogues and the Global Migration and Development Agenda – A Study on Five Regional Migration Dialogues Bringing Together Countries in Africa, Asia and Europe* (International Centre for Migration Policy Development 2016) 9-10.

tackle the common challenges labour migration presents.<sup>254</sup> They prompted IOM to organise a forum in order to promote a deeper understanding of labour migration issues in Asia, which happened with the convening of the first Ministerial Consultations on Labour Migration, in Colombo, Sri Lanka, in April 2003. The two-day meeting, chaired by the host country, was envisaged to be a high-level dialogue between officials responsible for labour and migration issues – each delegation comprised at least a Minister or a similar rank official – with the goal of providing them a platform to share experiences, discuss issues and identify potential areas for action relating to the management of overseas employment and contractual labour.<sup>255</sup>

The Ministerial Consultations comprised three levels: a *preparatory level*, in the form of background papers, prepared with the support of IOM, serving as the basis upon which discussion could be initiated.<sup>256</sup> Such papers provided participants with general information on labour migration in Asia and comparative elements of the participant countries,<sup>257</sup> an *intermediate level*, comprising a one-day meeting of senior officials and representatives of international or regional organisations,<sup>258</sup> during which discussion evolved around three thematic areas previously selected by the organiser; and a *ministerial level*, in a one-day meeting reserved for the political statements of the high-ranking representatives of the participating countries, mostly Ministers of Labour, as well as the IOM Director-General. The participating countries agreed

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<sup>254</sup> Colombo Process, *Labour Migration Ministerial Consultations for Countries of Origin in Asia – Final Report*, Vol. I (2003).

<sup>255</sup> The concepts of ‘overseas employment’ and ‘contractual labour’ are explained in Sub-section 4.6.4, below.

<sup>256</sup> IOM was crucial in the preparation of the background papers, assuming a relevant role in defining the scope of the discussions since the beginning of the dialogue mechanism.

<sup>257</sup> The background papers were prepared and made available to participants in advance (also included in Vol. II of the Final Report): 1- International Labour Migration in Asia: Trends, Characteristics, Policy and Interstate Cooperation; 2- Compendium of Labour Migration Policies and Practices in Major Asian Labour-Sending Countries. Colombo Process, *Labour Migration Ministerial Consultations for Countries of Origin in Asia – Final Report*, Vol. II (2003).

<sup>258</sup> Namely, the Asia Pacific Migration Research Network, the Bangladesh Association of International Recruiting Agencies, the ILO and the IOM.

on the occasion to have a regular follow-up on the issue of labour migration management, with the second meeting scheduled for the following year. IOM's assistance in organising the second meeting was expressly requested.

The starting point of the CP already included some of the features that would characterise its future development. First, the CP was envisaged as “a new instrument of diplomacy and dialogue [amongst countries of origin, which was established] to exchange views and perceptions, to analyse their labour migration experiences, to share best practices and to test and seek validation of responses to particular problems – all in a climate of openness and informality”.<sup>259</sup> Moreover, there was an express intention to think about migration collectively in a way that would bring the countries of origin's perspective to the forefront. At that time, this was an innovative approach, since cooperation on labour migration was often perceived as a control mechanism and, hence, an instrument to advance the interests of destination countries.<sup>260</sup>

Despite being a state-driven mechanism, the CP tried since the beginning to engage relevant non-state actors in its activities, not only international and regional organisations, but also non-governmental organisations. I will address this topic in more detail while introducing the CP Operating Modalities.<sup>261</sup> For now it suffices to say that this openness to civil society provided the opportunity, although limited, for migrant workers' representation at this forum.

Another relevant feature is the fact that a multilevel discussion structure was put in place, engaging not only political officials at the ministerial level, but also bureaucrats and technical experts involved in migration policy formulation and implementation. This feature would

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<sup>259</sup> IOM Director-General. Colombo Process, *op. cit.* (n. 254) 123.

<sup>260</sup> Annick Pijnenburg, Thomas Gammeltoft-Hansen and Conny Rijken, *op. cit.* (n. 188).

<sup>261</sup> See Sub-section 4.3, below.

become crucial during the historical development of the CP for the adoption of a more technical approach to labour migration discussions. Additionally, this dual structure provided the opportunity for strengthening the inter-personal relationships among recurrent participants in CP meetings, which is relevant for norm diffusion: they facilitate learning as a diffusion mechanism, as mentioned before.<sup>262</sup>

Lastly, it counted on IOM's support. IOM became an institutional facilitator of dialogue on migration issues and acted as the Process's Secretariat. The role of IOM will be critically discussed in detail below.<sup>263</sup>

#### **4.2. Institutional development**

The 2003 Consultations recommended the establishment of regular multilateral consultations on labour migration, which resulted in the institutionalisation of the CP. Subsequent Ministerial Consultations took place in Manila, Philippines (2004); Bali, Indonesia (2005); Dhaka, Bangladesh (2011); Colombo, Sri Lanka (2016); and Kathmandu, Nepal (2018).

The CP consultations' timeline shows a certain level of inconsistency on the commitment to promote consultations regularly.<sup>264</sup> Yet, it is possible to identify different phases in the CP's institutional development:

- The 2003-2005 period corresponds to a phase of consolidation. In this first period, the CP witnessed the first enlargement: Afghanistan was welcomed as an observer in 2004 and became a member in 2005; the establishment of a stable organisational functioning structure; the consolidation of a basic agenda; and the broadening of its observers: the

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<sup>262</sup> See Sub-sections 2.3.1 (epistemic communities) and 2.5.1 (diffusion mechanisms), above.

<sup>263</sup> See Sub-section 4.6.2, below.

<sup>264</sup> In the first Ministerial Consultation in 2003, several countries expressed the wish of giving such meetings regularity. Bangladesh, Indonesia and the Philippines expressly called for having Consultations on a yearly basis.

third Consultation welcomed a broader group of observers, including countries of destination<sup>265</sup> and international and regional organisations.<sup>266</sup> In terms of its institutionalisation, this dialogue forum became known as the *Colombo Process* in the second round of ministerial meetings and its current official designation was adopted in 2005.

Despite the importance given to the political level of the Process, during this phase the CP expanded its scope of action by implementing non-political and technical initiatives, through the convening of Senior Officials Meetings (SOM),<sup>267</sup> ambassadorial-level meetings of the Geneva-based CP representatives,<sup>268</sup> regional workshops and thematic area working groups (TAWG).

The agenda was set also during this phase. The CP elected three main thematic areas around which dialogue on migration issues has since developed: *i.* Protection of migrant workers and provision of services to temporary overseas contractual workers; *ii.* Optimising benefits of organised labour migration; *iii.* Capacity building, data collection and inter-state cooperation.

- A subsequent phase in the CP's evolution is characterised by the paucity of high-level political meetings, with only two Ministerial Consultations held in the decade 2006-

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<sup>265</sup> Bahrain, Italy, Kuwait, Malaysia, Qatar, South Korea, Saudi Arabia and the United Arab Emirates.

<sup>266</sup> The Asian Development Bank, the ASEAN, the GCC, the Department for International Development UK (DFID), the European Commission, the ILO, the International Committee of the Red Cross, the Joint United Nations Programme on HIV/AIDS (UNAIDS), the United Nations Development Programme (UNDP), the United Nations Development Fund for Women (UNIFEM), the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), and the World Bank.

<sup>267</sup> Up to the end of 2021, five SOM meetings were held, namely in May 2014, October 2015, November 2015, August 2016 and November 2018.

<sup>268</sup> In order to overcome geographical dispersion, the CP used the accreditation of its member states' ambassadors at IOM and other UN agencies and their physical presence in Geneva, Switzerland, to create an internal platform for direct diplomatic contact.



2016 (2011 and 2016), in clear contrast with the regularity of the first years.<sup>269</sup> However, the lack of activity at the political level was not followed at other levels. After the Bali Ministerial Consultation in 2005, the CP developed a training curriculum for, and joint training courses of, labour attachés and overseas employment administrators, as well as held regional workshops for employment agencies and ethical recruitment.

During this phase, the CP sought to diversify its dialogue partnerships, making a visible effort to engage with countries of destination. This effort resulted in the establishment in 2008 of the Abu Dhabi Dialogue<sup>270</sup> and the Asia-EU Dialogue on Labour Migration.<sup>271</sup> Besides this move towards formal dialogue with destination countries, a parallel trend of bigger involvement of civil society became noticeable since the fourth Ministerial Consultation held in Dhaka, Bangladesh, in 2011.<sup>272</sup> Six observer states from different geographical regions attended the Dhaka meeting, as well as international organisations, such as the United Nations, the European Commission, the International Committee of the Red Cross, UN Women, UNAIDS and ILO. I deem even more significant the fact that representatives from civil society and migrants' organisations

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<sup>269</sup> The time gap between the third and fourth, as well as between the fourth and fifth Ministerial Meetings, happened against the express deliberations made by the Ministers: in September 2005 it was decided that “the next annual Ministerial Consultations will be held in 12 months’ time” but that meeting only happened in 2011; similarly, despite the Dhaka Declaration of 2011 affirming that the Ministers “agree that the fifth CP ministerial consultation for countries of origin in Asia (Colombo Process) will be held in 2013”, it only took place in August 2016.

<sup>270</sup> See Sub-section 3.3.2, above. The CP and ADD are technically two distinct and independent inter-state consultation mechanisms, although their agendas complement each other. “The agendas of the Colombo Process and ADD are complementary, and intentionally so. Both deal with international labour migration governance, and related migrant protection and rights issues. It is through those policy areas that the migration-and-development features of their discussions receive attention”. Charles Harns, *op. cit.* (n. 240) 52.

<sup>271</sup> The Asia-EU Dialogue on Labour Migration is an inter-regional consultative mechanism within the framework of the CP, linking the Asian block of countries of origin and the European Union, as well as experts not affiliated with national governments.

<sup>272</sup> Stefan Rother, *op. cit.* (n. 21) 198.

could address the plenary meeting and present a set of recommendations,<sup>273</sup> embodying the ‘whole of society’ approach that the CP expressly acknowledges.<sup>274</sup>

Also during this second phase of institutional development, the CP adopted its first internal rules (2011) and experienced its second enlargement – Cambodia joined the Process in 2016.

- A subsequent phase started in 2016 with the beginning of Nepal’s chairmanship. The active participation in the GCM drafting and implementation processes, as discussed in Chapter 5, is illustrative of the strong leadership experienced during this period. However, this dynamism was interrupted by the COVID-19 pandemic and the transition of the chairmanship to Afghanistan in 2021, months before the Taliban regime reassumed power in the country.<sup>275</sup>

During its chairmanship, Nepal implemented the newly adopted Operating Modalities, which I will address in the following section, in an attempt to solve the main obstacles to a more effective functioning of the Process, particularly its self-funding system.

### 4.3. Operating modalities

The previous section reveals some inconsistency in the CP’s institutional development. The functioning of the Process has been permeable to internal factors like the financial constraints, an initial weak institutional setting and gaps in leadership, as well as external ones such as political and public health crisis.<sup>276</sup> As acknowledged by a close observer in the activities of the CP, it “appeared to be no overarching institutional architecture that integrated [the] many

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<sup>273</sup> Charles Harns, *op. cit.* (n. 240) 50.

<sup>274</sup> Colombo Process, *Safe, Regular and Managed Migration: A Win-Win for All - Summary Report of the Fifth Senior Officials Meeting* (2018) 5.

<sup>275</sup> The 2018 Kathmandu Declaration scheduled the 7<sup>th</sup> CP Ministerial Consultation for 2020 but it did not take place due to the COVID-19 pandemic.

<sup>276</sup> Charles Harns, *op. cit.* (n. 240) 49.

positive elements and other vital components in a manner that generated sufficient momentum within CP”.<sup>277</sup>

The CP tackled this issue by adopting, in 2011, its first Operating Modalities. The document provided overall guidelines for member states to institutionalise the process of dialogue and engagement and bring about regularity, predictability, and sustainability to the process.<sup>278</sup> In particular, the Operating Modalities established the procedures for the appointment and role of the chairmanship; the format and hosting of meetings; the ways of conducting dialogue with destination countries; the funding structure; and the modalities to engage with civil society organisations and other stakeholders.<sup>279</sup> The Operating Modalities, which provide the adequate level of formality to a cooperation mechanism that is intended to be informal,<sup>280</sup> were amended in 2016, with the new version being adopted during that year’s Ministerial Consultation in Colombo, Sri Lanka.

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<sup>277</sup> Ravinatha Aryasinha, Permanent Representative of Sri Lanka to the UN in Geneva, on the occasion of the handing over of the Chairmanship of the Colombo Process on 29 March, 2017, available at <http://www.ft.lk/article/609897/Aryasinha-on-Colombo-Process--Part-I>; and <http://www.ft.lk/article/610130/Aryasinha-on-Colombo-Process--Part-II> (last access: August 11, 2019).

<sup>278</sup> Colombo Process, *Report of the Fourth Ministerial Consultation on overseas Employment and Contractual Labour for Countries of Origin in Asia – Migration with Dignity* (2011).

<sup>279</sup> Colombo Process, *op. cit.* (n. 252).

<sup>280</sup> As an observer of RCPs’ activities rightly put it, “the beauty of the consultative processes is the formality in the informality and the informality in the formality. Because it’s informal, everybody is open, but there is a formal arrangement that is done. There is a secretariat, (...) there is a way the meeting is organised, there is an agenda, so these are all formal. But the debate at dialogues is informal”. Bernhard Perchining and Marion Noack, *op. cit.* (n. 253) 41.

The 2016 Operating Modalities cover the following subject-areas:<sup>281</sup>

*i. Objectives*

The objectives of CP have been steady since 2003. The newest Operating Modalities simply reaffirm the aim of providing a forum for Asian labour countries of origin to enhance dialogue on labour migration issues, which includes the sharing of experiences and best practices; consultations on issues faced by migrant workers, labour origin and destination countries; and optimizing the benefits from organized labour migration; as well as the dialogue with countries and regions of destination. The CP also pursues initiatives aimed at capacity building, data collection and inter-state cooperation.

The CP seeks to realise its objectives through both dialogue and programmatic activities, including relevant technical assistance. The stated objectives do not reveal, however, any assumption of a normative mandate. In this respect, it is relevant the absence of any direct reference to the promotion of migrants workers' rights, except for a discrete reference to practical solutions for their well-being. It is also relevant that the CP assumes the objective of reviewing progress of the implementation of recommendations: albeit non-binding, recommendations might have a normative effect in the change of state action, a topic I will return to later in this chapter.<sup>282</sup>

*ii. Membership*

Membership of the CP remains open to other like-minded countries of origin in Asia if they fulfil the terms and conditions for membership established in the Operating Modalities, mostly related with commitment to cooperation and active participation in the activities of the CP. A

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<sup>281</sup> Colombo Process, *op. cit.* (n. 252).

<sup>282</sup> See Sub-section 4.6.4, below.

request for membership must be submitted to the Chair-in-Office and endorsed by the Ministerial Meeting. A request to withdraw from membership shall be submitted in writing to the Chair-in-Office.

*iii. Observers*

The CP welcomes states, regional economic communities and other organisations as observers. Member states would grant observer status on an *ad hoc* basis considering the benefit the CP would get from the prospective observer's relevant experience, expertise or perspective on issues of concern to member states; the ability and readiness of the prospective observer to conduct complementary activities at national, regional and international levels that are of relevance to the CP objectives; and the ability of the prospective observer to mobilise financial and other resources to support the proposed actions of the CP; and their willingness to align their activities with those of the CP.

Interested parties shall express their interest in writing to the Chair-in-Office. The Chair-in-Office, in consultation with the Member States, may invite on a case-by-case basis relevant United Nations agencies, other international or regional organisations, institutions and affiliates to participate as observers in open sessions of Senior Officials' Meetings and Ministerial Meetings, at which they can take the floor as and when invited by the Chair-in-Office.

The participation in CP meetings of a broad group of observers reinforces its engagement with civil society without abdicating state-ownership.

*iv. Chairmanship*

The chairmanship of the CP is based on a voluntary rotational system.<sup>283</sup> The 2016 amendment of the Operating Modalities determined that such a system is based on alphabetical order, aiming at ensuring predictability to the system. The term of office is limited to a two-year period commencing with the handover at the Ministerial Meeting and ending with the next Ministerial Meeting. The 2016 version of the document made the duration of the chairmanship clear and limited, as the original version of 2011 stated that the term of office would ‘generally be for a two-year period’. The Chair-in-Office is responsible for laying out a written agenda covering the priority issues and actions it will consider during the course of its Chairmanship as well as proposed timeframes for meetings and consultations. Furthermore, the country that is the Chair-in-Office hosts the Senior Officials’ Meetings, the Ministerial Meeting and any other meeting as necessary.

The coordination and external representation of the CP are additional tasks associated with the chairmanship: the Chair-in-Office represents and acts on behalf of the CP in other regional and multilateral processes and events, promoting its visibility; and the Permanent Representative to the UN in Geneva of the Chair-in-Office country coordinates and facilitates a regular dialogue among all CP Member States through the respective Permanent Representatives and the experts in Geneva, Switzerland, in consultation with their respective Governments, on issues mandated by the Senior Officials’ Meeting and the Ministerial Meeting.<sup>284</sup> These functions were added to the operating modalities in 2016.

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<sup>283</sup> The CP chairmanship has been held twice by Sri Lanka (2003–2004 and 2013–2017) and once by the Philippines (2004–2005), Indonesia (2005–2009), Bangladesh (2009–2013), Nepal (2017–2021), and Afghanistan (2021–present). According to the alphabetical order rule, Afghanistan assumed the Chairmanship on April 20, 2021, in virtual Chairmanship handover ceremony, prior to the political turmoil of August 2021.

<sup>284</sup> See (n. 268), above.

*v. Operational and technical support*

Since the beginning, IOM played a pivotal role in bringing together this group of countries and facilitating dialogue among them.<sup>285</sup> As previously mentioned, IOM organised the first and subsequent Ministerial Consultations, in collaboration with the respective chairmanships, as well as Senior Officials' Meetings. The operating modalities reaffirm IOM's important role in terms of provision of operational and technical support, either through the IOM mission of the respective country of the Chair-in-Office, the Regional Office in Bangkok, Thailand, or its headquarters in Geneva, Switzerland. It recognizes IOM's acquired expertise, the financial means and the logistic capacity to promote labour migration and migrant workers' rights, to conduct research, and to provide training, among other aspects. The reference to migrant workers' rights reflects IOM's thematic expansion that took place after it became a UN related organization in 2016.<sup>286</sup>

As necessary, the IOM participates in any discussions that need to be undertaken at the Geneva level with the respective CP Permanent Missions to the United Nations and other international organisations. On request and under the guidance of the Chair-in-Office, IOM serves as the reference point of contact among Member States; provides operational and technical support with the substantive preparations, including agendas, reports, and thematic discussions in relation to all CP meetings; undertakes and provides technical support toward research, studies and other analytical assessments, as well as any other substantive matters; provides support for fundraising, follow-up activities and any other CP initiatives and projects; hosts and maintains

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<sup>285</sup> See Section 4.1, above.

<sup>286</sup> See Sub-section 4.6.2, below.

the CP website;<sup>287</sup> and provides any other operational and technical support related to CP activities.<sup>288</sup>

In the 2016 Ministerial Meeting it was agreed to set up a permanent Colombo Process Technical Support Unit (CPTSU) in Colombo, Sri Lanka, headed by a technical expert recruited by IOM, with the funding provided by the Swiss Agency for Development and Cooperation (SDC).<sup>289</sup> The purpose of the CPTSU is to support the CP itself, to provide support to all the CP Member States in pursuing the goals and actions set in the thematic priorities of the CP, as well as to facilitate IOM's role.<sup>290</sup>

*vi. Format and hosting of meetings*

The CP holds biannual Ministerial Meetings and annual SOM hosted by the Chair-in-Office. The latter usually precedes Ministerial Meetings, when applicable. The Chair-in-Office, in consultation with the member states, determines which sessions of the established agenda will be open and which will be closed. In practical terms, the nature of the meetings is determined according to the topics under discussion: while some discussions take place in open sessions, organisational matters involving more sensitive topics like funding are addressed in closed sessions.<sup>291</sup> Observers may participate only in open sessions of the Ministerial Meetings at

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<sup>287</sup> The CP website (<http://www.colomboprocess.org/>) has public material, as well as a Restricted Interface, which is updated regularly, especially the TAWG section. The creation of a dedicated website is a milestone in terms of promoting the outcomes and the procedural aspects of the CP, reinforcing transparency. However, it does not always provide the most updated information. I reckon the website could be instrumental to the active participation of relevant stakeholders, including migrants themselves, in the work of the CP other than in the Ministerial Consultations, as well as an authoritative source of information relevant to the migration process. Unfortunately, it lacks the tools to reach a broader audience.

<sup>288</sup> For a critical assessment of IOM's role, see Sub-section 4.6.2, below.

<sup>289</sup> Colombo Process, *op. cit.* (n. 274) 12.

<sup>290</sup> The CPTSU was operationalized in January 2016 in accordance with the Terms of Reference agreed by the Member States during the Third Senior Officials' Meeting held in November 2015. *Idem.*

<sup>291</sup> For examples, at the 5<sup>th</sup> SOM (2018), session III (Funding Modalities and Administrative Issues) and session IV (Preparation for Sixth Ministerial Meeting) were closed sessions. Colombo Process, *op. cit.* (n. 274) 24.



which they may be invited to take the floor as determined by the Chair-in-Office. At the end of each Ministerial Meeting, the Chair-in-Office prepares a report on the proceedings of the Meeting.

#### *vii. Funding*

The CP used to depend on voluntary contributions from its member states, as well as and externally obtained funds, to support the costs of its meetings and maintenance of operational and technical support staff under an IOM Mission. In practical terms, funding depended on IOM. That was perceived as an obstacle to the realisation of the full potential of the dialogue mechanism, particularly to the predictability of CP regular meetings and rotation of the chairmanship.<sup>292</sup>

The funding system was revised in 2016. The Colombo Consultations endorsed a self-funding mechanism, based on equal annual contributions of USD 4,545 from each member state.<sup>293</sup> The contributions are primarily used to facilitate the holding of regular SOM and Ministerial meetings, but also to ensure some flexibility to engage in the substantive work of the CP. The calculation of the annual contributions was based on minimal estimated costs, intended to cover travel and participation costs for two officials from each member state to two SOM and one Ministerial Consultation over the course of each Chair two-year term. The possibility of funding an independent secretariat for the CP was discounted.<sup>294</sup> Annual contributions are to be paid in full and in a timely manner. For that, at the beginning of each year, at the request and

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<sup>292</sup> Ravinatha Aryasinha, *op. cit.* (n. 277) Part II (3. Institutional reform).

<sup>293</sup> The Nepalese Chairmanship gave Member States a choice between two self-funding models: a USD 8,545 annual contribution per CP Country, corresponding to an annual budget of USD 94,000, allocated to secretariat (staff and office costs) and meeting costs (option A); or a USD 4,545 annual contribution, for an annual budget of USD 50,000, allocated only to meeting costs (option B). Option B gathered the unanimous preference of Member States. Colombo Process, *op. cit.* (n. 252) Annex B.

<sup>294</sup> Colombo Process, *op. cit.* (n. 274) 18.

on behalf of the Chair, IOM sends a letter to all member states requesting the payment of the annual contributions before the end of the first half of the year.

The annual contributions are channelled to and managed by the IOM headquarters, in cooperation with the IOM office in the country that holds the chairmanship, while the full authority for how the funds will be used rests with the Chair. To ensure transparency in the use of the funds, these are managed in line with IOM administrative procedures and are accounted for in compliance with the Organisation's financial and accounting rules. The management of the CP funds is done through a specific IOM project, in line with the organisation's standard procedures. As recognised in Annex A of the Operating Modalities (2016),

The seven per cent overhead cost is an integral and important part of IOM's project budgeting and implementation process. Project-related overhead is a percentage charged on all project-related direct costs and used as supplementary funding for the Organization's core structure and administrative costs. An initial token overhead rate of two per cent will be charged to manage the funds of the CP self-funding mechanism for the first two years effective January 2017, with the understanding that in subsequent years the CP and IOM will review the overhead cost and decide on an agreed rate.

In January 2017, the CP member states and IOM signed a MOU operationalising this "quite unique [self-funding mechanism] among the many RCPs throughout the world".<sup>295</sup> The self-funding mechanism does not preclude the possibility of additional voluntary funding from CP member states nor of external funding from other sources to support project activities, meetings including participation of experts as well as other proposed initiatives that are in line with the objectives of the CP. The adoption of the self-funding mechanism was perceived by

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<sup>295</sup> Bruce Reed, Director of the Resource Management Department of IOM (<https://www.iom.int/news/colombo-process-member-states-launch-self-funding-arrangements>) (last access: August 11, 2019).

IOM Director-General as a “testament to the seriousness among Member States in collectively deciding to pay for themselves to participate in SOMs and Ministerial Consultations (...) to ensure regular and predictable meetings underscoring the independence of the Process”.<sup>296</sup>

The CP annual budget was estimated, at the time of the adoption of the current Operating Modalities, to be USD 50,000, allocated to the support of SOM and Ministerial Meetings costs.

*viii. Participation of civil society and other interested stakeholders*

The Chair-in-Office, in consultation with the member states, invites interested civil society and other interested stakeholders, who have expressed their interest in writing to the Chair-in-Office, to participate in open sessions of its Senior Officials’ Meetings and Ministerial Meetings on a case-by-case basis. The relevance, competence and operational interest on migration in line with the CP agenda, and on labour migration issues more specifically, as well as the national, gender and thematic balance in the representations should be taken in consideration when deciding the participation of civil society and other interested stakeholders. The Chair-in-Office, with due regard to the same criteria and with the consent of all CP member states, may also invite relevant experts of civil society and other interested stakeholders to take the floor under a related agenda item of the Senior Officials’ Meetings and Ministerial Meetings to provide expert opinion, share experiences, best practices and lessons learnt, with the view to ensuring decisions are based on informed policy options.

*ix. Decision making process*

The decisions at CP meetings are made on the basis of consensus.

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<sup>296</sup> Colombo Process, *Summary Report of the Sixth Ministerial Consultation* (2018) 2.

#### 4.4. Key areas of activity and outcomes

The CP prioritises five main thematic areas: 1) skills and qualification recognition process; 2) fostering ethical recruitment practices; 3) effective pre-departure orientation and empowerment; 4) promote cheaper, faster and safer transfer of remittances; 5) enhancing capacities of the CP participating countries to track labour market trends.

For each of these areas, a TAWG has been created and its leadership entrusted to those member states that volunteered to do so, based on their particular interest or experience in the subject matter.<sup>297</sup> The overall objective of the TAWGs is to lead discussions and actions of the assigned thematic areas, with the aim of harmonising policies based on sharing best practices, facilitate collaboration with relevant national and regional level initiatives and report on progress in the respective thematic areas at SOM and Ministerial meetings. TAWGs are responsible for a substantial part of the CP's regular activities outside the SOM and Ministerial levels.<sup>298</sup>

The 2016 Colombo Declaration identified four additional crosscutting themes, which are to be incorporated into the existing TAWGs, as appropriate: 1) migrant health; 2) promotion of equality for women migrant workers; 3) consular support for migrant workers; 4) operationalisation of the migration-related goals in the Sustainable Development Goals (SDGs). As reported at the Sixth Ministerial Consultation, the two areas focusing on gender equality and the SDGs should be mainstreamed into all the TAWGs. Migrant health should be integrated into the TSWG on Pre-Departure Orientation and Empowerment, while consular support for migrant workers should be integrated into the TAWGs on Pre-Departure and Empowerment

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<sup>297</sup> The five TAWGs are led by Sri Lanka, Bangladesh, the Philippines, Pakistan and Thailand, respectively.

<sup>298</sup> The TAWGs have met 18 times at the expert level between the 2016 and 2018 Ministerial Consultations (Kathmandu Declaration).

and Fostering Ethical Recruitment.<sup>299</sup> I will now briefly introduce the relevant aspects of each thematic area.

*i. Skills and qualification recognition*

This thematic area aims to improve CP migrants' employability in overseas labour markets. It recognises the importance of countries of origin adopting skills training programmes and developing national competency standards aligned with destination countries requirements and needs. This can facilitate mutual recognition of skills and qualification, which in turn can promote higher wages and better working conditions at destination.

The TAWG works towards exploring new labour markets where skilled workers are in demand through a mapping exercise; promoting mutual recognition of skills and qualification frameworks among CP member states in reference to international good practices (mainly ILO's Regional Model Competency Standards); and exploring the possibility of promoting higher wages for skilled workers through reviewing wage structures of CP member states and countries of destination and exchanging good practices and lessons learned from bilateral or multilateral agreements and negotiations.<sup>300</sup> The 2018 Kathmandu Declaration mentioned, as a possible action in this area, the establishment of a regional qualification framework to facilitate comparison of qualifications across countries of origin and enhanced recognition of skills of migrant workers in countries of destination. The recommendation of the Ministers "to continue dialogues regarding the possibilities of establishing a regional qualification framework" might have been done in the softest of terms but it reveals the acknowledgement of the need to

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<sup>299</sup> Colombo Process, *op. cit.* (n. 274) 5

<sup>300</sup> Colombo Process, *Summary Report of the Fourth Senior Officials' Meeting and the Fifth Ministerial Consultation* (2016) 4.

deepen cooperation at regional level.<sup>301</sup> If such framework were created it would contribute to the establishment of a new regional norm on skills and qualification recognition.

In this area, a few initiatives have taken shape in collaboration with regional countries of destination. Such is the case of ADD's Pilot Project on Skill Development, Documentation and Recognition, which focuses on skills certification in the construction, catering and electrical sectors in the United Arab Emirates (UAE) and Kuwait for nationals of India, Pakistan, Philippines, Bangladesh and Sri Lanka.<sup>302</sup>

#### *ii. Ethical recruitment*

This thematic area focuses on promoting ethical recruitment, paying particular attention to the issues of recruitment fees, terms and conditions of employment, and documentation. It aims to prompt the recruitment industry to enhance its corporate social responsibility and to adhere to codes of conduct that strive to protect migrant workers in the recruitment process and throughout the supply chain.

The TAWG on ethical recruitment has set three goals: 1) transform the recruitment industry from the employee-pay model to employer-pay model; 2) informal recruitment actors are covered under the regulatory framework; 3) migrant workers are well equipped with information that is necessary for decent work and safe migration.<sup>303</sup> It engaged with the Alliance of Asian Associations of Overseas Employment Service Providers, a network of lead recruitment industry representatives from each CP country. Particular attention was paid to ILO's Fair Recruitment Initiative and IOM's International Recruitment Integrity System (IRIS),

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<sup>301</sup> Colombo Process, *op. cit.* (n. 296) 27.

<sup>302</sup> Abu Dhabi Dialogue, Pilot Project on Skill Development, Documentation and Recognition (2014), available at <http://abudhabidialogue.org.ae/sites/default/files/document-library/Pilot%20Project%20on%20Skills%20Project%20Document.pdf> (last access: March 25, 2022).

<sup>303</sup> Colombo Process, *Background Paper for the 4<sup>th</sup> Senior Officials' Meeting* (2006) 12.

as relevant systems to strengthen ethical recruitment practices through a multi-stakeholder approach. With the same purpose, the TAWG developed standard terms of employment for domestic workers with the support of UN Women and the SDC. The CP submitted a position paper to feed into the process of proposing a global definition of recruitment fees and costs, which ILO adopted in early 2019.<sup>304</sup> I will later argue that the inputs from this TAWG contributed for the emergence of a new norm on ethical recruitment and its subsequent diffusion among CP member countries.<sup>305</sup>

Cooperation with countries of destination is also relevant in this field. India and Nepal were part of a research project on the labour recruitment industry in the UAE, which was commissioned by the UAE and presented to the ADD Ministerial meeting in 2017.<sup>306</sup>

### *iii. Pre-departure orientation*

Pre-departure services are of utmost importance.<sup>307</sup> They provide the means for upgrading the workers skills, which helps migrants to get better remuneration, climb the value chain and avoid exploitation. The main goal of pre-departure orientation is to create awareness through effective information dissemination for migrant workers and their families in order to empower them and make informed decisions to maximise the benefits of migration. The member states consider that pre-departure training and orientation programmes should be designed according to the specific needs of countries of destination and their market requirements. In this respect, skills development through education, particularly language and vocational training, are seen as

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<sup>304</sup> ILO, *Report of the Meeting of Experts on Defining Recruitment Fees and Related Costs*, Governing Body, 335<sup>th</sup> Session, Geneva, 14-28 March 2019 (GB.335/INS/14/2) (2019).

<sup>305</sup> See Section 5.3, below.

<sup>306</sup> IOM, *Final Report - Research on the labour recruitment industry between United Arab Emirates, Kerala (India) and Nepal* (2016).

<sup>307</sup> Graziano Battistella, *op. cit.* (n. 168) 7-23.

important strategies to improve the competitiveness of migrant workers and to match their skills with evolving market conditions. Pre-departure orientation and adaptation programmes can also be used to improve legal knowledge about human and labour rights and to disseminate information about the country of destination prior to departure, namely about its laws, habits, and working conditions.

Under the leadership of the Philippines and in coordination with countries of destination in the Gulf Region, the dedicated TAWG supports the development of a regional guide for pre-departure orientation modules and programme management system. It encompasses the development of training manuals and pre-employment, pre-departure and post-arrival orientation seminars and reintegration counselling. Several module guides have been adopted, including on remedies in cases of distress and crises situations and health management while working abroad, a topic that gained urgency during the COVID-19 crisis.<sup>308</sup>

A key task in this area is the enhancement of the capacity building for training of trainers, including professional instructors, training bodies and labour attachés.

#### *iv. Remittances*

The priority of this thematic area is the promotion of cheaper, faster and safer transfer of remittances. CP member states support the global efforts to reduce remittance transfer costs to less than 3 per cent, as stipulated in the 2030 Agenda for the Sustainable Development Goals.

Recognizing that remittances represent a vital economic lifeline for migrant workers' families, the TAWG led by Pakistan aims at improving domestic remittance regulatory framework,

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<sup>308</sup> Ellen Boccuzzi, Elizabeth Ferris, Renzo Guinto, Philip Hirsch and Jenna Holliday, *The Impact of COVID-19 on Migrants in Asia and the Pacific: Rethinking Resilience* (USAID 2020); Karaleka Antonia Nefeli, 'COVID-19 and its Impact on Labour Migration: The Case of Asia' (2021) 2(1) HAPSc Policy Briefs Series 109-117; Diana Suhardiman, Jonathan Rigg, Marcel Bandur, Melissa Marschke, Michelle Ann Miller, Noudsavanh Pheuangsavanh, Mayvong Sayatham and David Taylor, 'On the Coattails of globalization: migration, migrants and COVID-19 in Asia' (2021) 47(1) *Journal of Ethnic and Migration Studies* 88-109.



strengthening financial education to migrant workers and their families and promoting financial inclusion of remittance receivers. For that it is important to engage national financial institutions and local stakeholders and make use of formal remittance channels. In particular, CP member states wish to involve their respective Central Banks in the process of data collection, harmonisation of this data and involving a wider range of stakeholders including other relevant government agencies.

In any case, this thematic area ought to consider numerous external factors, such as the regulatory frameworks of countries of the holding banks where there are counter money-laundering regulations, counter financing of terrorism regulations, all of which have an impact on remittance costs.<sup>309</sup>

*v. Labour market analysis*

This thematic area aims to enhance the capacity of the CP member states to track labour market trends. Accurate and up-to-date information on employment forecasts, labour demand per industry, job vacancies, job descriptions, qualification standards, job registry systems, entry regulations, labour laws, wages, and benefits in countries of destination is crucial for planning and implementation of labour migration policies and skills development programmes. This data allows for better matching of migrant workers skills with labour market requirements of countries of destination, which can contribute to the provision of increasingly safe migration and decent work opportunities for migrant workers.<sup>310</sup>

The work of the TAWG on labour market analysis focuses on the establishment of data collection systems, analytical capacities, and international data-sharing mechanisms. It has

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<sup>309</sup> Colombo Process, *op. cit.* (n. 274) 13.

<sup>310</sup> Kathmandu Declaration, para. 19(e). Colombo Process, *op. cit.* (n. 296).

convened regional workshops on the topic and promoted the use of the CP website as an online repository and a knowledge forum whereby member states, through a restricted access portal, can share vital information on labour market trends.

*vi. Migrant health*

This new thematic area, previously considered together with pre-departure orientation, aims at promoting the health of migrant workers throughout the migration cycle to reduce long-term economic and social costs. It follows the initiative of the Human Rights Council on the topic of ‘right to healthcare for migrant workers’, as it would be imperative to ensure access to healthcare by migrants to realise the SDG 3 (‘Ensure healthy lives and promote well-being for all at all ages’). This thematic area focuses on the provision of migrant workers’ access to appropriate care at destination countries, considering the importance of universal health coverage.<sup>311</sup>

*vii. Promotion of equality for women migrant workers*

The objective of this thematic area is to promote the development of specific actions for women migrant workers from CP countries that can address potential discrimination and protect them from the precarious circumstances, such as unpaid or underpaid salaries, physical, sexual and mental abuse, lack of socialisation, poor working conditions, heavy workload, and not enough rest time. As previously mentioned, female migration in Asia is closely linked with domestic work, one of the most unregulated types of work and one particularly exposed to exploitation, harassment, abuse, and human trafficking.<sup>312</sup> These problems make Asian female migrants, particularly those working in the domestic and irregular sectors, a vulnerable group

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<sup>311</sup> Colombo Process, *op. cit.* (n. 303) 4.

<sup>312</sup> See Section 3.2, above.

with specific needs of protection. The CP vows to implement a ‘gender lens’ into all working groups discussions so as to strengthen the CP’s efforts to address specific needs and vulnerabilities of women migrant workers and promote equal opportunities for them.<sup>313</sup> Activities in this field have the support of UN Women’s Asia and the Pacific Regional Office.

*viii. Consular support for migrant workers*

CP countries recognize the importance of adopting a ‘Collective Preparedness Mechanism’ able to answer the needs of their migrants, in terms of safety, welfare and consular services, in case of crisis in countries of destination. Specific projects have been implemented in this regard with the support of IOM, namely an e-learning course for consular staff on crises preparedness and response; and the development of a government-owned smartphone application, which enables countries of origin to communicate with their nationals abroad including warning and advising on crises, making assistance available in real time. The CP intends to build linkages between the roles of consular officials of the diplomatic missions and the ethical recruitment working group in the protection of migrant workers and the grievance mechanisms related to it.<sup>314</sup> The CP served as a platform for its members to adopt coordinated responses to the 2011 Libya crisis, during which migrant workers were stranded in a civil war, and contributed to the establishment of an emergency fund at IOM.<sup>315</sup>

CP member states engaged in discussions to adopt a Ministerial-level Declaration of the Colombo Process Member States on the impact of COVID-19 on migrant workers, with a focus on the effects of the pandemic on labour migration and the need to uphold protection of

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<sup>313</sup> Kathmandu Declaration, para. 21(c). Colombo Process, *op. cit.* (n. 296).

<sup>314</sup> *Idem*, para. 21(d).

<sup>315</sup> IOM, *Fourth Global Meeting of Chairs and Secretariats of Regional Consultative Processes on Migration – Defining the Place of RCPs in a Changing International Migration Landscape* (IOM, 2013) 11. On the establishment of a Migration Emergency Funding Mechanism see IOM Standing Committee on Programmes and Finance (SCPF/67) (IOM, 2011) available at [https://www.iom.int/sites/g/files/tmzbd1486/files/2019-01/SCPF\\_67\\_2.pdf](https://www.iom.int/sites/g/files/tmzbd1486/files/2019-01/SCPF_67_2.pdf).

these workers. The draft Declaration was prepared by Nepal, in its capacity of Chair-in-Office, in coordination with the member states and with the assistance of the CPTSU.<sup>316</sup>

#### *ix. Operationalisation of the migration-related goals in the SDGs*

Several SDGs are related to migration and relevant to the work of the CP, especially SDG targets 8.8 (Protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment) and 10.7 (Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies). In this regard, the CP can be a platform to review regional progress made in implementing SDG targets and by sharing experiences and challenges in working with the globally agreed indicators. Nevertheless, the primary role in prioritising policy decisions and the implementation of the goals and targets lies with the individual member states.

#### **4.5. Ministerial Recommendations and Declarations**

The Ministerial Recommendations or Ministerial Declarations are the formal outcome of the Consultations and represent the collective stance of the CP member states on specific topics. They are political guidelines for future action of its members and can serve as a platform for making political declarations targeting migrants, the civil society, destination countries or the international community as a whole.

The Recommendations and Declarations of the Ministers reflect not only the individual statements produced by the representatives of each participating state, but also the statements of IOM and other observers, complemented by the technical work done at senior officials' meetings. Even though the Recommendations and Declarations do not substantially differ

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<sup>316</sup> IOM, *COVID-19 Response Situation Report 18* (IOM Regional Office for Asia and the Pacific 2020).

from the content of the Ministerial Statements they are not a mere grouping or systematisation of individual statements. In fact, some topics gain a new weight once individualised and contextualised as a common stance of the entire group of countries. In terms of structure, the Recommendations of the Ministers adopt different forms. The first three Consultations' Final Reports include a closing document called "Summary of Statements and Recommendations of the Ministers", following a basic structure which includes a background of the Colombo Process; the challenges identified and policy responses;<sup>317</sup> the recommendations of the Ministers; and the follow-up arrangements. The recommendations *stricto sensu* were organised by topics according to the agenda of the meeting. The Dhaka (2011), Colombo (2016) and Kathmandu (2018) Consultations presented the recommendations of the Ministers in the form of a Ministerial Declaration, and comprised two parts: recital paragraphs and specific recommendations clustered under sub-topics.<sup>318</sup>

#### **4.6. Discussion**

I now discuss some of the features I consider more relevant in the institutional development and operation of the CP, making this RCP an interesting case study in the regional context. In so doing, I will critically assess how the CP (and other inter-state consultation mechanisms) fit the theoretical framework on transgovernmentalism; the importance of IOM for the creation and operation of this dialogue mechanism, as well as agenda convergence; the reasons for competitors entailing in cooperation; the self-acknowledgment of changes in state practice directly associated with the work of the CP; and finally the hardships coming from what I call membership overlapping and cooperation fatigue.

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<sup>317</sup> This section was not included in the final document of the 2<sup>nd</sup> Ministerial Consultation.

<sup>318</sup> The Kathmandu Declaration also included an annex titled "Important Progress and Achievements of the Colombo Process Thematic Priorities". Colombo Process, *op. cit.* (n. 296).

The following discussion aims at contributing to a better understanding of this dialogue mechanism by highlighting its specificities and providing the general background for a closer look of its role in norm diffusion, as set in the research design.

#### **4.6.1. Transgovernmental network?**

The discussion begins with an attempt to place my case study within the boundaries of the theoretical framework explained in Chapter 2, particularly on transgovernmentalism. In so doing, I establish a possible path for the academic study of the CP, as well as other dialogue mechanisms, benefiting from some sort of theoretical legitimacy and tradition.

Although often ignored by IR network theory, migration hosts paradigmatic examples of transgovernmental networks. Jobst Köhler pioneered the conceptualisation of RCPs as transgovernmental networks, using a new analytical lens to analyse the internal organisation and functioning of RCPs. According to Köhler, “reconceptualizing RCPs as government networks helps to elucidate features of RCPs that are crucial for understanding their role and impact on inter-state relations and migration related policies”.<sup>319</sup>

The characterisation of the Colombo Process as a transgovernmental network can be drawn from the analysis of its structure and working methods. Recalling the characteristics of transgovernmental networks,<sup>320</sup> I consider that the CP shares the traits of informality and flexibility usually associated with these networks. Despite a tendency to an increasing ‘formalisation’, the CP is still a state-owned informal and thematically oriented structure that can adjust its working methods and agenda to the ever-changing environment of labour mobility in Asia. Moreover, in terms of membership it provides a forum for building trust and

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<sup>319</sup> Jobst Köhler, *op. cit.* (n. 38) 73.

<sup>320</sup> See Sub-section 2.3.1, above.

sharing information among officials working on labour migration issues in countries of origin in Asia. This can easily be perceived as the ‘disaggregated state’ cooperating through a typical information network, using Anne-Marie Slaughter’s taxonomy.<sup>321</sup> Whereas it promotes policy convergence, as in the case of recruitment or pre-departure information, the CP can even be (partially) classified as a harmonisation network. As a network, the CP can be at the genesis of a diffusion mechanism by providing the socialisation and opportunities for learning.

However, the CP is not a mere network of state executives from specialised ministerial departments. Besides working at a senior officials level, as the SOM and the several TAWG illustrate, a main component of the CP structure is the ministerial level. This provides political leadership and oversight to the mechanism, reducing the degree of agency autonomy at the bureaucratic level. On the one hand, the ministerial level sets the scope of the process through agenda setting and resources allocation, providing political stimulus and visibility to the CP. On the other hand, it provides issue linkage and coherence to the CP’s overall work required by the existence of different thematic areas, bundling the outcomes of TAWGs and SOMs carried out under delegated authority.

One can argue that the importance of the ministerial level increases the accountability of the whole process, since the core decisions are made at the political level. One of the common critiques associated with transgovernmental networks in general, and RCPs in particular, is the lack of accountability. While the attractiveness of functional cooperation lies in its informal settings, the fact it takes place far from public scrutiny raises serious doubts about the transfer of public authority from elected officials to bureaucrats, particularly when regulatory power is at stake. With the CP this criticism is less evident since it is not a regulatory network and also

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<sup>321</sup> *Idem.*

because the vertical structure allows political oversight over the work done at TAWG and SOM levels. The link between the ministerial level and increased accountability does not diminish the importance of the work done at the technical level; it simply means that there is a centralised political mechanism leading cooperation among labour sending countries in Asia. In the end, the legitimacy to interpret and define national interests underlying this form of international cooperation lies on ministers, not on bureaucrats.

In the CP, as in other RCPs, “ministerial participation and guidance tend to produce more concrete actions by the states party to the process than does a network of policy experts without the commitment of higher levels of government”.<sup>322</sup> This is relevant due to the thematic nature of the CP. While networks assume important autonomy in certain policy areas, labour migration is a field in which networks are under greater pressure from national political priorities in order to prevent the erosion of national sovereignty. This two-level structure vertically connected – bureaucratic and political – suits the need to establish a mechanism for executive control over the formation and activities of the CP. This is visible, for instance, in the TAWGs progress presentation done at the SOM<sup>323</sup> and the subsequent consideration of the SOM’s work at the Ministerial Consultation.<sup>324</sup> This structure promotes the horizontal coordination, efficacy, and coherence of the CP activities.

This form of network accounts for the lower level of independence awarded to governmental officials, which ultimately questions the idea of a disaggregated state. At least in labour migration, the centralised state is still in control, even at weak forms of international cooperation mechanisms, preventing the isolation of this policy field from political control. The

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<sup>322</sup> Randall Hansen, Jobst Köehler and Jeannette Money, ‘Introduction: Incentivizing Cooperation’, in R. Hansen et al., *op. cit.* (n. 163) 8.

<sup>323</sup> Colombo Process, *op. cit.* (n. 274) 6-11.

<sup>324</sup> Colombo Process, *op. cit.* (n. 296) 5.



analysis of the CP structure and functioning demonstrates the coexistence of centralised control mechanisms and the work of decentralised structures, a feature aptly described in ‘bundled’ transgovernmental networks literature.<sup>325</sup>

This preliminary conclusion justifies using transgovernmentalism as a theoretical framework to study the CP and eventually other RCPs.

#### **4.6.2. IOM’s guardianship**

I turn now to the analysis of the interaction between the CP and IOM. The previous sections already provided evidence of the decisive role assumed by IOM in the creation and development of this dialogue mechanism. The following discussion will clarify the nature of the existing relationship.

The RCP model has been promoted since the mid-1980s by the institutional policies and practices of specific intergovernmental organisations, most prominently by IOM but also by the UNHCR, the EU or the International Centre for Migration and Policy Development (ICMPD).<sup>326</sup> Although the convening of the (now considered) first meeting of a RCP, in 1985, was a state initiative,<sup>327</sup> IOM soon became an active participant in, if not the main promoter of, the diffusion of this type of cooperation, providing political, administrative and financial support, as well as technical expertise.<sup>328</sup>

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<sup>325</sup> Neil Craik and Debora Van Nijnatten, *op. cit.* (n. 99) 528.

<sup>326</sup> Shoshana Fine, ‘Regional Consultative Processes as Techniques of Partnership’ (2018) in Shoshana Fine, *Borders and Mobility in Turkey: Governing Souls and States* (Palgrave Macmillan 2018) 37-61.

<sup>327</sup> In November 1985, a meeting took place in Stockholm, Sweden, gathering the governments of Denmark, France, Germany, the Netherlands, Sweden, Switzerland and the United Kingdom. This initiative became the Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC) – considered the first RCP – later enlarged by likeminded states from other regions. Colleen Thouez and Frédérique Channac, ‘Shaping international migration policy: The role of regional consultative processes’ (2006) 29(2) *West European Politics* 373-375; Elaine Lebon-McGregor, ‘A History of Global Migration Governance: Challenging Linearity’ (2020), 167 *International Migration Institute Working Papers* 11-13.

<sup>328</sup> Jobst Köhler, *op. cit.* (n. 38) 69.

At its inception, RCPs could be seen as an escape valve, shifting states away from formal multilateralism precisely when it was gaining momentum from the beginning of the drafting process of the first UN treaty on migrant workers' rights.<sup>329</sup> Unsurprisingly, the main promoter of this informal model of cooperation on migration was an intergovernmental organisation then notably unenthusiastic about formal multilateralism. One cannot ignore that, in the 1990s and beyond, IOM's institutional culture was under the decisive neoliberal influence of the United States,<sup>330</sup> a known supporter of bilateralism on migration, which supplied leadership<sup>331</sup> and financial support to the organisation. IOM's active endorsement of a regional cooperation approach is seen as a strategic move of the organisation to use the political drive towards cooperation on migration outside the UN framework, filling a void left by the opposition of industrial countries to address migration issues within such a framework.<sup>332</sup>

IOM spread the RCP model by organising the dialogues, hosting secretariats, funding projects, and fomenting knowledge through the commission (mostly in-house) of literature on the topic.<sup>333</sup> In order to promote coordination amongst RCPs and other ISCMs, IOM organises the

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<sup>329</sup> Graziano Battistella, *op. cit.* (n. 6) 54-58.

<sup>330</sup> According to Antoine Pécoud, "IOM was from the start a politicised organisation, closely associated with U.S. leadership". Antoine Pécoud, 'What do we know about the International Organization for Migration?' (2018) 44(10) *Journal of Ethnic and Migration Studies* 1624; Randall Hansen, *op. cit.* (n. 163) 21; Megan Bradley accounts for the decisive influence of the United States on IOM: "From its founding, there has been a tradition of American leadership in the organization (...) and the United States has been IOM's largest funder, consistently contributing more than a third of the annual budget". Megan Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (Routledge 2020) 28.

<sup>331</sup> Since its establishment in 1951 (under a different name), the position of Director General has always been occupied by American citizens, with two exceptions: the Dutch Bastiaan Wouter Haveman (1962-1969) and the current Director General, the Portuguese António Vitorino (2018-present).

<sup>332</sup> Fabian Georgi, 'For the Benefit of Some: International Organization for Migration and its Global Migration Management', in M. Geiger and A. Pécoud (eds.) *The Politics of International Migration Management* (Palgrave Macmillan 2010) 55.

<sup>333</sup> Namely, the works by Randall Hansen, *op. cit.* (n. 36), Amanda von Koppenfels, *op. cit.* (n. 38), Charles Harns, *op. cit.* (n. 240), and Michele Klein Solomon, *op. cit.* (n. 227).

Global Meeting of Chairs and Secretariats of Consultative Processes on Migration (GRCP).<sup>334</sup>

In this respect, it adopted a strategy of self-legitimation by producing authoritative knowledge on the idea being promoted and thus increasing its reputational authority.<sup>335</sup> Thus, IOM became a diffusing agent of an “idea of how multilateral cooperation should work”,<sup>336</sup> assuming an active role in creating a migration regime suited to its institutional interests. Those interests were three-fold: 1) creating additional platforms for the promotion of the organisation’s management approach to migration; 2) strengthening its role as a leading actor in global migration governance; and 3) increasing opportunities for its projects and consequently for funding.

This last aspect might raise questions about IOM’s neutrality as a facilitator of functional cooperation. IOM is known for its ‘projectisation’ system, i.e. the practice of allocating staff and office costs to the operational activities and projects to which they relate, with funding relying upon specific projects.<sup>337</sup> IOM “is almost entirely dependent on project-based funding; while many IOs receive funding from states to implement programs encompassing a diverse range of activities, states pay IOM to provide particular services, packaged as discrete projects.

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<sup>334</sup> The GRCP has been organised by IOM regularly since 2005. The first GRCP was held in Geneva, Switzerland, with the support of the Global Commission on International Migration. Subsequent meetings were held in 2009 (Bangkok, Thailand), 2011 (Gaborone, Botswana), 2013 (Lima, Peru), 2015 (Cairo, Egypt), 2016, 2017 and 2019 (Geneva, Switzerland), and 2021 (online event). It brings together representatives of chairs and secretariats of all ISCMs to exchange their respective approaches on various migration topics and contribute to improved policy coherence at regional, interregional and global levels.

<sup>335</sup> Oleg Korneev, ‘Self-legitimation through knowledge production partnerships: International Organization for Migration in Central Asia’ (2018) 44(10) *Journal of Ethnic and Migration Studies* 1676.

<sup>336</sup> Colleen Thouez and Frédérique Channac, *op. cit.* (n. 327) 381.

<sup>337</sup> Whereas projectisation “allowed IOM to have relatively low mandatory contributions and to grow its overall budget”, it has also promoted internal fragmentation and competition among regional offices. Elaine Lebon-McGregor and Nicholas R. Micinski, ‘The Changing Landscape of Multilateral Financing and Global Migration Governance’ (2021), in T. de Lange, W. Maas and A. Schrauwen (eds.), *op. cit.* (n. 167) 28. According to other authors, “at times, the IOM even seems to behave in way that is closer to a multinational corporation than a typical UN agency”. Martin Geiger and Antoine Pécoud, ‘International Organisations and the Politics of Migration’ (2014) 40(6) *Journal of Ethnic and Migration Studies* 882.

More than 97 per cent of contributions to IOM are earmarked to particular projects”.<sup>338</sup> Therefore, RCPs can provide new opportunities for projects, as “there seems to be a clear link between promoting and sustaining [RCPs] and concurrently securing IOM’s participation and follow-up through the implementation of IOM programmes in the countries and regions concerned”.<sup>339</sup> The IOM project ‘Strengthening Labour Migration Capacity in Bangladesh, Indonesia, Nepal and the Philippines for Replication in other Colombo Process Countries’, funded by the EU and under which SOM were organised,<sup>340</sup> or the establishment of the Colombo Process Technical Support Unit, with the funding provided by the SDC, are illustrative of IOM’s approach and working methods. It is also worth mentioning the ‘Governance of Labour Migration in South and South-East Asia (GOALS)’, a three-year programme (2020–2023) jointly implemented by IOM, ILO and UN Women, also funded by the SDC.<sup>341</sup>

In sum, IOM had a vested political (neoliberal) and operational interest in the diffusion of RCPs, the functioning of which provide in turn increased opportunities for its own dealings through initiatives to be externally funded. Consequently, IOM might lack the idyllic status of neutral facilitator of functional cooperation on migration but that does not impinge on its

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<sup>338</sup> Megan Bradley, *op. cit.* (n. 330) 6.

<sup>339</sup> Martin Geiger and Antoine Pécoud, *op. cit.* (n. 337) 382.

<sup>340</sup> Colombo Process, ‘The 2<sup>nd</sup> Senior Officials’ Meeting of the Colombo Process – “International Labour Migration for Prosperity: Adding Value by Working Together” (2014) 3.

<sup>341</sup> The GOALS programme is funded under SDC’s regional programme “Decent Work for Migrant Workers from South Asia”. It aims to ensure that labour migration is safe, orderly and regular for all women and men from the Colombo Process Member States through strengthened collaboration and effective labour migration governance. One of the three interlinked outcomes upon which the programme is built is that Colombo Process Member States develop and progress actionable commitments for strengthened labour migration governance and policy coherence through multilateral dialogue. <https://www.iom.int/news/un-agencies-launch-programme-support-collaboration-and-effective-labour-migration-governance-south-and-south-east-asia> (last access: March 20, 2022).

legitimacy and effectiveness in promoting this approach to cooperation. As Stefan Rother rightly acknowledges,

Obviously, the core of IOM until today remains its project-based work, since that is where the overwhelming part of its financing is coming from. But that does not mean that there is a tension between projectization and the aim to count as a recognized actor in global governance.<sup>342</sup>

IOM's role in promoting the 'RCP model' can be identified since the beginning of the Colombo Process. Despite being publicly asserted as a state-owned mechanism, it was IOM's political, administrative and financial support that made it possible for the CP to position itself as a relevant actor in labour migration governance in Asia. Besides this support, IOM's influence can also be identified in terms of agenda setting. To some extent, the CP main thematic areas mimic IOM's priorities and their evolution. The original five thematic areas<sup>343</sup> were mostly operational (skills recognition, remittances, pre-departure orientation, quantitative data sharing; although the ethical recruitment theme had a slightly different nature, more grounded on migrants' rights concerns) and in line with IOM fields of action. This is particularly notorious in the election of labour market analysis as a main thematic area, since IOM has positioned itself as an authoritative source of (quantitative) data on migration, as demonstrated by the conceptualisation and operation of IOM Displacement Tracking Matrix, a system to track and monitor displacement and population mobility through primary data, or the creation of its Global Migration Data Analysis Centre. These initiatives are instrumental to

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<sup>342</sup> Stefan Rother, "'The' or 'A' leading organization in migration? IOM as an actor in global migration governance' (2020) 18(34) *Migración y Desarrollo* 10.

<sup>343</sup> See Section 4.4, above.

IOM's view that migration data and data analysis must be available to ensure effective policymaking.<sup>344</sup> The CP endorses the same view.

On the other hand, the addition of new crosscutting themes that took place in 2016, addressing human rights issues like the right to health and gender equality as well as the migration-development nexus, coincide with IOM's thematic expansion and its attempt to have a broader mandate in line with its new status within the UN system and with the environment created in the aftermath of the GCM adoption.<sup>345</sup> Such expansion has a direct link with the 2015 IOM Council Resolution No. 1310<sup>346</sup> adoption of the Migration Governance Framework that includes, as one of its three principles, the adherence to international standards and fulfilment of migrants' rights. In this respect, it is relevant that IOM Council expressly recalled "the principles of international law relevant to migration encompassing, inter alia, obligations under human rights, refugee, labour, humanitarian, maritime and transnational criminal law". Also in this respect, there is a strategic alignment between the agendas of both institutions.

The creation and functioning of the CP confirms the view expressed in literature according to which "the creation of RCPs has thus been a result of both state interests and the entrepreneurial efforts of international organizations to expand on the successful RCP model".<sup>347</sup>

The CP member states have always relied on IOM and called for its support and involvement. National statements at Ministerial Consultations not only show generalised public appreciation

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<sup>344</sup> According to Frank Laczko, Director of IOM Global Migration Data Analysis Centre, "data have no value by themselves unless they are used effectively to inform policy". IOM, *Inclusive and Innovative: Partnerships for Effective Global Governance of Migration*, 28 International Dialogue on Migration (IOM 2018) 65.

<sup>345</sup> Stefan Rother, *op. cit.* (n. 342) 18; Martin Geiger and Antoine Pécoud, *op. cit.* (n. 337) 875; Megan Bradley, *op. cit.* (n. 330) 20-25.

<sup>346</sup> C/106/RES/1310.

<sup>347</sup> Jeannette Money and Sarah P. Lockhart, *op. cit.* (n. 164) 188.

for IOM's assistance and services, but also call for its higher participation.<sup>348</sup> As China's representative stated at the Bali Ministerial Consultation, in 2005,

The IOM should make full use of its advantages in knowledge, information and technology, strengthen research on migrant workers, and provide a platform for the discussion on labour migration. It should also strive to achieve closer cooperation with other international organizations, international financial institutions and donors to mobilize resources for improved information sharing, policy development, skill training, capacity building and personnel exchange in this field.<sup>349</sup>

The call for IOM's role as a facilitator of cooperation is particularly visible when states intend to establish dialogue mechanisms between sending and receiving countries on issues of common interest. The Final Reports of the first three Ministerial Consultations are teemed with examples of express requests for IOM's initiative in this regard. The basic idea was for IOM to "play a crucial role in developing a regular institutional mechanism for consultations and coordination between sending and receiving countries and in promoting a safer and more dependable regime of migration management".<sup>350</sup>

There have also been pleas for IOM, sometimes in conjunction with ILO and other unnamed international organisations, to assume an active role in terms of standardisation of contractual obligations, setting of minimum standards pertaining to the rights of migrant workers, including some special provisions for security and protection of female workers, advocating for policies comprising minimum wage, equal treatment, and non-discrimination in wages at destination

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<sup>348</sup> Particularly in CP's first phase, countries requested IOM's technical support in areas such as the commission of studies; training and capacity building for people in charge of labour migration management and dealing with migrant workers; assistance in labour migration legislation reform; information sharing about legal framework, policies and market information of countries of destination.

<sup>349</sup> Colombo Process, *Third Ministerial Consultations on Overseas Employment and Contractual Labour for Countries of Origin in Asia – Summary of Statements and Recommendations of the Ministers* (2005).

<sup>350</sup> *Idem*.

countries, and the adoption of measures to ease the adjustment of migrating labour to the new environment in countries of destination.

The political, financial and practical support that IOM provides to the CP bonds the two institutions tightly, in a mutually beneficial relationship. I did not find any evidence that CP member states question the status quo. On the contrary, member states often expressly require more assistance from IOM, not less. Moreover, if the “independence of the Process”<sup>351</sup> was reinforced with mechanisms providing greater financial autonomy, they do not seem enough to identify a strong will towards an autonomous functioning of the CP. Notably, when member states had the chance to build up a bigger budget based on self-contributions they opted for the less ambitious alternative. In sum, I see the relationship between IOM and the CP as a form of guardianship, in which the CP relies heavily on external expertise and organisational capacity, despite having its own voice in policy matters and a standing in the international arena on its own right.

#### **4.6.3. Coopetition**

One of the features that called my attention since the beginning of my research was the fact that the CP embodied cooperation among countries competing for access to the same destination markets. What is the explanation of such apparent paradox?

Typically, inter-state consultation mechanisms gather countries with different interests and positioned differently at the migratory process. Whenever RCPs act as platforms for North-South dialogue they become the archetypal mode of functional cooperation described above. However, this type of cooperation has been understood as perpetuating existing power asymmetries among states, favouring stronger states. The RCP model may enable countries of

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<sup>351</sup> See Section 4.3 (n. 293), above.



destination to “systematically include and exclude prospective partners states on a strategic basis. Indeed the existing informal network and trans-regional governance structures create opportunities for forum-shopping and a ‘divide and rule’ approach by the North towards prospective Southern partner states”.<sup>352</sup> The engagement of regional hegemons in dialogue with countries of origin can be a way of assuming greater control over multiple aspects of the migration process relevant to their interests through, for example, agenda setting and policy coordination. As recognised in literature, “the driving force behind the RCPs has always been powerful states, and the most concrete outcomes of the RCPs reflect the interests of these states”.<sup>353</sup> Within this ‘vertical’ North-South divide, RCPs can serve as a mechanism to diffuse control-oriented policies and the interests of receiving states, reproducing unequal balances of power.<sup>354</sup> The Bali Process provides an example of how a regional hegemon – Australia – uses functional cooperation as a method to export its policy priorities to other countries or ‘shift the burden’ of refugee protection to other states.<sup>355</sup>

The Colombo Process, however, avoids this portrayal since its membership is built upon an identity of interests. The CP is a particularly homogenous RCP as all its members are countries of origin from the same region. Moreover, its dynamics do not reveal a hegemonic influence of members like China, India or Pakistan, considered regional powerhouses in demographic, economic, or military terms. In fact, the history of the CP shows a relative lack of interest of

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<sup>352</sup> Alexander Betts, ‘Conclusion’, in A. Betts, *op. cit.* (n. 162) 321.

<sup>353</sup> Jeannette Money and Sarah P. Lockhart, *op. cit.* (n. 164) 186.

<sup>354</sup> In the European context, “RCPs and the partnership discourse they espouse present forms of European conditionality in disguise, which only position states as partners if they meet EU expectations in migration management. The productive power of these discourses is that they are deployed in order to make states responsible in line with EU externalization agenda, thus pushing the European border outwards to engage non-European countries in Europe-facing migratory controls”. Shoshana Fine, *op. cit.* (n. 326) 39-40.

<sup>355</sup> Andrew Geddes, *op. cit.* (n. 212) 80; Susan Kneebone, *op. cit.* (n. 241) 601; Joseph H. Douglas and Andreas Schloenhardt, *Combating Migrant Smuggling with Regional Diplomacy: An Examination of the Bali Process* (The University of Queensland 2012) 13; Sébastien Moretti, *op. cit.* (n. 241) 8-9.

these countries in its functioning, illustrated by the fact that in two decades of existence none of them have yet assumed the chairmanship.

The characteristics of Asian labour migration reveal a concentration of destination markets, mostly within the region, and occupational sectors.<sup>356</sup> Therefore, countries of origin face fierce competition among themselves in order to secure greater access to destination labour markets and better placement opportunities for their nationals. The CP, paradoxically, is a ‘horizontal’ mechanism of cooperation amongst competitors. It brings together countries sharing the same interests as countries of origin but with antagonistic interests in obtaining relative advantages in the supply of manpower to the international labour market.<sup>357</sup> Borrowing the terminology of economic behaviour theory, this paradox can be described as a coepetitive relationship. Coepetition, a term coined in the 1990s to describe business networks, is defined as “simultaneous cooperative and competitive interactions between actors on any level of analysis, leading to the formation of a paradoxical relationship”.<sup>358</sup> This ‘cooperation among competitors’ is expressed at the activity level of the network as actors coordinate their activities in order to produce a problem solution, namely to gain access to external resources such as know-how, finances or other invaluable assets. Besides the cooperative level, actors still act individually to obtain a competitive advantage relative to the other partners.

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<sup>356</sup> See Section 3.2, above.

<sup>357</sup> The interests of sending countries may be summarised as: a) reducing employment and job creation pressure from huge surplus labour; b) earning foreign currency for balance of payment and creditworthiness; and c) gaining from migrants’ experiences and expertise upon return. Mizanur Rahman and Ahsan Ullah, ‘Introduction: Migration Policy – Theoretical and Conceptual Issues’, in M. Rahman and A. Ullah (eds.), *op. cit.* (n. 222) 4.

<sup>358</sup> Maria Bengtsson, Sören Kock, Eva-Lena Lundren-Henriksson, and Malin H. Näsholm, ‘Coepetition research in theory and practice: Growing new theoretical, empirical, and methodological domains’ (2016) 57 *Industrial Marketing Management* 4; Kim Kwang-Ho, ‘Coepetition: Complexity of cooperation and competition in dyadic and triadic relationships’ (2020) 49 *Organizational Dynamics* 1-6; Tzu-Ju Ann Peng, Stephen Pike, Johnson Chung-Hsin Yang, and Göran Roos, ‘Is Cooperation with Competitors a Good Idea? An Example in Practice’ (2012) 23 *British Journal of Management* 532-560.

Since the beginning of the twenty-first century, the CP member countries have engaged in legislative and policy reforms aimed at obtaining competitive advantages over their direct competitors. The outcome was the adoption of new migration policies and regulations, in the creation of new migration institutions such as dedicated ministries or governmental agencies, as well as the signing of bilateral agreements with destination countries.<sup>359</sup> Despite the differences in the migration policies of countries of origin, “ultimately they all regulate the procedures and requirements for citizens who intend to work abroad, the operations of recruitment agencies who extend foreign employment services, the safeguards and benefits to migrants and their families and the reintegration programs for migrants returning to the country”.<sup>360</sup> Simultaneously, countries of origin try to increase their competitive advantages through elevating their nationals’ profile in the international labour market, whether enhancing migrants’ skills through pre-departure skills programs or matching the needs of receiving countries labour markets with the supply of workforce, for instance through mutual recognition of qualifications schemes, or even through structured branding of national workforces.<sup>361</sup> The recourse to bilateral agreements is also demonstrative of a race among competitors to obtain better conditions for the placement of their workers at destination labour markets.

Countries of origin are aware of the existing competition among them and perceive it as ‘unhealthy’.<sup>362</sup> As acknowledged by the representative of Nepal at the Third Ministerial Meeting

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<sup>359</sup> Dovelyn Rannveig Agunias, Christine Aghazarm, and Graziano Battistella, *Labour migration from Colombo Process countries: Good practices, challenges and ways forward* (IOM 2011) 28-39.

<sup>360</sup> Graziano Battistella, *op. cit.* (n. 168) 10.

<sup>361</sup> Nation branding is an institutional practice wherein sending states promote the competitive advantages of their nationals in the global labour market over those of other countries through generalisations of national ‘qualities’. This practice has been described as a commodification of global workers for the benefit of the sending state, self-promoted as the ideal source for labour, which “opens or closes labour markets to national workforces, depending on their imagined social qualities and subjective assessments of their suitability for the occupation and region in question”. Geraldina Polanco, ‘Competition Between Labour-Sending States and the Branding of National Workforces’ (2019) 57(4) *International Migration* 146.

<sup>362</sup> Colombo Process, *op. cit.* (n. 254) and (n. 340).

of the CP, “we have been experiencing that more competition among the countries of origin has ended up in increased vulnerabilities and reduced protection of migrant workers. Accordingly, we feel competition should be replaced by enhanced collaboration and coordination.”<sup>363</sup> More recently, the role of the CP in curbing unhealthy competition among labour-sending countries with reference to ethical recruitment was clearly acknowledged:

With thousands of recruitment agencies spread across the region competing for limited job demand in common destination markets, there can be an incentive to undercut competition which leads to unfavourable outcomes for migrant workers (...). Therefore, a more concentrated approach among labour sending countries using platforms such as the Colombo Process is necessary to ensure minimum standards in recruitment and employment. A positive step in this direction was the inclusion of “Fostering Ethical Recruitment Practices” as one of the key thematic priority areas in the Kathmandu Declaration adopted on 16 November 2018 by the Colombo Process (CP).<sup>364</sup>

On the cooperation side, the CP member states benefit from economies of scale and access to heterogeneous resources. Despite the important advantages deriving from the adoption of uniformed discourses typically associated with transgovernmental networks in general and RCPs in particular, there are more prosaic advantages prompting cooperation among the CP member countries. By participating in this cooperation mechanism, countries have access to relevant information otherwise unreachable, benefit from IOM’s operational and technical support, and profit from financial resources supplied to IOM’s projects.

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<sup>363</sup> Colombo Process, *op. cit.* (n. 349).

<sup>364</sup> This included provisions on sustaining joint efforts towards no recruitment costs, strengthening governance to enforce decent work norms and policies and to consider the CP Recommended Elements for Interstate Labour Migration Arrangements to guide the bilateral labour agreements of the CP member states. *Nepal Labour Migration Report 2020*, Ministry of Labour, Employment and Social Security (2020) 25-26.

Perhaps more significantly, participation in the CP increases the international profile of small and less influential countries. This is due to the fact that the CP can act as a political block, with two different forms of intervention: first, assuming the role of a ‘qualified’ representative of migrant workers at international fora as it occurred during the negotiations of the GCM; second, adopting a united position to increase their bargaining power towards the receiving states,<sup>365</sup> a role that has been suggested as a potential ‘migration cartel’.<sup>366</sup>

Participants in the CP are aware of these roles, as revealed by the political discourse stemming from Ministerial Meetings. Since its inception, there have been calls for the CP to form a block to act in the international arena. For example, in 2005 Sri Lanka affirmed the need of labour sending countries “to band together to build greater international awareness about the complex issues associated with labour migration, as well as the concerns of labour-sending countries (...) through joint initiatives as a coalition of labour-sending countries, and through collective representation in relevant international bodies such as the United Nations and ILO”.<sup>367</sup> In the same meeting, Bangladesh suggested the formation of a negotiating forum of all labour sending countries “for furthering the case of movement of service providers in the WTO negotiations [of Mode 4 of GATS]”.<sup>368</sup>

The perception of the CP as a unitary actor in the international arena does not depend only on the political will of the participating countries; it interferes with other political powers and its implementation depends on the way other international relations’ actors perceive the CP

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<sup>365</sup> According to Stephan Rother, “the focus on inter-state cooperation could be seen as a means to build up a unified position and bargaining power towards the receiving states of migrants”. Stephan Rother, *op. cit.* (n. 21) 192.

<sup>366</sup> “(...) at the negotiating table, countries of origin could threaten to withdraw the workers, but a migration cartel is hard to implement. On the contrary, countries of origin are competing for a larger share of deployment, and in that respect they play into the hands of [destination] countries”. Graziano Battistella, *op. cit.* (n. 168) 10.

<sup>367</sup> Colombo Process, *op. cit.* 347).

<sup>368</sup> *Idem.*

countries as a group. Certainly, the most promising area for these countries to act as a block would be the intra-regional cooperation mechanisms established within the Colombo Process framework, namely the Asia-EU Dialogue on Labour Migration and the ADD. However, the interaction between the CP members with the ADD, albeit fruitful, shows a resistance of other countries in dealing with the Asian labour-sending nations as a group, even if all of them are simultaneously participating members of both RCPs. This can be exemplified by the negative reaction originated by the presentation of a common position statement of the CP members at a Senior Officials' Meeting of the ADD: such presentation "was not favourably received. The ADD Troika declared that they do not encourage CP members to make presentations as a combined body", as mentioned in the Final Report of the 2<sup>nd</sup> Senior Officials' Meeting of the Colombo Process, held in October 2014.

#### **4.6.4. Changes in state practice**

RCPs are credited for providing "transnational space for the production and diffusion of knowledge on migration issues and, at the same time, encourag[ing] a sense of shared community among diverse states".<sup>369</sup>

In the CP case, the ministerial level reinforces the communion of interests among Asian labour countries of origin through what has been described in different mechanisms as 'rituals of togetherness' or 'soft diplomacy'.<sup>370</sup> On the other hand, the work of TAWGs adopts a more practical and technical approach, implementing initiatives with a direct impact on capacity building, as well as on migrants' rights, which can act as a diffusion instrument. The Pilot Project on Skill Development, Documentation and Recognition (TAWG on skills and qualification recognition) and the development of standard terms of employment for domestic

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<sup>369</sup> Shoshana Fine, *op. cit.* (n. 326) 37.

<sup>370</sup> *Idem*, 42 and 51, respectively.

workers (TAWG on ethical recruitment) are just examples of relevant practical outcomes of the CP with such diffusion potential.<sup>371</sup> If the capacity of organising follow-up activities is an important criterion for assessing the effectiveness of RCPs,<sup>372</sup> the work of the CP at the technical level can be rightly perceived as relevant for labour migration in Asia. It remains to be seen, however, what kind of norms, if any, can be diffused through the CP activities.

However, there is a structural limitation to such outcomes since the CP voluntarily narrowed its scope of action to contractual labour, as reflected in its official denomination: The Ministerial Consultation on Overseas Employment and Contractual Labour. This terminology is common in Asia: whereas ‘overseas employment’ means the employment of a national citizen in a foreign country<sup>373</sup> and can be understood as a synonym of labour migration, ‘contractual labour’ seems to refer to specific forms of labour mobility under formal employment contracts, particularly the temporary labour migration of semi- and low-skilled workers processed under state supervision. Thus, most of the initiatives adopted under the CP’s aegis disregard other types of labour movements such as permanent labour migration, highly skilled migration, and migrant workers in the informal economy, including those in an irregular situation.<sup>374</sup>

The impact of the CP on state practice is difficult to assess. It is argued in literature that RCPs’ “impacts more generally take the form of unintended consequences than of those produced by

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<sup>371</sup> See Section 4.4, above.

<sup>372</sup> Jobst Köhler, *op. cit.* (n. 38) 87.

<sup>373</sup> According to article 13(h) of the Philippines Labour Code, ‘overseas employment’ means employment of a worker outside the Philippines; in section 2(13) of the Overseas Employment and Migration Act 2013, of Bangladesh, ‘overseas employment’ is defined as the employment of a Bangladeshi citizen in a foreign country outside the legal authority of Bangladesh. This expression is used in several national departments in charge of labour migration (For example: The Bureau of Emigration and Overseas Employment of Pakistan and the Philippine Overseas Employment Administration).

<sup>374</sup> Ryszard Cholewinski, ‘The ILO and the Global Compact for Safe, Orderly and Regular Migration: labour migration, decent work and implementation of the Compact with specific reference to the Arab states region’ (2020) 16 *International Journal of Law in Context*, 313. In the case of ADD, which denomination also refers to contractual labour, see IOM, *Managing Labour Mobility in Asia: A Holistic Approach – The Abu Dhabi Declaration and Pilot Project* (IOM/ILO 2015).

linear casualty”.<sup>375</sup> Although RCPs might be credited with the implementation of new policies and initiatives at the state level, this is difficult to discern partially due to the ‘opacity’ surrounding their activity. Therefore, it is argued, “scholars face barriers in assessing the causal relationship between RCPs and changes in state practice”.<sup>376</sup>

Nonetheless, states have been willing to report domestic changes and to establish a link with the CP, particularly in its early years.<sup>377</sup> Since the second Ministerial Consultations, held in 2004, the member states seem to have adopted a self-imposed reporting obligation. In this sense, the ministers’ statements are keen in presenting the measures and policies in place or under consideration in their respective countries relating to the thematic areas of the CP’s agenda. More significant, though, seems to be the will of a considerable number of countries of showing compliance with previous recommendations of the Ministerial Consultations, highlighting measures and policies that follow agreed stances in specific topics. Not only do countries expressly assume the relevance of ministerial recommendations in shaping their labour migration policies, but they also list measures and policies adopted in compliance with such recommendations or, at least, implemented according to their spirit. In the first case, for example, Nepal pledged its commitment to the Process during the Manila Consultations and assumed that “the deliberations and recommendations of the Consultations will be the source of inspiration for implementing policies and programmes as well as generating movement for betterment in labour migration management”.<sup>378</sup> In the second case, the declarations of

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<sup>375</sup> Jobst Köhler, *op. cit.* (n. 38) 87.

<sup>376</sup> Lesley Wexler, ‘The Role of Human Rights in Migration Regional Consultative Processes’ (2012) 106 *American Society of International Law Proceedings* 65, 66-67.

<sup>377</sup> The discourse analysis of the ministerial statements is eased in the first three Consultations, since the Final Reports included the transcription of the proceedings. After 2011, the Final Reports take the form of Summary Reports.

<sup>378</sup> Colombo Process, *Second Labour Migration Ministerial Consultations for Countries of Origin in Asia – Final Report* (2004).



Thailand, China and Vietnam are illustrative: Thailand comprehensively introduced its actions at the 2<sup>nd</sup> Ministerial Consultation, acknowledging that “as we got the guideline and recommendation from the First Asian Labour Ministerial Consultations, held last year in Colombo, Sri Lanka, some activities [from] the meeting had been implemented”<sup>379</sup> and at the third round of talks it was said that “in response to the recommendations from the two meetings, we are pleased to inform you that Thailand has initiated various policies and measures”<sup>380</sup>; at the Third Ministerial Consultation China listed five measures and policies implemented in the previous year, which were adopted “in light of the Chinese reality and the recommendations adopted in the Manila Consultations”<sup>381</sup>; Vietnam acknowledged that it “has implemented many activities in response to the three main recommendations of the Manila Consultations”<sup>382</sup>.

Albeit relevant, the assumed influence of the CP’s recommendations focused on practical measures related with the institutional capacity and services for migrant workers.<sup>383</sup> In general terms, and despite the practical relevance of these measures, the CP influence on the shaping of labour migration policies tend to have a diffuse nature, centred more on particular aspects than on the main political options underlying each country’s labour migration policies. This being said, it is also true that, at some point, some countries recognize a direct impact of the

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<sup>379</sup> *Idem.*

<sup>380</sup> Colombo Process, *op. cit.* (n. 349).

<sup>381</sup> *Idem.*

<sup>382</sup> *Idem.*

<sup>383</sup> For instance, the five measures mentioned in the 2005 Chinese statement dealt with better regulation of recruitment agencies; enhancement of contacts with receiving countries for information on demand in international markets; improvement of skills training and pre-departure adaptation training; development of training materials for staff in recruitment agencies aiming at improving compliance with regulations and competitiveness; and improvement of policies on employment of foreigners in China. Similarly, the measures Thailand assumed in 2005 as implementation of recommendations refer to the establishment of a One-Stop Service Center for Overseas Employment; the improvement of the efficiency of pre-departure orientation; the utilisation of the Overseas Workers’ Welfare Fund; the monitoring of private recruitment agencies’ performance; and the establishment of a labour data bank.

recommendations stemming from the CP on core pieces of legislation grounding such policies. Probably the best example would be the assertion made by Pakistan about amendments introduced to its Emigration Law:

Following the Colombo consultations, Pakistan has taken a number of initiatives intended to put in place emphasis on improving [the] legal framework and institutional capacity building dealing with migrant workers. (...) Similarly, we are processing some changes in the emigration law keeping with the latest trends and model practices of friendly countries and in line with recommendations of [the] Colombo meeting.<sup>384</sup>

In the context of norm diffusion on ethical recruitment, the following chapter provides additional examples of changes in state practice associated with the CP activities.<sup>385</sup>

#### **4.6.5. Membership overlapping and cooperation fatigue**

Two final aspects worth mentioning in this discussion: membership overlapping and cooperation fatigue. The existence of multiple cooperation mechanisms on migration in Asia, some of which have a broad scope while others are narrowly themed, entices states to simultaneously participate in several of such mechanisms. Regionally, the CP member states participate not only on the ADD but also on the Bali Process. Beyond the region, this group of states participate in the Asia-EU Dialogue on Labour Migration and the Global Forum on Migration and Development, to name a few. Additionally, five CP member countries are also ASEAN members, an organisation with its-own agenda on labour mobility. Despite being at two different conceptual levels, ASEAN being a regional integration framework while CP being a transgovernmental network,<sup>386</sup> both deal with labour mobility issues.

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<sup>384</sup> Colombo Process, *op. cit.* (n. 330).

<sup>385</sup> See Sub-section 5.3.2, below.

<sup>386</sup> Stefan Rother, *op. cit.* (n. 21) 190.

This membership overlapping can potentiate the interaction among states in different stages, reinforcing the perceived advantages of functional cooperation in creating epistemic communities. It also promotes agenda crossing, which allows a multi-dimensional approach to labour migration issues. This is evident in the interaction between the CP and the Bali Process,<sup>387</sup> since labour migration and people smuggling and trafficking in persons can have some intersecting features, particularly in the case of irregular or undocumented labour migration. Such intersection takes the form of “a wide spectrum ranging from totally voluntary movement in which the mover controls the migration process, to kidnapping and trafficking at the other extreme”.<sup>388</sup> The risk, however, is to facilitate the ‘agenda contamination’ if the same individuals are involved in different thematic debates it might be difficult to compartmentalise them, which would be detrimental to those mechanisms with a narrower scope. Nevertheless, one can argue that the CP has tried to avoid such contamination: the absence of irregular migration from its scope, even after the adoption of the new thematic areas in 2016, might be related with the specific theme of the Bali Process and the wish to avoid a duplication of efforts.

In any case, the participation of states in multiple cooperation mechanisms might require a substantial political, financial, and even physical effort from national bureaucracies, particularly for small or developing countries. In these cases, experts involved in migration dialogues are scarce and they are required to participate in meetings and seminars across the region, as remote meetings became generalised only after COVID-19 restrictions were put in place. In the end, this could create a situation where states and bureaucrats experience ‘cooperation fatigue’.

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<sup>387</sup> Emphatically, IOM Regional Office in Bangkok hosts the secretariats of both RCPs.

<sup>388</sup> Graeme Hugo, ‘International Labour Migration and Migration Policies in Southeast Asia’ (2012) 40 *Asian Journal of Social Science* 404.

#### 4.7. Concluding remarks

The institutional development of the Colombo Process discussed above shows the willingness of Asian labour-sending countries to go a step further in terms of cooperation, making use of this RCP as an effective mechanism of policy harmonisation and a promoter of actions to the benefit of their nationals working abroad. The CP is not a classical inter-governmental organisation; it is a state-led, non-binding and informal forum to facilitate dialogue and cooperation on issues of common interest and concern to Asian labour-sending countries relating to labour mobility.<sup>389</sup> However, its institutional development and actions make it more than a mere facilitator of dialogue among its member states. The CP went beyond being a mere dialogue mechanism on migration and assumed a specific role in migration governance by countries of origin. Its tangible achievements in terms of enhancement of pre-departure orientation, improvement of consular protection for migrant workers, reform of the recruitment industry, or expansion of the use of standard terms of employment for domestic workers ensuring that minimum standards are incorporated into employment contracts, just to name a few, are examples of how the CP can be an active stakeholder for migration in Asia.

The CP has gained its own voice that goes beyond the aggregation of the individual voices of the twelve member states. It has done so without changing its institutional nature but by positioning itself, acting as a block,<sup>390</sup> as an autonomous stakeholder in the renovated migration governance system, representing half of the world's population.

There is, however, a relevant aspect of the CP's activities that is purposely absent from the analysis of this chapter: the interplay of the CP with the GCM, both during its drafting and adoption processes, as well as in the current efforts towards its implementation. The GCM-

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<sup>389</sup> <http://www.colomboprocess.org/>

<sup>390</sup> Stefan Rother, *op. cit.* (n. 21) 192.

related activities were (somehow artificially) detached from the case study for analytical purposes, since it substantiates the hypothesis of RCPs having impact on normativity through norm diffusion processes, which will be addressed in the following chapter.

## CHAPTER 5

### **NORM DIFFUSION AND FUNCTIONAL COOPERATION: THE IMPLEMENTATION OF THE GCM**

The case study analysed in the previous chapter reveals how the CP can contribute to the dissemination of ideas: through its agenda and activity, this RCP has built a common understanding on the main issues for countries of origin, positioning itself as a source of knowledge production in labour migration in Asia. As previously explained, the CP adopts a specific view on labour migration closely associated with IOM's agenda, which consequently would be internalised and influence state practice, domestically and internationally. Nevertheless, despite the existence of *prima facie* evidence of changes in state practice correlated with the CP<sup>391</sup> it is difficult to establish causal relationship between its activity and specific national laws. This difficulty, some would argue, is the confirmation of the inexistence of such a relationship and, thus, the CP does not *cause* the adoption of norms domestically. At best, one could easily recognise its role in socialisation, i.e. the process of inducting actors into the norms and rules of a given community.<sup>392</sup> I do not concur with this argument: albeit difficult, it is possible to establish the mentioned causal relationship, as I intend to demonstrate in the following sections.

In this chapter I convene the explanatory value of diffusion to sustain the working hypothesis that RCPs can act as conductors in the spread of norms, ideas, institutions, policies and practices in time and space.<sup>393</sup> Through the combination of theoretical and empirical elements, I

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<sup>391</sup> See Sub-section 4.6.4, above.

<sup>392</sup> Jeffrey T. Checkel, 'International Institutions and Socialization in Europe: Introduction and Framework', in J. T. Checkel (ed.) *International Institutions and Socialization in Europe* (Cambridge University Press, 2007) 5.

<sup>393</sup> Tobias Lenz, *op. cit.* (n. 149) 213.

address this issue in the context of the GCM and argue that the interaction between the CP and the GCM is inductive of norm diffusion and promotes or reinforces the normative effects of the latter. It is true that RCPs do not impose specific actions to be taken or laws to be adopted, in similar fashion to legal obligations stemming from international law. Yet, other ways to promote and facilitate the spread of norms exist and there is evidence, I argue, that dialogue mechanisms on migration potentiate at least learning and emulation.<sup>394</sup> The gathering of such evidence, however, presents a serious methodological problem associated with the broader question of causation in the social sciences.<sup>395</sup> I address this problem through a qualitative causality test for norm diffusion, as explained in Chapter 2.<sup>396</sup> In the following sections, I will apply it to validate the hypothesis that RCPs are vehicles for socialisation and ultimately diffusion.

The working hypothesis of norm diffusion through RCPs requires a norm to be diffused. In section 5.1, I identify the overreaching notion of ‘safe, orderly and regular migration’ as a new norm in international migration and use the concept of norm cluster, which will then be described, as an explanatory tool for the scope of the (un)desired normative effect associated with the GCM.

This chapter analyses the dynamics between the CP and the Global Compact, in particular the CP contributions to the drafting and implementation of the GCM. This interaction has relevant consequences, I argue, in the actual or future internalisation of GCM’s concepts, policies, and framework into CP member states domestic legal systems. Through empirical examples of novel state action associated with the GCM’s stance on fair and ethical recruitment, as one of

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<sup>394</sup> See Sub-section 2.5.1, above, for the explanation of these diffusion mechanisms.

<sup>395</sup> Herbert Obinger et al., *op. cit.* (n. 135) 112.

<sup>396</sup> See Sub-section 2.5.2, above.

GCM's objectives directly associated with labour mobility, I demonstrate the proposition that inter-state consultation mechanisms have a role in the enhancement of the normative framework for labour migration.

### **5.1. Safe, orderly and regular: 'virtuous' migration as a norm**

On 19 December 2018, the UN General Assembly endorsed an aspirational view of international migration: one that is *safe, orderly and regular*. Through the endorsement of the Global Compact for Safe, Orderly and Regular Migration, also known as the Marrakech Compact on Migration, a significant number of states framed how migration should be or, at least, how they would like it to be.<sup>397</sup>

The process leading to the GCM's adoption started as an attempt to find a coherent and comprehensive approach to the vast influx of people into Europe trying to flee war-torn areas like Iraq, Syria and Afghanistan. The virtue of migratory movements that are safe, orderly and regular was in clear contrast to the chaotic, anarchic and uncontrolled large cross-border movements of people, as the 2016 New York Declaration for Refugees and Migrants, paving the way to the GCM, made abundantly clear.<sup>398</sup> The GCM recognises migration as a source of prosperity, innovation and sustainable development, as long as it is safe, orderly and regular.<sup>399</sup>

Despite meriting being part of the official designation of the Global Compact, the notion of 'safe, orderly and regular migration' is somehow illusive, as it remains undefined in its text. The

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<sup>397</sup> Adopted in Marrakech at a UN special conference on December 10, 2018 and endorsed by a resolution of the UN General Assembly on December 19, 2018 (UNGA A/RES/73/195). The GCM obtained 152 votes in favour, five against (Czech Republic, Hungary, Israel, Poland, United States), 12 abstentions (Algeria, Australia, Austria, Bulgaria, Chile, Italy, Latvia, Libya, Liechtenstein, Romania, Singapore, Switzerland), and 24 countries not voting.

<sup>398</sup> For a comparison between the New York Declaration and the GCM, see Elspeth Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration and International Human Rights Law', in C. U. de Sousa (ed.) *The relevance of migration for the 2030 Agenda for Sustainable Development: The Global Compact for Safe, Orderly and Regular Migration* (Universidade Autónoma de Lisboa 2019) 225-245.

<sup>399</sup> GCM, para. 8. This is in contrast with the perils of unsafe, disorderly and irregular migration, which is risky and challenging for individuals and communities in countries of origin, transit and destination (GCM, para 11).



GCM, however, was not the first document where this expression could be found. It was previously included in the 2030 Agenda for Sustainable Development (2015),<sup>400</sup> in IOM's Migration and Governance Framework (2015),<sup>401</sup> in the Report of the UN Secretary-General "In safety and dignity: addressing large movements of refugees and migrants" (2016)<sup>402</sup> and in the New York Declaration for Refugees and Migrants (2016).<sup>403</sup>

Although none of the above-mentioned documents define the concept, IOM's Glossary on Migration does. According to IOM's definition, 'safe, orderly and regular migration' is:

The movement of persons in keeping both with the laws and regulations governing exit from, entry and return to and stay in States and with States' international law obligations, in a manner in which the human dignity and well-being of migrants are upheld, their rights are

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<sup>400</sup> Target 10.7 of the 2030 Agenda for Sustainable Development, adopted by the UN General Assembly on 21 October 2015 (UNGA A/RES/70/1), requires States to "facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies."

<sup>401</sup> IOM's Migration and Governance Framework (C/106/40) adopts a slightly different version of the concept in its subtitle ("The essential elements for facilitating orderly, safe, regular and responsible migration and mobility of people through planned and well-managed migration policies"), whereas its Objective 3 is about ensuring that "migration takes place in a safe, orderly and dignified manner."

<sup>402</sup> The report (A/70/59) has multiple references to the concept 'safe, orderly and regular migration'. However, in para. 88 the Secretary-General adds the adjective 'fair', resembling ILO's terminology deriving from the 2014 Director-General's Report "Fair Migration: Setting an ILO Agenda (ILC.103/DG/IB).

<sup>403</sup> In the New York Declaration for Refugees and Migrants, adopted by the UN General Assembly on September 19, 2016 (UNGA A/RES/71/1), states:

- i. Acknowledged that "the benefits and opportunities of safe, orderly and regular migration are substantial and are often underestimated (para. 4);
- ii. Committed to "cooperate closely to facilitate and ensure safe, orderly and regular migration, including return and readmission, taking into account national legislation" (para. 41);
- iii. Promised to "consider facilitating opportunities for safe, orderly and regular migration, including, as appropriate, employment creation, labour mobility at all skills levels, circular migration, family reunification and education-related opportunities (para. 57);
- iv. Envisaged migrants' return "to their country of origin or nationality in a safe, orderly and dignified manner, preferably on a voluntary basis, taking into account national legislation in line with international law" (para. 58).

respected, protected and fulfilled and the risks associated with the movement of people are acknowledged and mitigated.<sup>404</sup>

Due to its composite nature, it is useful to analyse the three elements separately.

*i. Safe migration*

Safe migration refers to migratory movements across borders that are able to safeguard the well being of migrants, protecting their lives and health from the risks associated with human trafficking and migrant smuggling, often while in transit. Therefore, the rights to life and to physical integrity of migrants are the benchmarks in determining the safety of migration.<sup>405</sup>

Some authors go beyond these facets and adopt a broader view of the concept of safe migration, encompassing the overall protection of migrants and the entirety of their rights.<sup>406</sup> In any case, unsafe migration as the deviation from the norm can be seen as “the result of obstacles which states place in the way of some people which make safe migration unavailable”.<sup>407</sup>

*ii. Orderly migration*

The notion of orderly migration refers to the ideas of control and intermediation. Firstly, migration is orderly if it occurs with respect to national administrative procedures for border crossing, i.e. people exit and enter national territories through the appropriate channels and with the right documentation. This characteristic is closely associated with border control and

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<sup>404</sup> IOM, *Glossary on Migration*, 34 International Migration Law (IOM 2019) 191.

<sup>405</sup> This view is reflected in the New York Declaration’s statement that states “are determined to save lives” (para. 10).

<sup>406</sup> Nicola Piper and Laura Foley, ‘Is ‘regular’ migration a safer form of migration? The case of Asia’ (2022) 6 *Revista DIECISIETE* 101.

<sup>407</sup> According to Elspeth Guild, “these obstacles include visa requirements, sanctions on carriers which do not refuse transport to migrants without the right documents and databases filled with various bits of personal data of questionable quality about migrants the contents of which databases are then shared among groups of countries with exclusionary consequences for migrants”. Elspeth Guild, ‘The UN’s Search for a Global Compact on Safe, Orderly and Regular Migration’ (2017) 18(7) *German Law Review* 1787-1788.

law enforcement as tools for states to know who is within their territories. Therefore, “whether the arrival is orderly or disorderly depends primarily on whether the relevant state authorities are present in sufficient numbers to undertake the job of border control and whether the job of border control is properly articulated to the numbers of persons crossing the border”.<sup>408</sup>

Secondly, the concept of orderly migration can be associated with intermediation. States and international organisations should intervene in order to assist migrants using the proper channels, matching their skills with job opportunities, providing adequate information about legal paths for migration, or assisting migrant workers’ prompt return to their countries of origin once they are no longer needed at destination,<sup>409</sup> an idea that can be traced to IOM precursors’ mandate and actions.<sup>410</sup>

### *iii. Regular migration*

The idea of regular migration is about legality: regular migration occurs when there is compliance with the laws of the countries of origin, transit and destination.<sup>411</sup> Nonetheless, regularity is mostly measured according to the set of rules in place at destination countries, which determine the conditions of stay in their territory.<sup>412</sup> Thus, “the separation of regular from irregular migration presupposes that a state has a system not only of border control but

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<sup>408</sup> *Idem*, 1789.

<sup>409</sup> The 2017 Sutherland Report (Report of the Special Representative of the Secretary-General on Migration A/71/728) envisages return within the concept of orderly migration: “Return, readmission and reintegration are essential elements of a well-ordered migration system. When migrants do not have the legal right to remain in a country of destination, whether because they arrived or stayed irregularly, because their legal stay was on a temporary basis (e.g. as a seasonal worker), or because, after a fair hearing, their application for asylum has been denied, it is within each State’s discretion to remove such people from its territory” (para. 38).

<sup>410</sup> Namely the Intergovernmental Committee for European Migration’s assistance provided to European migrants and refugees in the aftermath of World War II (the so-called ‘surplus population’), as well as the resettlement programs in other continents in the 1960s-1980s. Megan Bradley, *op. cit.* (n. 330) 4, 8-9.

<sup>411</sup> IOM, *op. cit.* (n. 404) 175.

<sup>412</sup> I recall article 5(a) ICRMW according to which migrant workers are considered as documented or *in a regular situation* if they are authorised to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party (stress added).

also of migration laws and requirements against which the requests of migrants can be judged”.<sup>413</sup> Regularity becomes a status – a legally constructed phenomenon – that differentiates between those who comply with the terms (purpose and length) of their authorisation to stay in a country’s territory and those who do not.<sup>414</sup>

The three elements of the concept ‘safe, orderly and regular migration’, when combined, entail an idea of *legality chain* throughout the migratory process, encompassing countries of origin, transit and destination.<sup>415</sup> The desired migration is one in which migrants only move within previously established parameters in terms of time (when), space (where) and purpose (why); in which the rules are respected and migrants comply with multiple instances of control along their journeys: how they travel, the documents they use, where and how they cross borders, and the length and purpose of their stay at destination. In this sense, the GCM’s view is that migration should be controlled, predictable and therefore manageable. However, the equal value of the concept’s three components has been contested in literature, based on the ‘politically uncomfortable but empirically defensible proposition’ that regular and orderly migration is not necessarily safer for migrants. Indeed, there has been a call to re-examine the assumption that regular, orderly migration will necessarily be safer or better for migrants in all contexts, considering that such assumption is mostly a product of the migratory reality of the

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<sup>413</sup> Elspeth Guild, *op. cit.* (n. 407) 1790.

<sup>414</sup> Vicki Squire, ‘The construction and contestation of illegality’, in E. Carmel et al. (eds.), *op. cit.* (n. 171) 138. See also, *inter alia*, Franck Düvell, ‘Irregular Migration’, in A. Betts (ed.), *op. cit.* (n. 162) 78-108; Nicola Piper and Laura Foley, *op. cit.* (n. 406) 99. See also General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, issued in 2013 by Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW/C/GC/2).

<sup>415</sup> Silvana Santi, ‘What is “Orderly Migration”? Towards Asymmetric Multilateralism as Driving Force of Global Migration Control Policies’ (2020), 104 *Colombia Internacional* 15 (in Spanish).

Global North. Therefore, according to this view the notion of ‘safe migration’ should be disaggregated from ‘regular and orderly migration’ in migration discourses and practice.<sup>416</sup>

### 5.1.1. The GCM and the emergence of a norm cluster

By enshrining the notion of safe, orderly and regular migration, the GCM is not only adhering to or promoting an ideal form of migration – the virtuous ‘well-ordered’ migration – but also establishing a new norm in international migration. It describes how migration should be, how states should act, which actions they should adopt and how they should cooperate.<sup>417</sup> It advocates “an ideal world of ideal states in which large-scale migration is effectively regulated by a set of legitimate formal and informal norms”.<sup>418</sup> The ideational view of migration entails, nonetheless, a discrepancy between the realities of migration on the ground and the representation of migration in the text of the GCM: “while migration on the ground is mixed, volatile, dynamic and resists regulation, the migration predicated in the GCM is hierarchically structured as ‘good’ (safe, orderly and regular) and ‘bad’ (unsafe, disorderly, irregular)”.<sup>419</sup>

The ambition of having a safe, orderly and regular migration seems to be an undeniable advantage for migrants and states alike.<sup>420</sup> However, by adopting it as a norm the GCM creates an epistemological differentiation between ‘good’ and ‘bad’ migration and delegitimises the

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<sup>416</sup> Maryann Bylander, ‘Is Regular Migration Safer Migration? Insights from Thailand’ (2019) 7(1) *Journal on Migration and Human Security* 15-16.

<sup>417</sup> Similarly, Antoine Pécoud argues that “by explaining how migration should take place and how states should govern it, the GCM portrays an ideal migration world”. Antoine Pécoud, ‘Narrating an ideal migration world? An analysis of the Global Compact for Safe, Orderly and Regular Migration’ (2021) 42(1) *Third World Quarterly* 27.

<sup>418</sup> Colin Grey, ‘The Global Compact for Migration as social theodicy’, in C. Dauvergne (ed.), *Research Handbook on the Law and Politics of Migration* (Edward Elgar Publishing 2021) 346. Grey argues that the GCM “seeks to guide the co-construction, by everybody, of a legitimate set of formal and informal norms (laws, policies, and practices) for migration governance that will transform the way migration features in our social world”. *Idem*, 341.

<sup>419</sup> Anna Triandafyllidou, ‘The global governance of migration: Towards a ‘messy’ approach’ (2021), *International Migration* 6.

<sup>420</sup> The GCM recognises that safe, orderly and regular migration works for all when it takes place in a well-informed, planned and consensual manner (para. 13).

latter, either free migration<sup>421</sup> or ‘crisis migration’,<sup>422</sup> because it does not conform to the norm. This contrast between norm and deviation “can fuel processes of illegalization that are both harmful as such and jeopardize the GCM’s stated aspirations”.<sup>423</sup>

The norm for international migration remains equivocal, though. In clear contrast with norms like the ban on landmines or the prohibition of chemical weapons, the content of the desired behaviour in international migration is open-ended and not self-explanatory. Perhaps it could not be otherwise as the GCM, like other international legal or political instruments, is a compromise that ought to be flexible enough to encompass the interests of different stakeholders while making it adaptable to distinct regional and national contexts.<sup>424</sup> The consensus was made possible due to, among other features, the inclusiveness of the drafting process,<sup>425</sup> the depoliticisation of the discourse on migration attempting to neutralise the

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<sup>421</sup> Arguably, the international norm up to the twentieth century and still the norm in specific regional contexts, particularly EU’s freedom of movement policy.

<sup>422</sup> ‘Crisis migration’ is a term used in para. 30 of the Sutherland Report, *op. cit.* (n. 409).

<sup>423</sup> Leonie Ansems de Vries and Katharine T. Weatherhead, ‘Politics of Knowledge Production in the Global Compact for Migration’ (2021) 23(2) *Interventions – International Journal of Postcolonial Studies* 310. According to these authors, “whilst the GCM’s concern with safe migration is promising, we are critical of how the notion of ‘safe, orderly and regular’ has been produced as a means of migration management which undermines the GCM’s stated aspiration. It can serve to reinforce harmful processes of illegalization which rest on entrenched gradations of (il)legitimacy in migration policies, supported by underlying epistemological frameworks.” *Idem*, 297.

<sup>424</sup> Elizabeth G. Ferris and Katharine M. Donato, *Refugees, Migration and Global Governance: Negotiating the Global Compacts* (Routledge 2020) 114-117.

<sup>425</sup> The preparatory process leading to the adoption of the GCM, set in motion by the 2016 New York Declaration for Refugees and Migrants, included three phases: consultations, stocktaking and intergovernmental negotiations (UNGA A/RES/71/280 – Modalities for the intergovernmental negotiations of the global compact for safe, orderly and regular migration).

The General Assembly expressly invited UN member states to contribute to this preparatory process by participating in consultations “through regional and subregional consultative processes and, as appropriate, within global processes, mechanisms and initiatives” (para. 22(b)).

Consultations took place between April and November 2017 and comprised of informal thematic sessions and informal interactive multi-stakeholder hearings with representatives of non-governmental organisations, civil society organisations, academic institutions, parliaments, diasporas, migrants, migrant organisations, the private sector, and national human rights institutions compliant with the Paris Principles. The thematic sessions covered the following six topics:

- i. Human rights of all migrants; social inclusion; cohesion; and all forms of discrimination, including racism, xenophobia and intolerance;

controversies over the topic,<sup>426</sup> and the non-binding nature of the document. In this respect, one should keep in mind that the GCM does not impose specific actions and policies on states. Instead, in order to fulfil its twenty-three objectives and commitments, the GCM presents a catalogue of possible actions to be chosen from by states to attain safe, orderly and regular migration. It is up to states to choose those that better suit their interests in their national or regional migratory context.<sup>427</sup>

At this point, I recall what was previously explained about the tripartite structure of norms, which comprises problem, value and behaviour.<sup>428</sup> When applied to the GCM, it is arguable that in order to minimise the negative impacts of disruptive migration (problem), and based on the assumption that migration can be beneficial to all if properly managed (value), states shall ensure that migration is safe, orderly and regular (behaviour). None of these elements is unitary and unequivocal, though. They represent a bundle of interrelated issues – from a multiplicity of

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- ii. Irregular migration and regular pathways, including decent work, labour mobility, recognition of skills and qualifications and other relevant matters;
  - iii. International cooperation and governance of migration in all its dimensions, including at borders, on transit, entry, return, readmission, integration and reintegration;
  - iv. Contributions of migrants and diasporas to all dimensions of sustainable development, including remittances and portability of earned benefits;
  - v. Addressing drivers of migration, including adverse effects of climate change, natural disasters and human-made crises, through protection and assistance, sustainable development, poverty eradication, conflict prevention and resolution;
  - vi. Smuggling of migrants, trafficking in persons and contemporary forms of slavery, including appropriate identification, protection and assistance to migrants and trafficking victims.

The inputs received during consultation were compiled during the stocktaking and gave origin to the ‘zero draft’ (available at <https://refugeemigrants.un.org/gcm-zero-draft>), which was subject to further scrutiny and negotiations, until the final text was approved.

<sup>426</sup> Antoine Pécoud, *op. cit.* (n. 417) 17. Differently, other authors perceived the GCM as unable to neutralise the controversies surrounding migration governance, mostly due its ‘principled ambiguity’ between state sovereignty, and a human rights approach favourable to migrants. According to those authors, “the Compact endorses a normatively ambiguous position in an effort to induce agreement among a wide range of actors with different interpretations of the problems associated with migration, and the appropriate solutions to these problems”. Scott D. Watson and Corey Robinson, ‘Knowledge controversies of global migration governance: understanding the controversy surrounding the Global Compact’, in C. Dauvergne (ed.), *op. cit.* (n. 418) 329.

<sup>427</sup> Antoine Pécoud, *op. cit.* (n. 417) 19; Bimal Ghosh, *The 2018 Global Migration Compact A Major Breakthrough or an Opportunity Lost or Both?* (Palgrave Macmillan 2021) 49.

<sup>428</sup> See Section 2.5, above.

problems to a myriad of possible solutions – reflecting the complexity of migration as a global phenomenon, as acknowledged in the GCM.<sup>429</sup>

I argue that the GCM was indeed a stimulus for the creation of a new norm in international migration, but rather than creating a single norm it produced a cluster of norms, i.e. a bounded collection of interrelated specific problems, values, and behaviours that are understood to be similar enough that their adopters form a family group.<sup>430</sup> In this case, “while a state is constrained to do *something* appropriate, it is enabled by the relative freedom of choice within the cluster to determine for itself what constitutes ‘appropriate behaviour’ in its own specific context”.<sup>431</sup> The notion of norm cluster provides a valuable conceptual and analytical tool for understanding the GCM’s role as a trigger of a new norm in international migration. The multiple acceptable combinations of appropriate behaviour for attaining safe, orderly and regular migration are a result of the different perceptions about the problems and challenges raised by disruptive, unregulated or mismanaged migration, which are aligned with the interests of countries of origin, transit or destination, as well as the various possible actions to tackle them. The policy instruments and best practices associated with each of the twenty-three objectives are thus just recommendations for action towards the main goal.

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<sup>429</sup> GCM, para. 10-11.

<sup>430</sup> Carla Winston, *op. cit.* (n. 138) 647. Differently, Jeffrey S. Lantis and Carmen Wunderlich define norm clusters as “collections of aligned, but distinct, norms or principles that relate to a common, overreaching issue area”. Jeffrey S. Lantis and Carmen Wunderlich, ‘Resiliency dynamics of norm clusters: Norm contestation and international cooperation’ (2018) 44(3) *Review of International Studies* 571.

<sup>431</sup> Carla Winston, *op. cit.* (n. 138) 647.



### 5.2.2. The (un)desired normativity of the GCM

The emergence of a norm cluster in international migration deriving from the GCM, as argued, does not mean that such norm(s) are *legal* norms. The question of normativity here is whether the norm “is able to constrain the actions of states on a factual, empirical level, without taking regard of the question whether we are in presence of a norm formally and explicitly touted as legal”.<sup>432</sup> Whereas compliance with international norms can have a legal rationale associated with the respect for the paramount principle *pacta sunt servanda*, it can also be politically motivated. In this case, the ability of a norm to determine state action derives mostly from the authority of the norm’s source, the adherence to the discourse it entails, or the consensus gathered around it. States may conform to a norm due to political reasons like peer pressure (naming and shaming) or because of self-interest, not necessarily because they are legally obliged to.<sup>433</sup>

This is also true, I reckon, in respect of the GCM and the above-mentioned norm cluster. The GCM’s nature – it is not a treaty but a non-binding, cooperative framework<sup>434</sup> – neither hinders its authority nor its normative effects. In fact, the consensus leading to its adoption reveals an authority that other international instruments on migration do not possess, even if legal in nature like the ICRMW. According to the GCM itself, its authority rests on its consensual nature, credibility, collective ownership, joint implementation, follow-up and review.<sup>435</sup> This fact is relevant to gather the international community around the set of political commitments

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<sup>432</sup> Peter Hilpold, ‘Opening up a new chapter of law-making in international law: The Global Compacts on Migration and for Refugees of 2018’ (2020) 26 *European Law Journal* 230.

<sup>433</sup> Tim Höflinger, ‘Non-binding and therefore irrelevant? The Global Compact for Migration’ (2020) 75(4) *International Journal* 667.

<sup>434</sup> The GCM “presents a non-legally binding, cooperative framework that builds on the commitments agreed upon by UN Member States in the New York Declaration for Refugees and Migrants” (GCM, para. 7).

<sup>435</sup> GCM, para. 15(b).

towards border and migration management, as well as the new political discourse on migration. The GCM's authority can be a rallying force to convince states that it is in their best interest to conform with its deliberative guidelines for migration policymaking<sup>436</sup> that rests on the key concept of safe, orderly and regular, inasmuch as in the importance of international cooperation<sup>437</sup> and the whole-of-government and whole-of-society approaches.<sup>438</sup>

The advent of a new norm on migration is, in my opinion, the most far-reaching normative effect of the GCM. Yet, the GCM has been associated with other potential normative effects, with several authors<sup>439</sup> underpinning its role as a hermeneutical tool in the interpretation of the law applicable to migrants; in establishing technical standards in terms of migration data collection; or its potential in the consolidation of political commitments into future legal norms, a feature already envisaged in the 2017 Sutherland Report.<sup>440</sup> More importantly, the GCM has been acknowledged as being a restatement of existing international law applicable to

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<sup>436</sup> Colin Grey, *op. cit.* (n. 418) 346.

<sup>437</sup> GCM, para. 8, 11, 14, 15(b), 42, 43, 47.

<sup>438</sup> GCM, para. 15(i)(j). On the whole-of-society approach, see J. Kevin Appleby, 'Implementation of the Global Compact on Safe, Orderly, and Regular Migration: A Whole-of-Society Approach' (2020) 8(2) *Journal on Migration and Human Security* 214-229.

<sup>439</sup> See, *inter alia*, Alessandro Bufalini, 'The Global Compact for Safe, Orderly and Regular Migration: What is its contribution to International Migration Law?' (2019) 58 *QIL – Questions of International Law* 5–24; Vincent Chetail, 'The Global Compact for Safe, Orderly and Regular Migration: a kaleidoscope of international law' (2020) 16 *International Journal of Law in Context*, 253–268; Bimal Ghosh, *op. cit.* (n. 427) 49–50; Elspeth Guild, Tugba Basaran and Kathryn Allison, 'From Zero to Hero? An analysis of the human rights protections within the Global Compact for Safe, Orderly and Regular Migration (GCM)' (2019) 57(6) *International Migration* 43–59; Thomas Gammeltoft Hansen, 'The Normative Impact of the Global Compact on Safe, Orderly and Regular Migration' (2017), in T. Gammeltoft-Hansen, E. Guild, V. Moreno-Lax, M. Panizzon and I. Roele (eds.) *What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration* (Raoul Wallenberg Institute of Human Rights and Humanitarian Law) 7–10; Peter Hilpold, *op. cit.* (n. 432) 226–244; Tim Höflinger, *op. cit.* (n. 433) 662–673; Jens Vedsted-Hansen, 'The Normative Potential of the Migration Compact', in P. Minderhoud, S. Mantu and K. Zwaan (eds.) *Caught in Between Borders: Citizens, Migrants and Humans* (Radboud Universiteit 2019) 335–342.

<sup>440</sup> "The global compact on migration could bundle agreed norms and principles into a global framework agreement with both binding and non-binding elements and identity areas in which States may work together towards the conclusion of new international norms and treaties." Para. 87, *op. cit.* (n. 409).

migrants.<sup>441</sup> This includes human rights law, such as the prohibition of collective expulsion and of arbitrary detention, the principle of non-discrimination and the best interests of the child, and international labour law. In this respect, the GCM provides

consistency and systematization of the obligations of States, in particular their human rights obligations, in so far as they apply to migrants. In doing so it does not create new obligations for states but creates a framework that consolidates and clarifies the preexisting ones ensuring that States acknowledge their human rights obligations to migrants.<sup>442</sup>

Nonetheless, the restatement is not comprehensive, as “the Compact was never intended to provide an exhaustive picture of the various legal norms governing migration. Its partial account of international law discloses the political priorities of states to achieve their objectives as well as the functions they assign to soft law as a supplement to hard law”.<sup>443</sup> This might be a case of emergence of so-called ‘interstitial norms’ or ‘modifying norms’, which “do not themselves have a normative force of the traditional kind but instead operate by modifying the normative effect of other, primary norms of international law”.<sup>444</sup>

Since the GCM’s inception, the debate on its normative nature has been centred on its self-proclaimed non-binding nature, while mirroring the discussions on the role and functions of soft law. Without joining such discussions here, I consider that it is not irrelevant for the GCM to be catalogued as a political agreement or an instrument of international law. I agree that the GCM “epitomises the potential and the limits of soft law in promoting intergovernmental co-

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<sup>441</sup> The GCM declares resting not only on the purposes and principles of the Charter of the United Nations (para. 1) but also on an extensive list of international law instruments and political agreements (para. 2).

<sup>442</sup> Elspeth Guild et al., *op. cit.* (n. 439) 45.

<sup>443</sup> Vincent Chetail, *op. cit.* (n. 439) 254.

<sup>444</sup> Vaughan Lowe, ‘The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?’ (2001), in M. Byers (ed.) *The Role of Law in International Politics: Essays in International Relations and International Law*, (Oxford University Press 2001) 213.

operation and global governance. While reflecting the reluctance of states towards legally binding instruments, soft law operates as a co-ordinating device to frame their future actions within a common line of conduct that is mutually agreed upon”.<sup>445</sup> However, the virtues of the GCM’s non-bindingness are limited. Like other instruments of soft or hard law, its binding effect rests on two main factors: the determinacy of its commitments and the political will of states in implementing them. On the one hand, states feel obliged to conform to an agreed goal if the agreements they enter into, legal or not, provide them with a sufficiently clear path for action. In this respect, the GCM’s norm cluster offers a roadmap to achieve safe, orderly and regular migration, by combining the right amount of flexibility and determinacy in the catalogue of actions provided. It has the ability to move from the realm of principles into tangible actions.<sup>446</sup> Thus, states are bound to the commitments they agreed upon in the GCM not because of a legal imperative but because they committed to specific goals with relative freedom of action to achieve them, and their behaviour will be subject to evaluation during the implementation review process, a subject I will later revisit. In the end, political commitments are also binding and have consequences.<sup>447</sup> On the other hand, irrespective of having a legal or political nature, international agreements’ efficacy relies on the political will of states to abide by them. The ICRMW is a clear example of a legal instrument – considered a core international human rights treaty – that has been unable to gather enough political will for its ratification and implementation. The GCM, on the contrary, might possess the ability to act as a rallying force of the majority of the international community around its shared vision, particularly on the role

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<sup>445</sup> *Idem*, 267.

<sup>446</sup> For example, the provision of comparative websites to provide accessible information on remittance transfer costs by provider and channel (GCM, para. 36(f)).

<sup>447</sup> Elizabeth G. Ferris and Katharine M. Donato, *op. cit.* (n. 424) 108. See also Justin Gest, Ian M. Kysel and Tom K. Wong, ‘Protecting and Benchmarking Migrants’ Rights: An Analysis of the Global Compact for Safe, Orderly and Regular Migration’ (2019) 57 (6) *International Migration* 60-79; Ana Rita Gil, ‘Guiding Principles of the Global Compact on Migration’, in C. U. de Sousa (ed.), *op. cit.* (n. 398) 202.

of international cooperation in tackling migration as a multi-dimensional phenomenon. The GCM's higher political authority, deriving from its GCM 'shared understandings' and 'cross-cutting and interdependent principles',<sup>448</sup> might compensate for the lack of legal force. As Tim Höflinger wrote,

The GCM does possess the relevance, capacities, and legitimacy to become a normative force in the field of international migration governance. Compliance with its outlined commitments will, however, be strongly dependant on the political will of the participating states. Perhaps its key function will be to fill the existing gaps in hard law in migration governance by fostering cooperation and be consolidating international obligations, standards, and stakeholders of a crosscutting topic into one instrument.<sup>449</sup>

In sum, the GCM's non-binding nature might have been an attractive feature for states to enter into its drafting and adoption processes. However, at the current implementation stage this can be seen as a fallacy if used as an argument to exclude states from the commitments of the GCM. By creating and adhering to a new norm (cluster), states defined what is the appropriate behaviour in international migration and they are bound by such norm, as the implementation mechanisms will assess. These mechanisms, which I will address in the following section, as well as the diffusion processes they entail, are instruments for the reinforcement of safe, orderly and regular migration as the paramount principle ruling international migration.

The case for the GCM's normative effect brings to the forefront the theoretical approach embodied in the concept of informal international lawmaking.<sup>450</sup> It is a reminder that the

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<sup>448</sup> GCM, para. 10 and 15, respectively.

<sup>449</sup> Tim Höflinger, *op. cit.* (n. 433) 672.

<sup>450</sup> See Section 2.4, above.

international system encompasses new forms of creating norms, some of which have the potential to assume legal status.

## 5.2. The interaction between the Colombo Process and the GCM

As previously mentioned, a diffusion process requires the presence of five main elements: stimulus, object, medium, actors and outcome.<sup>451</sup> The analysis of what prima facie seem to be plausible explanations for diffusion of GCM norms in the context of functional cooperation on labour migration allows me to draw the following sub-hypothesis:

- *Stimulus*: the GCM's adoption was a stimulus for norm diffusion.
- *Object*: the GCM created, or at least consolidated, a new norm in international migration.
- *Medium*: RCPs are a medium for the diffusion of norms triggered by the GCM.
- *Actors*: the CP is an active actor in norm diffusion triggered by the GCM.
- *Outcome*: it is probable that the CP causes the diffusion of GCM's norms in Asia.

In the previous section, I elaborated on how the GCM acted as a stimulus for the adoption of a new norm cluster on international migration and I identified what such norm is. I turn now to the role of RCPs as actors for the diffusion of norms triggered by the GCM. Specifically, I will revisit the Colombo Process as my case study in order to infer possible instances for norm diffusion. In the course of this analysis, the role of the CP as a potential actor or medium in such process will be addressed. This requires considering two different moments in the interaction between the CP and the GCM: the drafting and the implementation stages. The result of the analysis of this interaction is expected to be extensible to other RCPs in different regional settings.

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<sup>451</sup> See Sub-section 2.5.1, above.

### **5.2.1. Drafting: Contributions from the Colombo Process**

The CP's participation in the drafting of the Global Compact embodies the role assigned to ISCMs in its adoption process. Originally, the New York Declaration for Refugees and Migrants acknowledged RCPs and other ISCMs as relevant actors in strengthening cooperation and affirmed a desire for RCPs' support in the negotiations leading to the GCM.<sup>452</sup> Similarly, the Modalities Resolution for the intergovernmental negotiations of the GCM invited states and other relevant stakeholders, through regional and sub-regional consultative processes, as well as global processes, mechanisms and initiatives, to contribute to the preparatory processes of the GCM.<sup>453</sup>

The CP embraced the importance of the GCM since its inception. Its first acknowledgement of the Global Compact was made in the 2016 Colombo Ministerial Declaration, weeks before the formal adoption of the New York Declaration in September 2016, which set in motion the process leading to the GCM. Then, the Ministers declared "taking note of the process of intergovernmental negotiations leading to the adoption of a Global Compact for Safe, Orderly and Regular Migration in 2018".<sup>454</sup> After that first step, the Nepalese chairmanship took on the challenge to engage in the preparatory process of the Global Compact with the purpose of reflecting the perspective of Asian labour-sending countries in its final text. With such purpose, the Chair-in-Office, with support from the SDC and IOM, convened a two-day workshop held

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<sup>452</sup> New York Declaration, Annex II, para. 14.

<sup>453</sup> UNGA A/RES/71/280. The Global Forum on Migration and Development (GFMD) and IOM's International Dialogue on Migration (IDM) were expressly mentioned in para. 22(b).

<sup>454</sup> Colombo Declaration, para. 6.

in Kathmandu, Nepal, in September 2017 aimed at achieving a common position and contribution of the CP member states to the GCM preparatory process.<sup>455</sup>

The CP contribution was three-fold, through the submission of:

- The “Joint Recommendation of the Colombo Process Member States to the Global Compact for Migration”;<sup>456</sup>
- Inputs from the different TAWGs, decided at Geneva-held meetings in October 2017;
- Individual submissions by CP countries, acting in their national capacity but in line with the CP stances or as CP members, in particular Nepal as the CP acting chair and the chairs of each TAWG.

The Joint Recommendation acknowledged the GCM as an historic opportunity to contribute to and enhance global migration governance. It presented the CP’s activities compliant with the six informal thematic consultations adopted in the modalities for the GCM negotiations as a set of good practices. Furthermore, it made recommendations and actionable commitments, based on tangible achievements and effective collaboration through the CP’s five thematic areas working groups, also including references to the four additional crosscutting themes.<sup>457</sup> The CP member states committed “to make collective efforts towards achieving [their] recommendations by 2030 while recognizing that some (...) should be achieved in a more immediate time frame”.<sup>458</sup> Moreover, they positioned the CP as an active actor in GCM’s

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<sup>455</sup> Colombo Process (CP) Engagement in the Global Compact for Safe, Orderly and Regular Migration (GCM): Towards a CP joint contribution to the GCM (2017), available at [https://www.colomboprocess.org/images/Summary-of-CPMS-GCM-consultation\\_Final-including-annexes\\_.pdf](https://www.colomboprocess.org/images/Summary-of-CPMS-GCM-consultation_Final-including-annexes_.pdf).

<sup>456</sup> Available at: <https://www.colomboprocess.org/images/CP-Joint-Recommendation-to-the-GCM--final.pdf>.

<sup>457</sup> See Section 4.4, above.

<sup>458</sup> Joint Recommendation “Role for the Colombo Process in implementation of the Global Compact for Migration”.



implementation, recognizing that it “could play a role in supporting the implementation and follow-up of those actionable commitments of the GCM that are in line with the Colombo Process’ overall goals and commitments (...) through its on-going activities such as policy dialogue, sharing of experience and best practices, enhancing policy coherence, capacity building, data collection, analysis and research and collaborative operationalization of actionable commitments through targeted project interventions”.<sup>459</sup>

The CP common stances were shared at different panels of regional informal thematic sessions and submitted to the stocktaking phase, which took place in Mexico at the end of 2017.

The active participation of the CP in these consultations culminated in the incorporation of the group’s shared views into GCM’s final text. That was acknowledged by the Kathmandu Declaration, which recognised “that the objectives and action agenda laid out in the GCM are inclusive of the Colombo Process Joint Recommendation and shared view by Member States of the Colombo Process in consultations, meetings and in the TAWGs”.<sup>460</sup> The Ministers also noted that paragraphs 47, 50 and 52 of the GCM make “reference to the importance of Regional Consultative Processes (RCPs) in contributing to the GCM implementation, follow up and review processes”.<sup>461</sup> In this respect, IOM’s Director-General affirmed at the Sixth Ministerial Consultation, taking place prior to the formal adoption of the GCM: “the Colombo Process’s important contribution to the GCM, and Nepal’s leadership as Colombo Process Chair in shaping the GCM text whereby all Colombo Process recommendations have been incorporated is a remarkable achievement of which to be proud”.<sup>462</sup>

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<sup>459</sup> *Idem*.

<sup>460</sup> Kathmandu Declaration, para. 7. Colombo Process, *op. cit.* (n. 296).

<sup>461</sup> *Idem*, para. 8.

<sup>462</sup> Colombo Process, *op. cit.* (n. 296) 2.

The CP thematic areas and crosscutting themes are reflected in several of the GCM objectives, namely Objectives 1, 3, 6, 14, 18 and 20.<sup>463</sup>

### **5.2.2. Implementation: Towards effective implementation, follow-up and review**

The GCM's success depends on the effectiveness of its implementation. Despite the importance of its content, "as any international document, certainly those of the non-legally binding type the strength of its language will mostly depend on the follow-up. The Compact's non-binding nature means that States may decide which parts to implement, or whether not to implement at all".<sup>464</sup> The GCM acknowledges that implementation rests with states, which have the sovereign right to determine their national migration policy and their prerogative to govern migration within their jurisdiction.<sup>465</sup> RCPs are invited to provide platforms to exchange experiences on the GCM's implementation, share good practices on policies and cooperation, promote innovative approaches, and foster multi-stakeholder partnerships around specific issues.<sup>466</sup> The GCM, thus, assigns important roles to ISCMs in its implementation, follow-up and review, in particular by contributing to the International Migration Review Forum (IMRF).<sup>467</sup>

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<sup>463</sup> The relevant objectives are: Objective 1 (collect and utilise accurate and disaggregated data as a basis for evidenced-based policies); Objective 3 (provide accurate and timely information at all stages of migration); Objective 6 (facilitate fair and ethical recruitment and safeguard conditions that ensure decent work); Objective 14 (enhance consular protection, assistance, and cooperation throughout the migration cycle); Objective 18 (invest in skills development and facilitate mutual recognition of skills, qualifications and competences); and Objective 20 (promote faster, safer, and cheaper transfer of remittances and foster financial inclusion of migrants).

<sup>464</sup> Jan Wouters and Evelien Wauters, *The UN Global Impact for Safe, Orderly and Regular Migration: Some Reflections* (Institute for International Law 2019) 9.

<sup>465</sup> Kathmandu Declaration, para. 15(c) and para. 41. Colombo Process, *op. cit.* (n. 296).

<sup>466</sup> *Idem*, para. 47.

<sup>467</sup> Para. 47, 50 and 52. See IOM, *The role of inter-State consultation mechanisms on migration in the Global Compact for Safe, Orderly and Regular Migration* (IOM, 2019); IOM, Seventh Global Meeting of Chairs and Secretariats of Regional, Inter-regional and Global Consultative Processes on Migration (GRCP 7) – *Inter-State Consultation Mechanisms on Migration and the Global Compact for Safe, Orderly and Regular Migration* (IOM, 2017).

The CP's implementation efforts are based on the dual role states have as sovereign entities able to shape their own migration policies in the context of sharp competition among regional labour-sending countries, and as members of a forum promoting cooperation on migration.

Under Nepal's leadership, the CP formed a working group to develop a common strategy or template to implement the GCM. Thereafter member states could prepare their national strategies to implement the Global Compact, following CP's guidelines. In May 2019, the CP held in Bangkok, Thailand, the *Consultation on the Colombo Process Engagement in Global Frameworks related to Migration: Towards the Effective Implementation, Follow-up and Review*. The two-day meeting aimed to support the CP member states' commitments on global frameworks related to migration, particularly the GCM, which were articulated in the Kathmandu Declaration as the outcome of the Sixth Colombo Process Ministerial Consultation.<sup>468</sup> The aim was to promote policy harmonisation and mitigate competition among the twelve CP countries.<sup>469</sup>

There is, therefore, a interrelationship between the GCM and the CP: while the GCM's objectives are implemented through CP collective action, it also “provides a platform/framework to advance the shared objectives of the Colombo Process in a more conducive environment where the issue has received global attention”.<sup>470</sup>

The CP member states, both collectively and in their individual capacity, have engaged in preparation of the quadrennial IMRF, a follow-up mechanism envisaged as the primary intergovernmental global platform to discuss and share progress on all implementation aspects

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<sup>468</sup> Colombo Process, *Summary Report - Consultation on the Colombo Process Engagement in Global Frameworks related to Migration: Towards the Effective Implementation, Follow-up and Review* (Chair-in-Office of the Colombo Process and IOM, 2019), available at [http://www.colomboprocess.org/documents/summary-report-cpconsultation-on-global-frameworks-may2019-pdf\\_12-05-2019-10-08-45.pdf](http://www.colomboprocess.org/documents/summary-report-cpconsultation-on-global-frameworks-may2019-pdf_12-05-2019-10-08-45.pdf).

<sup>469</sup> Interview with CP Chairmanship official (author's archives).

<sup>470</sup> Deepak Dhital, Permanent Representative of Nepal to the UN in Geneva. Colombo Process, *op. cit.* (n. 274) 2.

of the GCM taking place from 2022 onwards.<sup>471</sup> The document adopting the modalities and organisational aspects of the IMRF,<sup>472</sup> which had a CP member state – Bangladesh – as one of the two co-facilitators, institutionalises the participation of RCPs in the review process. Regional consultative processes on migration are expressly invited “to review the implementation of the Global Compact, within their respective regions, and to contribute to the work of the forums, with the involvement of all relevant stakeholders”.<sup>473</sup>

The CP contribution to the progress and challenges with regard to implementing the GCM have been channelled regionally through the Asia-Pacific Regional Review of Implementation of the Global Compact for Safe, Orderly and Regular Migration conducted by UN’s Economic and Social Commission for Asia and the Pacific (ESCAP).<sup>474</sup> It is worth noticing that some countries expressly invoke their CP membership in the Voluntary GCM Review, an ESCAP survey conducted to inform the Asia-Pacific Regional Review of Implementation of the GCM. Pakistan, for instance, not only mentioned its participation in the CP and other ISCMs but also its role as chair of the CP TAWG on remittances.<sup>475</sup>

By the end of the first trimester of 2022, eight Asian countries have joined the GCM Champion Countries Initiative,<sup>476</sup> six of which are CP member states, namely Bangladesh, Cambodia,

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<sup>471</sup> GCM, para. 49(b)-(e).

<sup>472</sup> UN GA Resolution, adopting draft resolution A/73/L.99.

<sup>473</sup> GCM, para 52; IMRF modalities, para. 10.

<sup>474</sup> On the implementation of the GCM, ESCAP has issued relevant reports reviewing the progress and challenges with regard to implementing the GCM, including the implications of COVID-19 (ESCAP/GCM/2021/1), a synthesis of voluntary GCM reviews in Asia and the Pacific (ESCAP/GCM/2021/CRP.1), a summary of stakeholder consultations for Asia and the Pacific (ESCAP/GCM/2021/CRP.2), and the Report of the Asia-Pacific Regional Review of Implementation of the Global Compact for Safe, Orderly and Regular Migration (ESCAP/GCM/2021/CRP.3).

<sup>475</sup> ESCAP/GCM/2021/CRP.1, para. 80; GCM Voluntary National Report (Regional Review: Asia and the Pacific): [https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/pakistan\\_voluntary\\_gcm\\_survey\\_report.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/pakistan_voluntary_gcm_survey_report.pdf)

<sup>476</sup> The GCM Champion Countries Initiative is a voluntary piloting process promoting implementation of the GCM. According to the UN Migration Network website, “The UN Network on Migration invited a group of

Indonesia, Nepal, the Philippines and Thailand. The remaining two regional Champion Countries are Azerbaijan and Iraq.

### **5.3. Implementing the GCM: Norm diffusion on ethical recruitment**

The quest for norm diffusion within functional cooperation mechanisms requires the selection of a specific norm to be studied. The consequence of having a norm cluster is the multiplicity of norms contained therein and the impossibility of addressing them all. Therefore, I narrowed the scope of my investigation to sub-norms connected with the GCM's objectives on labour mobility, namely Objectives 5 and 6. Considering the CP's thematic scope and main areas of activity, particularly the existence of a TAWG on ethical recruitment, I chose to examine Objective 6 (facilitate fair and ethical recruitment and safeguard conditions that ensure decent work) in order to assess the presence of a (sub)norm on ethical recruitment susceptible of being diffused through the CP. Once such a norm is identified it will be possible to apply the causality test to determine the outcome of an eventual diffusion process.

#### **5.3.1. The principle of free employment<sup>477</sup>**

My argument is that the GCM adopted the principle of free employment as a sub-norm on ethical recruitment.

In the 2016 New York Declaration, states committed “to reducing the costs of labour migration and promote ethical recruitment policies and practices between sending and receiving countries”.<sup>478</sup> Subsequently, in the GCM they committed to review existing recruitment

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Member States to serve as ‘Champion countries’ for the implementation of the GCM, targeting them with explicit support from the Network, while also generating key insights, lessons learned, and positive practices that can be shared in dedicated spaces and with other Member States”. [www.migrationnetwork.un.org](http://www.migrationnetwork.un.org) (last access: March 18, 2022).

<sup>477</sup> This sub-section uses previously published material, namely from the book chapter ‘Recruitment fees, indebtedness, and the impairment of Asian migrant workers’ rights’. Pedro de Sena, *op. cit.* (n. 167) 93-111.

<sup>478</sup> New York Declaration, para. 46.

mechanisms to guarantee that they are fair and ethical.<sup>479</sup> One of the suggested actions is the prohibition of recruiters and employers from charging or shifting recruitment fees or related costs to migrant workers in order to prevent debt bondage, exploitation and forced labour.<sup>480</sup> The most up-to-date definition of ‘recruitment fees and related costs’ was adopted in 2018 and includes “any fees or costs incurred in the recruitment process in order for workers to secure employment or placement, regardless of the manner, timing or location of their imposition or collection”.<sup>481</sup> This definition is guided by international labour standards and should be read together with the ILO’s *General principles and operational guidelines for fair recruitment* (2016).

The GCM commitment to “prohibit recruiters and employers from charging or shifting recruitment fees or related costs to migrant workers”<sup>482</sup> embodies the principle of free employment. It is an attempt to change labour market paradigms and replace the worker-pay model, which places the burden of recruitment costs onto migrant workers, by an employer-pay model effective for all skills levels, in accordance with international law.

The principle of free employment dates back to ILO’s 1919 Unemployment Convention (No. 2) and the Unemployment Recommendation (No. 1) and is mirrored in several ILO

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<sup>479</sup> GCM, para. 22.

<sup>480</sup> GCM, para. 22(c): “Improve regulations on public and private recruitment agencies in order to align them with international guidelines and best practices, and prohibit recruiters and employers from charging or shifting recruitment fees or related costs to migrant workers in order to prevent debt bondage, exploitation and forced labour, including by establishing mandatory, enforceable mechanisms for effective regulation and monitoring of the recruitment industry”. On the link between the worker-pay model and debt bondage, see Pedro de Sena, *op. cit.* (n. 167) 105.

<sup>481</sup> ILO, *Report of the Meeting of Experts on Defining Recruitment Fees and Related Costs* (Geneva, 14-16 November 2018), Governing Body, 335<sup>th</sup> Session, Geneva, (ILO 2019), (GB.335/INS/14/2), para. 9.

According to ILO, recruitment fees include: payments for recruitment services offered by labour recruiters, whether public or private, in matching offers of and applications for employment; payments made in the case of recruitment of workers with a view to employing them to perform work for a third party; payments made in the case of direct recruitment by the employer; or payments required to recover recruitment fees from workers.

On the other hand, related costs, which are expenses integral to recruitment and placement within or across national borders, include: medical costs; insurance costs; costs for skills and qualification tests; costs for training and orientation; equipment costs; travel and lodging costs; and administrative costs. *Idem*, para. 9-12.

<sup>482</sup> GCM, para. 22(c)

conventions. This prohibition is best exemplified by ILO Convention No. 181 (Private Employment Agencies Convention, 1997), considered the most up-to-date instrument in this field<sup>483</sup> but without a significant number of ratifications among Asian countries, with the notable exceptions of Israel, Japan and Mongolia. Pursuant to article 7(1), “private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers”. This prohibition applies to both domestic and international recruitment. A similar principle can be found in ILO standards on forced labour, namely the Protocol of 2014 to the Forced Labour Convention 1930,<sup>484</sup> and the Forced Labour Supplementary Measures Recommendation, 2014 (No. 203). The Recruitment and Placement of Seafarers Convention, 1996 (No. 179) and the Maritime Labour Convention, 2006 also prohibit charging recruitment fees and related costs to workers, including migrants. In turn, the Domestic Workers Convention, 2011 (No. 189), which has been ratified in Asia only by the Philippines, bans deducting fees charged by private employment agencies from the remuneration of (migrant) domestic workers [article 15(1)].<sup>485</sup> Most recently, the principle of free employment was consolidated in the document that approved ILO’s definition of recruitment fees and related costs, according to which

Recruitment fees or related costs should not be collected from workers by an employer, their subsidiaries, labour recruiters or other third parties providing related services. Fees or related

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<sup>483</sup> ILO, *Findings from the global comparative study on the definition of recruitment fees and related costs*, Background paper for discussion at the Tripartite Meeting of Experts on Defining Recruitment Fees and Related Costs, (International Labour Office 2018) 8.

<sup>484</sup> Ratified only by eight Asian countries: Bangladesh (enters into force on 20 January 2023), Israel, Kyrgyzstan, Saudi Arabia, Sri Lanka, Tajikistan, Thailand and Uzbekistan.

<sup>485</sup> In this respect, one can but wonder if the Convention No. 189 legitimises charging recruitment fees to workers, as long as they are not deducted from wages, contrary to other instruments of international law.

costs should not be collected directly or indirectly, such as through deductions from wages and benefits.<sup>486</sup>

Despite being a paramount principle, it is not without derogations. Article 7(2) of Convention No. 181 allows some exceptions, which shall be established, upon consultations, in the interest of the workers concerned and only in respect of certain categories of workers (such as artists, professional sportspersons, high-level professionals and executives), as well as specified types of services provided by private employment agencies, such as access to computer databases containing information about vacancies, specialised training services or special employment-related services. The same admissibility of exceptions is envisaged in the definition of recruitment fees and related costs. Whereas allocating recruitment fees to workers is prohibited, it is recognised that national legislation has the flexibility to allow workers to be charged costs related to the recruitment process. This possibility is subject to some conditions, including compliance with relevant international labour standards and tripartite consultations, as long as they are in the interest of the workers concerned; limited to certain categories of workers and specified types of services; and the corresponding related costs are disclosed to the worker before the job is accepted.<sup>487</sup>

The GCM followed the path towards prohibition. Though partially aligned with international law instruments, the GCM has important consequences from what is (or not) written in its text. First, it seems to adopt an absolute prohibition, as it does not acknowledge the possibility of legitimate exceptions. Second, it establishes a direct link between the violation of the free employment principle and serious cases of labour and human rights abuses, namely debt bondage, exploitation, and forced labour.

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<sup>486</sup> ILO, *op. cit.* (n. 481) Appendix, II (6).

<sup>487</sup> Annex, II B (11).



Albeit well-intended and ranking high in terms of principles, the GCM's adherence to an absolute prohibition might be unrealistic.<sup>488</sup> Nonetheless, it provided the century-old principle of free employment a new political impetus and brought it to the forefront of migration discourse, something that ILO's more pragmatic approach was not able to do, as it will be exemplified next.

### 5.3.2. The Colombo Process and member states practice

The CP prioritises fostering ethical recruitment practices as one of its five main thematic areas. The promotion of the principle of free employment has been endorsed not only at the Ministerial level, but also through the work of the TAWG on ethical recruitment, which has the shift in the recruitment industry towards the implementation of the employer-pay model as one of its goals.<sup>489</sup> The 2018 Kathmandu Declaration recommended, in line with the relevant objectives and related actions of the GCM and SDG targets and indicators,

to sustain joint efforts towards no recruitment cost to migrant workers through continued support to the process of proposing a global definition of recruitment fees and costs, further alignment of regulatory frameworks with global initiatives including the General Principles and Operational Guidelines for Fair Recruitment and the International Recruitment Integrity System, and appropriate policies and programmes towards the transformation of the recruitment industry.<sup>490</sup>

Such a statement represents a significant shift from previous discourse, which did not advocate a total prohibition of recruitment fees charged to migrant workers. Originally, the CP encouraged the reduction of recruitment fees (1<sup>st</sup> Ministerial Consultation, 2003) or the

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<sup>488</sup> Pedro de Sena, *op. cit.* (n. 167) 104-105; Philip Martin and Martin Ruhs, 'Labour Market Realism and the Global Compacts on Migration and Refugees' (2019) 57(6) *International Migration* 84-85, 88.

<sup>489</sup> See Section 4.4, above.

<sup>490</sup> Kathmandu Declaration, para. 19(b). Colombo Process, *op. cit.* (n. 296).

rationalisation of migration costs (4<sup>th</sup> Ministerial Consultation, 2011), with suggestions for the adoption of measures towards a placement-fee ceiling.<sup>491</sup> The Colombo Declaration (5<sup>th</sup> Ministerial Consultation, 2016), however, echoed the prioritisation by the newly installed TAWG on ethical recruitment and called, for the first time, for “the transformation of the recruitment industry through ensuring that the recruitment/placement of migrant workers from CPMS shall be at no cost to the worker”.

In 2017, the inputs from the CP TAWG on ethical recruitment to the GCM drafting process advocated the promotion of the employer-pay model through defining recruitment fees and related costs, as well as the adoption of effective mechanisms to lower migration costs, including by capping visa-trading, with the cooperation of origin and destination countries.<sup>492</sup> The ethical recruitment thematic inputs were presented and fully integrated into the Joint CP Recommendations to the GCM and were also presented by Bangladesh, as TAWG chair, at the GCM Thematic Session 6.<sup>493</sup>

Following the adoption of the GCM, the majority of CP member states began acting towards the implementation of the free employment principle. In doing so, they recognised the link between the Global Compact and their legal, administrative and political initiatives by mentioning them in their Voluntary GCM Review Survey Reports:

- *Bangladesh*: adopted the *Overseas Employment and Migrants (Recruiting Agents’ Licence and Conduct) Rules 2019* and the *Overseas Employment and Migrants (Recruitment Agents’ Classification) Rules 2020*, to facilitate fair and ethical recruitment and safeguard conditions

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<sup>491</sup> Dovelyn Rannveig Agunias, Christine Aghazarm and Graziano Battistella, *op. cit.* (n. 359) 49.

<sup>492</sup> Available at [https://refugeesmigrants.un.org/sites/default/files/colomboprocess\\_cp2.pdf](https://refugeesmigrants.un.org/sites/default/files/colomboprocess_cp2.pdf).

<sup>493</sup> Colombo Process, *op. cit.* (n. 468) 10.

that ensure decent work. In January 2022, Bangladesh ratified the Protocol of 2014 to the Forced Labour Convention 1930;<sup>494</sup>

- *Cambodia*: In January 2020, the Association of Cambodian Recruitment Agencies and the Manpower Association of Cambodia collaborated with the Ministry of Labour and Vocational Training to develop the Code of Conduct for Cambodian Private Recruitment Agencies, which aims at promoting and protecting the rights of Cambodian migrant workers during the recruitment process. MOUs and other agreements are being entered into between not only the Cambodian Government and the governments of the migrant-receiving countries, but also the private companies for ethical recruitment, protection and more benefits to the Cambodian migrants;<sup>495</sup> The Policy on Labour Migration for Cambodia 2019-2023 expressly recognises that it was reviewed against the priorities outlined in the GCM, amongst other instruments, in order to ensure coherence with global priorities. On ethical recruitment, the policy intends to strengthen the management of private recruitment agencies (Objective 1.3) by reviewing and revising checklist inspection procedures and strengthening the capacity of labour inspectors for fair assessment of the practices of private recruitment agencies.<sup>496</sup>
- *Indonesia*: In ensuring regular migration, the Indonesian Government adopted Regulations No. 9 of 2020 issued on 15 July 2020, regarding the elimination of recruitment fees, which took effect in early 2021. This regulation was formulated to support the

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<sup>494</sup> Bangladesh - GCM Voluntary National Report (Regional Review: Asia and the Pacific), available at [https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/bangladesh\\_voluntary\\_gcm\\_survey\\_report.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/bangladesh_voluntary_gcm_survey_report.pdf).

<sup>495</sup> Cambodia - GCM Voluntary National Report (Regional Review: Asia and the Pacific), available at [https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/last\\_voluntary\\_gcm\\_review\\_inputs\\_of\\_cambodia\\_consolidated\\_23\\_03\\_2021.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/last_voluntary_gcm_review_inputs_of_cambodia_consolidated_23_03_2021.pdf).

<sup>496</sup> Paragraph 7.1.3. Objective 1.3. (21-22), available at <https://asean.org/wp-content/uploads/2021/12/1.-Labour-Migration-Policy-2019-2023.pdf>.

implementation of Law No. 18 of 2017 on the Protection of Indonesian Migrant Workers. Through this regulation, the Indonesian Government incorporates the principles of the IRIS, in which the employers and the government must bear placement costs for migrant workers.<sup>497</sup>

- *Nepal*: Nepal signed Bilateral Labour Agreements and MOUs with nine destination countries (in 2018, Nepal signed MOUs with Malaysia and in 2019 with the United Arab Emirates and Mauritius). One of the principles included in those agreements is the employer-pay principle;<sup>498</sup> The revision of Nepal’s Foreign Employment Policy reflects the major contextual changes in labour migration governance, which includes the endorsement of the GCM and the inclusion of migration related indicators in the SDGs.<sup>499</sup>
- *Pakistan*: Several measures have been taken to reduce the migration costs, namely through the digitalisation of the emigrants’ registration process in order to reduce the role of intermediaries in recruitment and migration processes;<sup>500</sup>
- *Sri Lanka*: In 2019, a review of the implementation of the Labour Migration Policy (2008) was conducted, and the Ministry of Foreign Employment has taken steps to update the National Policy taking in to account the findings of the review and the recently developed global, regional and local frameworks on labour migration as SDGs and the GCM. Under

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<sup>497</sup> Indonesia - GCM Voluntary National Report (Regional Review: Asia and the Pacific), available at [https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/indonesia\\_voluntary\\_gcm\\_survey\\_report.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/indonesia_voluntary_gcm_survey_report.pdf).

<sup>498</sup> Nepal - GCM Voluntary National Report (Regional Review: Asia and the Pacific), available at [https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/nepal\\_voluntary\\_gcm\\_survey\\_report.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/nepal_voluntary_gcm_survey_report.pdf); see also IOM, *Assessment of Inter-State Consultation Mechanisms on Migration Summary of Findings per ISCM* (IOM 2019), available at [https://www.iom.int/sites/g/files/tmzbd1486/files/colombo\\_process\\_assessment\\_survey\\_profile.pdf](https://www.iom.int/sites/g/files/tmzbd1486/files/colombo_process_assessment_survey_profile.pdf).

<sup>499</sup> *Nepal Labour Migration Report 2020*, *op. cit.* (n. 364) 51.

<sup>500</sup> Pakistan - GCM Voluntary National Report (Regional Review: Asia and the Pacific), available at [https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/pakistan\\_voluntary\\_gcm\\_survey\\_report.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/pakistan_voluntary_gcm_survey_report.pdf)

the core area of ‘effective governance of migration’, the updated policy includes strategies and activities on strengthening regulatory institutions such as Sri Lanka Bureau of Foreign Employment and to streamline the recruitment process within ethical recruitment systems, as well as regulations on recruitment intermediaries. Also in 2019, the Operational Manual for Labour Sections of Sri Lankan Diplomatic Missions in Destination Countries was updated to effectively streamline the protection of migrant rights and welfare as well as the ethical recruitment practices,<sup>501</sup>

- *Philippines*: The Philippines and the Kingdom of Bahrain signed an agreement wherein both agreed to develop and formulate a standard contract to reflect both countries’ efforts to lower recruitment costs, uphold fair and ethical recruitment policies, as well as safeguard conditions that ensure decent work and protect migrant workers against exploitation and abuse. This happened almost a month after the final text of the GCM was adopted during the July and last plenary session of the GCM negotiations at the UN Headquarters in New York.<sup>502</sup>
- *Vietnam*: Vietnam issued the Law on Vietnamese Guest Workers 2020 (Law n. 69), which came into force on 1 January 2022. This law reduces recruitment fees and related costs charged to migrant workers by prohibiting brokerage charges from being passed on to them.<sup>503</sup>

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<sup>501</sup> Sri Lanka - GCM Voluntary National Report (Regional Review: Asia and the Pacific), available at [https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/sri\\_lanka\\_survey\\_final\\_report.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/sri_lanka_survey_final_report.pdf).

<sup>502</sup> The Philippines - GCM Voluntary National Report (Regional Review: Asia and the Pacific), available at [https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/philippines\\_voluntary\\_gcm\\_survey\\_report.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/philippines_voluntary_gcm_survey_report.pdf).

<sup>503</sup> Vietnam - GCM Voluntary National Report (Regional Review: Asia and the Pacific), available at [https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/viet\\_nams\\_response\\_to\\_gcm\\_voluntary\\_review.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/viet_nams_response_to_gcm_voluntary_review.pdf); see also Global Compact for Safe, Orderly and Regular Migration – Report of the Secretary-General, 27 December 2021 (A/76/642).

### **5.3.3. Instances of norm diffusion**

This list of actions mentioned in the previous sub-section reveals not only the diligence of member states in conforming with the CP thematic priorities currently in force, but also an intentional adjustment of their behaviour to the normative discourse streaming from the GCM. There is a clear preference for framing their policies under the GCM's prohibitive stance, instead of using alternative frameworks eventually more beneficial to both states and migrant workers' interests such as ILO's, which combines the principle of free employment with some acceptable exceptions. It allows charging migrants the costs of those goods or services directly provided to them, i.e. it prohibits the allocation of agency commissions to migrants, while allowing charging them some of the related costs, according to the tripartite definition adopted in 2018. Hence, policymakers in those CP member states had an option between not only two different scopes for the principle of free employment, but also between two normative orders to justify their options.

Their willingness to put national policies towards ethical recruitment under the GCM implementation efforts establishes, I argue, *prima facie* evidence of correlation between the GCM norm cluster on safe, orderly and regular migration and the sub-norm on ethical recruitment on the one hand, and those national policies on the other hand. The specified content of the national laws, BLAs, MOUs or codes of conduct implemented by the abovementioned CP member states seem to reflect the normative content of the GCM. Yet, it is possible that states would adopt similar policies even in the absence of the GCM, especially having in mind that ILO has demonstrated a durable commitment towards ethical recruitment

and decent labour, as I explained above. This would be an alternative explanation, giving rise to a case of so-called spurious diffusion.<sup>504</sup>

Despite the importance of ILO and SDGs' frameworks on ethical recruitment for national discourses surrounding the implementation of the free employment principle, I do not perceive them as suitable alternative explanations for state action. The CP's thematic focus on ethical recruitment, which predates the GCM, does not justify either, in my view, the current wave of state behaviour in this respect. In fact, the timing and language of the policy instruments in question allow the inference that the GCM provided the impetus for a renewed advocacy for the principle of free employment as a manifestation of the normative content of the concept of safe, orderly and regular migration embodied in the Global Compact.

As mentioned before, the quest for diffusion causation is a probabilistic endeavour rather than deterministic.<sup>505</sup> By applying Lenz's qualitative, choice-oriented approach to assess diffusion it is possible to identify an emulation process between the GCM and some CP member states: States had several choices in this policy area and adopted those falling within the GCM framework (step 1). They embraced the normative content coming from Objective 6 of the GCM and it is possible to establish a correlation between its sub-norm on ethical recruitment and state action of several CP member countries, as confirmed by the discourse analysis of the GCM Voluntary National Reports (step 2). State action towards the implementation of the principle of free employment cannot be explained by previously existing frameworks, such as ILO's, due to their lack of political strength to determine state behaviour (step 3).

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<sup>504</sup> See Sub-section 2.5.2 (n. 152), above.

<sup>505</sup> See Sub-section 2.5.2, above.

It is possible, then, to infer the existence of a diffusion process on the principle of free employment stemming from the GCM. Moreover, it is probable the CP acted as a socialisation venue and thus as a medium for diffusion, in the context of its thematic priorities.

#### **5.4. Concluding remarks**

The previous sections provide the basis for three main inferences: 1) The GCM has a tangible normative effect, materialised through the emergence of the ideal notion of safe, orderly and regular migration as a new international norm (cluster); 2) Such norm is being diffused internationally, not only through learning, but also competition and emulation processes; and 3) The Colombo Process is contributing for the diffusion of the new norm, acting as a medium within its diffusion process. These aspects combined highlight an argument that might, at first, be counterintuitive: functional cooperation mechanisms, like the CP, do have a normative impact on the creation of norms in international labour migration, to which they indirectly contribute by enabling diffusion processes.

I provide concrete examples of recent changes in state action that, in my opinion, can be linked to the CP and, looking further, to the new norms emerging from the GCM. I established a correlation between such changes and the CP's efforts to implement the Global Compact. Moreover, such examples allow me to argue, based on a probabilistic analysis, that the CP *causes* the diffusion of norms, like the one on ethical recruitment scrutinized in section 5.3.

The consequences of these arguments and inferences will be addressed in the concluding chapter of my research. For now, however, it is important to stress that the validation of the hypothesis underlying my research project might open new ways of perceiving the RCPs' role within the overall labour migration governance system.





## **Part III**

# **RETHINKING FUNCTIONAL COOPERATION ON LABOUR MIGRATION**

## CHAPTER 6

### **CONCLUSION**

#### **6.1. Research synopsis**

The genesis of my research project can be linked to my academic interest in two fields of law – international law and (labour) migration law – that seemed somehow irreconcilable. It became empirically evident that these legal disciplines were not the most successful combination in terms of the development of international legal regimes. While academic and political discourses continuously praised the advancements of international cooperation in areas like environmental or financial law, international migration was always mentioned with caution: sovereignty is an obstacle to international cooperation on labour migration and national interests are detrimental to a solid international legal regime on labour mobility. In the beginning of my research I presented an overview of the current international law instruments on labour migration, but I argued they are not suitable to entail high levels of adherence and they do not provide the basis for an effective international legal regime. Therefore, my basic question is “if not international law, then what?”

The existence of instances of informal cooperation on migration raised the hypothesis that those mechanisms can be an alternative for multilateral cooperation on labour migration. Whether they are a true remedy or just a placebo remained an open question. However, the functioning of multiple inter-state consultation mechanisms in different geographies were

intriguing enough to start a research project driven by the hypothesis that this type of cooperation could have a role in the creation of an international regime on labour migration. I wondered if norms could be created, directly or indirectly, through RCPs or other ISCMs. Hence, my research question: can functional cooperation enable normativity in labour migration?

Answering this query entailed a major challenge, as the question was counterintuitive. These mechanisms are non-binding by definition and, thus, not intended to impose any type of state behaviour. They are not supposed to create or help create norms. Moreover, a positive answer could hinder the attractiveness of functional cooperation on migration and jeopardise one of the few instruments states have to cooperate on the matter. Yet, I decided to take a calculated risk because I see the potential of ISCMs in the development of a stronger international regime on labour migration. If it is undeniable that the existing international law instruments on labour mobility do not entice adherence, one may try to find alternative ways to build such a regime. Otherwise, international labour migration regulation would have to rest on bilateral agreements, shunned from the benefits of multilateralism.

These dialogue mechanisms are not international organisations and they do not have the power or the will to enact laws. However, there are ‘new forms of normativity’ in different areas of international affairs, which are credited with a normative function.<sup>506</sup> The empirical evidence of such reality leads to “the compelling finding that international norms are undoubtedly no longer made exclusively through treaties and binding instruments of IOs and the correlative

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<sup>506</sup> For example, the campaign against so-called ‘blood diamonds’ led to the establishment, through the Kimberley Process, of a certification scheme aiming at removing conflict diamonds – rough diamonds used to finance wars against governments – from the global supply chain, which has been internalised around the world. <https://www.kimberleyprocess.com>

recognition of the importance of norms originating in informal processes”.<sup>507</sup> I wonder if the same can be happening, albeit unintentionally, on international labour migration. Then the sub-questions: can functional cooperation mechanisms on labour migration act as norm-makers? If so, what is the creation process of such norms? These sub-questions positioned my research project close to the contentious arena of soft law, which I deliberately tried to avoid. Despite the theoretical interest of the debate on the nature of soft law, I realised that joining such debate would divert my attention from the core of my research. In this respect, however, I made some ontological assumptions: soft law exists; it has a normative effect irrespective of being perceived as law or non-law; and it might be the result of the so-called ‘new forms of normativity’. Since my research project concerns norm creation processes, which is not limited to legal norms, I do not need to classify the norms eventually emanating from functional cooperation mechanisms as soft or hard law. I need, however, to inquire into less obvious norm creation processes, based on the possibility that functional cooperation may not create norms in a direct way but rather indirectly. I hypothesised that ISCMs, particularly RCPs, could enhance normativity not by emanating new norms but by contributing to the diffusion of norms created elsewhere. Hence, my last sub-question: can functional cooperation contribute to norm diffusion? I was aware since the beginning that a positive answer to this question could entail a change in the way functional cooperation on migration is perceived, as it would attribute a role to RCPs and other ISCMs often ignored in literature. If it were proven these informal mechanisms contribute to the diffusion of norms in labour migration, RCPs would after all be playing a normative role. If I could reach such conclusion, I would be contributing to cooperation and international law-making theories by adding a new and unexpected actor.

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<sup>507</sup> Jean D’Aspermont, *op. cit.* (n. 25) 186.

The hypothesis underlying my research became more pertinent with the adoption of the GCM. This novel instrument, drafted while the investigation was already in progress, reinforced the idea that states prefer political rather than legal frameworks to address labour migration issues. Moreover, RCPs were assigned important roles in the drafting and implementation processes of the Global Compact. This was a golden opportunity to expand the scope of my research by incorporating the GCM into it.

The theoretical framework advanced in Chapter 2 provided the background for the research project. Cooperation theory was briefly explained, contrasting the realist and liberal approaches. Although these approaches could shed light on the reasons for states entailing in international cooperation, they fell short in explaining the status quo in areas outside the realm of 'high politics', such as migration. The idea that states have an interest based on which they decide to cooperate and that they do so to obtain relative or absolute gains might have an explanatory value in those approaches. However, states' identities and interests are not, in my view, an a priori reality. I subscribe to the constructivist postulates that those identities and interests are forged in the course of social processes and that the interaction among states helps the formation of their identities and their behaviour. Yet, states no longer act in the international system as a unitary agent: there is an increased level of autonomy in the participation of sub-units of the states in international affairs, some of which are delegated with authority in regulatory matters. Hence, I searched for alternative conceptual approaches to explain these facets of state action. Transgovernmentalism seemed attractive as it combines the participation of sub-units of the state in international affairs with the idea of networks. I provided a definition of transgovernmental networks and listed their main characteristics, together with an assessment of their advantages and pitfalls. My argument here is that these networks shall be recognised by their flexibility and adaptability, as well as their potential for the diffusion of

principles, values and ideas, at a relatively low institutional cost. However, they also entail problems in terms of transparency, accountability and legitimacy. Especially when assuming a regulatory function, the denationalisation of state function through transgovernmental networks can increase the risk of arbitrariness, due to the lack of representativeness of technocrats acting as regulators. This debate brings to the forefront the role of epistemic communities in shaping state behaviour. I built on literature to acknowledge that theoretically RCPs could fit into this conceptual approach. However, labour migration continued to be mostly absent from transgovernmental networks analysis.

Several other conceptual approaches, such as ‘transnational legal process’, ‘international public authority’ and ‘global administrative law’,<sup>508</sup> could also be summoned to explain, now from a legal perspective, how these informal networks contribute to norm creation processes. Instead, I chose informal international lawmaking, as it seemed a perfect fit. This approach aims to highlight the “elements of normative global processes that prima facie fall outside the traditional scope of ‘law’ but may nevertheless be seen as forming part of a lawmaking process”<sup>509</sup> and it could easily apply to my investigation. On the basis of extensive empirical studies, this multi-faceted approach provides an in-depth analysis of the reasons why informal international lawmaking emerged – sociologically, strategically and normatively – and why it is still on the rise.<sup>510</sup> The scope and conceptualisation entailed in the informal international lawmaking approach seemed particularly suitable to studying the role of informal dialogue mechanisms on migration. However, labour migration continued to be excluded from the empirical cases under scrutiny. This placed my investigation at a crossroad: either labour

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<sup>508</sup> See Section 2.4 (n. 123), above.

<sup>509</sup> Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, ‘An Introduction to Informal International Lawmaking’, in J. Pauwelyn et al., *op. cit.* (n. 25) 1.

<sup>510</sup> *Idem.*

migration was not suitable to be part of these ‘new forms of normativity’ or its characteristics would make it untraceable under the common lenses used to detect instances of informal lawmaking.

My last sub-question – can functional cooperation contribute to norm diffusion? – attempted to explore a new approach. Hypothetically, informal mechanisms on migration could have a normative effect, although indirect through norm diffusion. This path of inquiry required the adoption of basic terminology and conceptual framework, which I did also in Chapter 2. There, I explained what norm diffusion is and how it works, elaborating on the diffusion mechanisms of coercion, competition, learning and emulation. Building on existing literature on diffusion, I developed the notion of elements of norm diffusion processes, illustrating with practical examples the sequential roles of stimulus, object, medium, actors and outcome. My contribution in this respect is the inclusion of the object, i.e. the norm being diffused, into the logical concept of diffusion process. Finally, I addressed the issue of causality in norm diffusion. I share the view that diffusion causation does not require proving that an event is necessary and sufficient to an outcome; instead, it is only needed to demonstrate that such an event increases the probability of occurring a certain outcome. Nevertheless, it is still required to establish a causal link between the two ends of a diffusion process. I used an existing test for qualitatively establishing such a link, which I applied to my case study in the final part of my research project.

The thematic and regional scopes adopted in the research design were first dealt with in Chapter 3. Initially, I reflected on the specificities of international cooperation on labour migration. Based on the insights of labour migration scholarship, I acknowledged how difficult it is for international cooperation in this policy area to thrive. I argued this is due to the

asymmetrical nature of labour migration. While other policy fields benefit from shared state interests in solving a transnational problem, labour migration is characterised by polarised interests associated with (often) clear states' identities as countries of origin or destination. I agree with the common understanding proclaimed by the GCM that "migration is a defining feature of our globalized world, connecting societies within and across all regions, making us all countries of origin, transit and destination."<sup>511</sup> However, there are still different interests shaped by how states position themselves in migratory processes. Hence, my argument: the asymmetric nature of labour migration flows is not inductive of multilateralism. As explained in Section 3.1, international cooperation on labour migration, in its traditional form, requires the combination of some relevant factors, namely the existence of a problem in the international system that needs a solution; the convergence of the states involved in resorting to cooperation; the devising of an approach to cooperation affording benefits to all the parties; and the existence of mechanisms preventing states' defection. If these factors do not coexist, cooperation on labour migration does not happen, assumes a bilateral form or is diverted away from international law into the realm of informal, political mechanisms. It enters, then, the territory of functional cooperation.

In tandem with this theoretical perspective on international cooperation on migration, I felt it was necessary to provide some empirical background about labour migration in Asia. Section 3.2 presented, thus, the main characteristics of this phenomenon in terms of its quantitative dimension and determinants. I consider the intra-regional dimension of labour migration in Asia particularly striking, as it puts into question the inevitability of South-to-North flow of migrant workers. After all, labour migration in Asia is mostly a regional issue. The main argument here is that the continent is so diverse that it hosts the same economic, political and

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<sup>511</sup> GCM, para. 10.



legal asymmetries that were theoretically identified as conditioning cooperation on this matter. Together with several quantitative facets of Asian labour migration, I touched upon some topics that I deemed relevant for the characterisation of international labour mobility in the region, such as the impact of remittances on development and the dynamics of human capital formation. However, a detailed analysis of these issues was out of the scope of the current study, but they remain as interesting topics for future research.

Considering that one of the preliminary conclusions is the preference for functional cooperation mechanism, Chapter 3 concluded with a synopsis of three active ISCMs in Asia. The comparison of these three dialogue mechanisms reinforces the ideas of thematic diversity and structural adaptability in order to provide a suitable answer to states' needs. The introduction to the working of the Bali Process, the Abu Dhabi Dialogue and the Almaty Process served as a comparative tool to better grasp the role played in the region by the case study of my research.

The second part of this study entails the empirical research of a functional cooperation mechanism in Asia. In Chapter 1, I argued the suitability of single case studies in qualitative research, despite acknowledging the risk of selection and confirmation bias. Based on the theoretical framework previously developed, Chapter 4 entailed an in-depth analysis of the Colombo Process. Such analysis was divided into two parts. First I described the genesis of this thematic RCP and its institutional development, together with a detailed explanation on its internal functioning, key areas of activities and outcomes. I deem this part particularly relevant, since there is no literature available on the organisational aspects of the Colombo Process. I contribute, then, to the body of literature on RCPs and other ISCMs with an institutional analysis of a mechanism that has been assuming a stronger level of formalisation in respect of

the way it operates, including the way it is financed. Chapter 4 provided, thus, a bird-eye view of the CP, offering relevant and systematised information useful not only for my research, but also for further academic studies. The second part is more analytical, as I reflect on those issues that seem more relevant to form an opinion on the real or potential role of the CP on labour migration governance in Asia. In this respect, there is one feature that I see worth highlighting here: the bond between the CP and IOM. Like most ISCMs, the creation and development of the CP are highly dependent on the institutional and financial support of IOM. It provided the necessary expertise for the establishment of a coherent approach to labour migration in Asia based on the perspective of countries of origin. The alignment of agendas between the two institutions is symbolic, as it creates a cycle of mutual sustainability, with both actors profiting from each other, as I explained in Sub-section 4.6.2. The nature of such relationship leads me to classify it, somehow provocatively, as a case of guardianship.

In Chapter 5, I turned my attention to the empirical aspects of norm diffusion. Based on the insights of this theoretical framework, I analysed the cornerstone of the GCM: the concept of safe, orderly and regular migration. The international community was able to go beyond the conjectural circumstances surrounding the migratory crisis experienced in Europe in the mid-2010s and enshrine in a multilateral instrument a concept reflecting the way states want migration to be. I highlighted the aspirational nature of this concept and the differentiation it entails between desired vis-à-vis undesired migration. Moreover, I addressed the three elements of this bundled concept in order to clarify their meaning. An interesting perspective found in literature, that deserves serious consideration, is that regular migration does not necessarily safeguards the interests and rights of migrants, which contradicts the standard discourse on migration.

As a non-binding political framework, the GCM is not supposed to have legal effects. Yet, in literature multiple normative effects have been identified, the most important of which, I argued, is the creation of a new norm in international migration: safe, orderly and regular migration. Like any other norm, this one is not neutral, as it entails an option for a migratory process that is closely controlled by states of origin, transit and destination, which could in some instances be detrimental to the rights and interests of migrants. The emergent norm, however, is not unitary; it is, in my opinion, a norm cluster, a concept found in norms scholarship with a relevant explanatory value for cases where a combination of problems, values and solutions are at play. Such is the case of the GCM, as states were given a catalogue of possible actions to attain the ultimate goal of having well managed, i.e. controlled migration.

The in-depth analysis of the case study done in Chapter 4 was complemented with the study of the contribution of the CP to the drafting and implementation processes of the GCM. RCPs were explicitly assigned a significant role in both processes, which the CP fulfilled. Not only were its views included in the final document, but it also became a regional actor in the implementation, follow-up and review of the Global Compact. During the Nepalese Chairmanship, the CP prompted policy harmonisation by developing a common strategy for the GCM's implementation at national level. I argued that the interaction between the CP and the GCM is circular: the group's stances on labour migration are included in the Compact, which in turn facilitates adherence to its principles and promotes internalisation.

The way states internalise the GCM became the subject of Chapter 5's last section. Here, I narrowed down the scope of my study to one of the sub-norms included in the norm cluster of safe, orderly and regular migration. The GCM's suggestion that states prohibit recruiters and employers from charging or shifting recruitment fees or related costs to migrant workers

embodies the principle of free employment. I explained the scope of the principle, the different expressions it assumes in several international law instruments and the shape it took in the GCM. My main argument here is that the Global Compact did not take the most pragmatic approach to the prohibition of charging recruitment fees and related costs to migrant workers. The complexity associated with the recruitment industry and the importance of its activity for the placement of migrant workers, as well as for the safeguard of some of their rights, would suggest a more nuanced approach to the principle of free employment.

Based on this contextualisation, I inquired how the CP member countries embrace the GCM's sub-norm on ethical recruitment. I analysed the Voluntary GCM Review Survey Reports submitted to ESCAP by the CP countries and tried to identify examples of state action embodying the principle of free employment since the GCM's adoption. Although not all twelve countries reported measures in this respect, a significant number did so. Perhaps the examples of state action and the justifications presented were not the 'smoking gun' mentioned in literature,<sup>512</sup> but they were strong enough to recognise the existence of prima facie correlation between the GCM and CP member states' practice. Although states were not obliged to internalise the principle of free employment as enshrined in the GCM, they were willing to incorporate it into their domestic legal systems or into bilateral cooperation instruments. First, because they acknowledge it as the norm on ethical recruitment; second, because the norm matches the CP thematic priorities.

Once this correlation was established, I could complete the qualitative test for assessing the existence of a norm diffusion process in the context of the CP. Before the final analysis about the outcome of the diffusion process, I identified the presence of all other elements: I found

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<sup>512</sup> Simone Schroff, *op. cit.* (n. 53) 6.

that the GCM's adoption was the stimulus for the creation and diffusion of a new norm cluster on migration, including a sub-norm on ethical recruitment, and the CP acted as a socialisation venue for sharing such norms. Was this a case of spurious or real diffusion? By applying the three-step qualitative test I adhered to, I can argue that the internalisation of the GCM's principle of free employment by the CP member states is the outcome of a norm diffusion process.

## **6.2. Research attainments and new paths for research**

The endeavour of researching the role of functional cooperation on labour migration is coming to a conclusion and it is now the time to reflect on its main attainments and academic contribution, as well as on possible paths for further investigation.

Based on the main finding that informal cooperation mechanisms on labour migration have a normative impact through norm diffusion, I argue that my research deepens the knowledge on the following subject matters:

- i. *Prospects for international cooperation on labour migration* – Without diminishing the importance of international law, I assume that the development of a comprehensive international regime on labour migration will probably continue to be built outside the realm of law. Instead of crying foul about this fact, I advocate a shift towards the promotion of those frameworks, even if political in nature, that are able to enhance the effectiveness of such regime. The momentum built around the GCM, in tandem with its ambitious implementation process, are a clear example of how a non-binding instrument can induce changes on state behaviour, including the enhancement of migrants' rights. My argument is that the GCM has significant normative effects, the most relevant of which is the creation of a new norm on migration. If states define what is the appropriate behaviour

on international migration and comply with such norm, I do not see – perhaps cynically – a reason to differentiate if they do so because they ought to (legal) or they want to (political). In this respect, I do not subscribe to the views claiming that international cooperation on labour migration does not exist or is doomed. Instead, I believe it will continue to thrive in its functional form. Therefore, advocacy efforts should be refocused towards these informal and flexible ways of cooperating, attempting to use those features for the purpose of improving the international regime on (labour) migration. However, one should make sure that functional cooperation on migration is not used as an additional instance of control aiming at the reduction of migratory flows, like some authors deem possible.<sup>513</sup>

- ii. *The normative power of functional cooperation mechanisms* – By the end of my research, I could answer affirmatively to my research question: functional cooperation mechanisms do have a normative role to play. They contribute to the internalisation of norms through norm diffusion processes. This finding can be a turning point in the general perception of RCPs and other ISCMs, moving them away from being mere ‘talk venues’ and giving them a more meaningful role in labour migration governance. The enhancement of migrant workers’ rights can, therefore, be prompted by functional cooperation. The acknowledgement of such a normative role justifies that closer attention be paid to these mechanisms. The risk, however, is that states become more cautious and abstain from participating in ISCMs, fearing undesired normative consequences of such cooperative ventures. I believe that, in this respect, it is also needed to find the right balance between the flexibility states desire and the highly needed enhancement of migrant workers’ legal protection. The assumption of a normative power should also be balanced with the

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<sup>513</sup> Jeannette Money and Sarah P. Lockhart, *op. cit.* (n. 164) 14.

reinforcement of the transparency and accountability of these mechanisms, as well as higher levels of participation from migrants and their representatives.

- iii. *The Colombo Process institutional development* – The case study demonstrated that the Colombo Process has experienced a continuous process of institutionalisation. The 2016 Operating Modalities are, in this respect, a landmark document, as it gave the mechanism's activities a higher level of predictability, including in financial terms. However, it continues to be highly dependent on IOM's technical expertise and financial support, which might prevent this group of countries from taking stronger stances defending their interests as countries of origin. It is my understanding that the CP would benefit from reducing its dependency on IOM, making use of the self-funding mechanism to reinforce its financial soundness and to reaffirm its members' commitment towards this institutional dialogue. It could, if needed, diverge its agenda more easily, focusing on issues not necessarily aligned with IOM's mind-set. Although there is a noticeable change in IOM's agenda in terms of the safeguard of migrants' rights, the CP could be more explicit in promoting a common approach for the protection of migrant workers by the countries of origin. Eventually, this would require the adoption of common rules on recruitment fees and procedures, minimum wages, migration channels or contractual clauses, even if such legal harmonisation means the loss of competitive advantages in placing a state's nationals abroad. Ultimately, this evolution would entail a change in the CP's nature, evolving from being an informal dialogue mechanism towards a stronger regional integration model or, in a more utopian perspective, even its transformation into a new regional organisation with explicit regulatory powers. I do not expect such radical changes in the foreseeable future, though. In any case, even if that happens one day such new organisation should never resemble existing organisations like

the ASEAN, in order to avoid opening a new front of institutional competition and contributing to additional layers of membership overlapping and cooperation fatigue. Realistically, I believe the CP should continue its institutionalisation process towards a more active and permanent participation of non-state actors, particularly migrant workers, even if that means a lesser control of the Process by states. The involvement of a broader range of interested stakeholders would ultimately benefit the efficacy and legitimacy of the Process, as well as of national policies on labour migration. The involvement of migrant workers would then be a fruitful legacy from functional cooperation on labour migration for the betterment of migrant workers' rights.





## **ABSTRACT**

*Title (in English):* Normativity and functional cooperation on labour migration – Norm diffusion in the context of inter-state consultation mechanisms in Asia

This PhD thesis examines the role of informal cooperation mechanisms in the development of normativity on labour migration. At its genesis lays a paradox: actors in labour migration – states, migrants and employers alike – would benefit from the clarity provided by an effective legal regime, which requires a strong commitment to international cooperation; however, states are reluctant to cooperate towards such regime as it impinges on their sovereignty.

States tend to place cooperation on labour migration outside the realm of international law in an attempt to circumvent binding international obligations, preferring political rather than legal frameworks. Hence, the underlying basic questions: why not international law and if not international law, then what? The overall goal of this research is, hence, to identify potential viable alternatives to the shortcomings of international law in shaping national legal orders in a field impinging state sovereignty and national interests, while touching upon the fundamental rights of migrant workers.

The quest for normativity on labour migration goes beyond treaties and multilateralism as ‘the usual suspects’ of international lawmaking processes. It scrutinises the fundamentals of cooperation theory in search of alternative processes for creating standards of behaviour outside the realm of law. In doing so, this thesis is placed at the borderline between law and international relations, contributing to the increasing dialogue between the two social sciences. Its interdisciplinary nature requires a combined methodological approach, with the use of the

methods most commonly associated with legal research, while borrowing some useful methods from the social sciences.

This thesis sheds light on the role of Regional Consultative Processes (RCPs) and other inter-state consultation mechanisms in creating norms on labour migration through norm diffusion.

The emergence of RCPs and other inter-state consultation mechanisms in the 1980s provided an informal venue and opportunity for states with common interests in migration to come together, understand each other's perspectives and identify possible solutions for the problems and challenges it entails. Yet, can these mechanisms have an impact on normativity? Can they act as norm creation processes and instil a stronger legal regime on labour migration? If such an impact exists, how is it expressed? Therefore, this research tries to answer a main question: can functional cooperation enable normativity on labour migration? The underlying hypothesis is that RCPs play a relevant role in norm diffusion processes, as demonstrated by their intervention in the drafting and implementation processes of the 2018 Global Compact for Safe, Orderly and Regular Migration.

The thesis entails an in-depth analysis of the Colombo Process, one of the most active RCPs in Asia, illustrating the efforts towards improving labour migration governance from the perspective of countries of origin. The fact that its twelve member countries represent nearly half of the world's population, more than a quarter of the total number of migrants and more than one-fifth of the global gross domestic product is an additional compelling argument to pay close attention to this cooperation mechanism. The study of the Colombo Process, moreover, highlights the characteristics of labour migration in Asia and the importance of its intra-regional dimension, which is often forgotten in literature.

The relevance of this thesis is multi-fold. Firstly, it provides an insight of the interrelation between law and politics, contributing to the dialogue between law and international relations. In doing so, it highlights the importance of new forms of normativity and the combination of legal and non-legal features they entail. Secondly, it deepens knowledge on inter-state consultation mechanisms on migration, particularly on RCPs, filling a void in terms of academic studies on their workings and achievements. Thirdly, it prompts academic awareness of labour migration dynamics in the Asian context. More importantly, though, this thesis provides arguments for a shift in advocacy efforts towards informal cooperation mechanisms, since they are able to create – through diffusion – new norms to the benefit of labour migration’s stakeholders, particularly migrant workers, while improving the overall international regime on labour migration.



## **SAMENVATTING**

*Titel (Nederlands):* Normativiteit en functionele samenwerking inzake arbeidsmigratie – De verbreiding van normen via overlegstructuren tussen staten in Azië

Dit proefschrift onderzoekt de rol van informele overlegstructuren in de ontwikkeling van normen, ook wel aangeduid als normativiteit, inzake arbeidsmigratie. Aanleiding voor dit onderzoek is een paradox : de actoren in arbeidsmigratie - zowel staten, migranten als werkgevers - zouden baat hebben bij een duidelijk en effectief juridisch regime, waarvoor een sterk engagement tot internationale samenwerking vereist is. Staten zijn echter terughoudend om aan de totstandkoming van een dergelijk regime mee te werken omdat dit hun soevereiniteit aantast.

In een poging om bindende internationale verplichtingen te omzeilen neigen staten ernaar de samenwerking op het gebied van arbeidsmigratie buiten het internationale recht te plaatsen; zij geven de voorkeur aan politieke boven wettelijke kaders. Vandaar dat de onderliggende vraag in dit onderzoek is: waarom geen internationaal recht en als internationaal recht geen optie is, wat dan wel? Het algemene doel van dit onderzoek is dan ook, bij gebrek aan internationaal recht, mogelijk haalbare alternatieven te identificeren in de nationale rechtsorde op een terrein dat raakt aan zowel de soevereiniteit als de nationale belangen van staten, en eveneens aan de fundamentele rechten van migrerende werknemers.

De zoektocht naar normativiteit inzake arbeidsmigratie gaat verder dan verdragen en multilateralisme, beide 'the usual suspects' van internationale wetgevingsprocessen. Dit onderzoek gaat na wat de grondslagen zijn van de samenwerkingstheorie en zoekt naar alternatieve processen voor het creëren van gedragsnormen buiten het domein van het recht.

Dit proefschrift bevindt zich daarmee op de grens tussen recht en internationale betrekkingen en draagt bij aan de toenemende dialoog tussen deze beide sociale wetenschappen. Het interdisciplinaire karakter van dit onderzoek vereist een gecombineerde methodologische aanpak, die gebruik maakt van de methoden die het meest worden geassocieerd met juridisch onderzoek, terwijl ook enkele bruikbare methoden uit de sociale wetenschappen zijn ingezet.

Dit proefschrift werpt in het bijzonder licht op de rol van regionale overlegprocessen (*regional consultation processes*, RCP's) en andere overlegstructuren tussen staten bij het tot stand brengen van normen over arbeidsmigratie via verbreiding.

De opkomst van RCP's en andere overlegstructuren tussen staten in de jaren tachtig van de vorige eeuw bood staten met gemeenschappelijke belangen bij migratie een informele ontmoetingsplaats en gelegenheid om elkaars standpunten te begrijpen en mogelijke oplossingen te vinden voor de problemen en uitdagingen die migratie met zich meebrengt. De vraag is of deze overlegstructuren invloed hebben op de normativiteit van staten. Kunnen zij fungeren als normscheppende processen en zorgen voor een sterker juridisch regime voor arbeidsmigratie? Als een dergelijke impact bestaat, hoe komt deze dan tot uiting? Uit deze vragen volgt de hoofdvraag die dit onderzoek beoogt te beantwoorden: kan doelmatige samenwerking de normativiteit inzake arbeidsmigratie faciliteren? De onderliggende hypothese is dat RCP's een relevante rol spelen in normverbreidingsprocessen. Dit blijkt bijvoorbeeld uit het optreden van de RCP's bij het opstellen en uitvoeren van het VN Global Compact voor Veilige, Ordelijke en Reguliere migratie uit 2018.

Het proefschrift vervolgt met een grondige analyse van het Colombo-proces, een van de meest actieve RCP's in Azië, en illustreert de inspanningen ter verbetering van de *governance* van arbeidsmigratie vanuit het perspectief van de herkomstlanden. Het feit dat de twaalf

aangesloten landen samen bijna de helft van de wereldbevolking uitmaken en meer dan een kwart van het totale aantal migranten en meer dan een vijfde van het mondiale bruto binnenlands product vertegenwoordigen, is een extra argument om aandacht aan deze samenwerkingsstructuur te besteden. De studie van het Colombo-proces belicht bovendien de kenmerken van de arbeidsmigratie in Azië en het belang van de intraregionale dimensie daarvan, die in de literatuur vaak wordt vergeten.

De relevantie van dit proefschrift is meervoudig. Ten eerste biedt het inzicht in de onderlinge relatie tussen recht en politiek en draagt het bij aan de dialoog tussen recht en internationale betrekkingen. Het belicht daarbij het belang van nieuwe vormen van normativiteit en de combinatie van juridische en niet-juridische kenmerken die deze met zich meebrengen. Ten tweede verdiept het de kennis over overlegstructuren tussen staten op het gebied van migratie, met name over RCP's, en vult het een leemte in de academische studies over de werking en de resultaten daarvan. Ten derde stimuleert dit proefschrift het academisch bewustzijn van de dynamiek van arbeidsmigratie in de Aziatische context. Belangrijker nog is dat dit proefschrift argumenten aanreikt die pleiten voor een verschuiving van internationaal recht naar informele samenwerkingsstructuren, aangezien deze - via verbreiding - nieuwe normen kunnen creëren ten gunste van migrerende werknemers, en tegelijkertijd het algemene internationale stelsel inzake arbeidsmigratie kunnen verbeteren.





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