

## **The Global Compact for Safe, Orderly and Regular Migration: What is its contribution to International Migration Law?**

*Alessandro Bufalini\**

### *1. Introduction*

The recent endorsement by the United Nations General Assembly of the Global Compact for Safe, Orderly and Regular Migration (Global Compact on Migration or GCM)<sup>1</sup> has been the subject of extensive political debate at both the national and international level. This significant public attention is undoubtedly due to the importance that migration policies have assumed as a crucial battlefield of political confrontation. Public concern in this field has indeed considerably increased in recent years, following the so-called European ‘migrant crisis’ and the advent of the Trump administration. Against this backdrop, the adoption of the Global Compact on Migration manifests the widespread belief that States need to grasp migration on a global scale and establish common ground and shared expectations.

Both international migration governance and law are in fact extremely multi-layered and fragmented.<sup>2</sup> The complexity of this political and legal framework is due to the lack of a clear architecture and the interaction of a variety of actors. The main subjects involved are of course States and regional organizations, but a vital role is increasingly played by international institutions and the private sector.<sup>3</sup> Admittedly, non-governmental organizations work together with national and international

\* Research Fellow in International Law, University of Viterbo, Italy.

<sup>1</sup> Resolution adopted by the General Assembly on 19 December 2018, UN Doc A/RES/73/195 (11 January 2019) Annex: Global Compact for Safe, Orderly and Regular Migration.

<sup>2</sup> A Betts, *Global Migration Governance* (OUP 2011).

<sup>3</sup> See, for a broader picture, V Chetail, ‘The Architecture of International Migration Law: a Deconstructivist Design of Complexity and Contradiction’ (2017) 111 *AJIL Unbound* 18-23.

institutions on a variety of migration management issues and influence migration policies and regulations in numerous ways.

As a result, sources of international migration law retain a high level of fragmentation. To a certain extent, protection is afforded to migrant workers through ILO conventions<sup>4</sup>. Additionally there are some common and widespread principles and rules as regards the status of refugees.<sup>5</sup> A large number of States are also involved in regional agreements that deal with multiple issues relating to migrants and their status.<sup>6</sup> And then, of course, there are human rights treaties and customary international law.

The Global Compact on Migration is therefore the first attempt to provide international migration governance with a comprehensive and unitary framework, taking into account the interests of principal stakeholders in the process of migration.<sup>7</sup> The GCM sets a very ambitious aim: to deal with international migration ‘in a holistic and comprehensive manner’ and to approach the phenomenon ‘in all its dimensions’.<sup>8</sup> To do this, the GCM identifies twenty-three objectives and ten guiding principles. These principles include, for example, international cooperation and respect for national sovereignty and human rights. The problem, of course, is how to integrate and coordinate these values and principles. It is quite evident, in fact, that the invocation of national sovereignty may often prevent international cooperation,<sup>9</sup> and that the universality of hu-

<sup>4</sup> See, in particular, the 1990 UN Convention on All Migrant Workers and Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3. Many migrant-receiving States, however, have not ratified this treaty yet.

<sup>5</sup> Obviously, the reference here is to the Geneva Convention in Relation to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150.

<sup>6</sup> The European Union is of course the most important example as regards the development of common mechanisms and policies to govern the movement of people.

<sup>7</sup> For a first appraisal on the GCM’s governance potential, see M Panizzon, D Vitiello, ‘Governance and the UN Global Compact on Migration: Just another Soft Law Cooperation Framework or a New Legal Regime governing International Migration?’ (4 March 2019) EJILTalk! <[www.ejiltalk.org/governance-and-the-un-global-compact-on-migration-just-another-soft-law-cooperation-framework-or-a-new-legal-regime-governing-international-migration/#more-16947](http://www.ejiltalk.org/governance-and-the-un-global-compact-on-migration-just-another-soft-law-cooperation-framework-or-a-new-legal-regime-governing-international-migration/#more-16947)>.

<sup>8</sup> See the declaration introducing the GCM (n 1).

<sup>9</sup> Especially if one considers that ‘sovereignty, even equal sovereignty, includes the power not to cooperate with every other state in all circumstances’ see W Ripaghen, ‘From Soft Law to Ius Cogens and Back’ (1987) 17 Victoria U Wellington L Rev 81, 98.



man rights may at times collide with States' interest to maintain a differentiation based on citizenship in the protection of fundamental rights, especially as regards social rights.

This paper, however, does not aim at determining whether and to what extent the GCM is able to reconcile these apparently opposing principles. It will rather focus on the GCM's legal form. In fact, the GCM will here be subject to scrutiny with the aim of clarifying the impact that it – as a peculiar instrument of law-making – may have on the application, interpretation and development of international migration law. In order to do so, I will first try to clarify the nature of the GCM as a source of international law and to detect the elements that determine its normative value (section 2). In light of these factors, I will assess the impact that the GCM may have on existing law (section 3) and on the progressive development of customary international migration law (section 4). The final remarks will shed some light on the adoption of the Global Compact on Migration as an expression of a more general trend in States' disengagement from international law (section 5).

## *2. The uncertain legal form and value of the Global Compact on Migration*

The GCM is the result of a process begun in 2016 with the New York Declaration for Refugees and Migrants, unanimously adopted by the UN General Assembly, by a consensus of its 193 Member States. The New York Declaration was in practice a political action plan aimed at best responding 'to the growing global phenomenon of large movements of refugees and migrants'.<sup>10</sup> To do so, States envisaged the adoption of two separate instruments dealing with all relevant issues concerning refugees and international migration. In December 2018, in fact – after a year and half of discussion and consultation involving States, international institutions and the civil society – the process culminated in the creation of the Global Compact on Refugees<sup>11</sup> and the Global Compact on Migration.

<sup>10</sup> UN Doc A/RES/71/1 (6 October 2016) para 2.

<sup>11</sup> Report of the United Nations High Commissioner for Refugees (13 September 2018) UN Doc A/RES/73/12 (Part II) Global Compact on Refugees. For some early comments, see TA Aleinikoff, 'The Unfinished Work of the Global Compact on

The Global Compact on Refugees, drawn by the UN High Commissioner for Refugees, was affirmed by the General Assembly with a resolution that received 181 votes in favour, two against (United States and Hungary) and three abstentions (Eritrea, Liberia and Libya).<sup>12</sup>

The GCM was adopted at the Marrakesh Intergovernmental Conference by 164 UN Member States<sup>13</sup> and then endorsed by the UN General Assembly by majority, with 152 votes in favour, 5 against (Czech Republic, Hungary, Israel, Poland, and the United States of America) and 12 abstentions. 24 States did not take part in the vote.

As is evident from these numbers, the GCM gained less consensus than its twin. In addition, countries voting in favour of the General Assembly's resolution endorsing the GCM, were less than those who approved – only eight days before – the intergovernmental agreement in Marrakesh.

As explicitly stated in the document, this agreement is of 'a non-legally-binding' character.<sup>14</sup> The choice in favour of a soft law instrument is not difficult to explain. Recourse to soft law has significant advantages for States. First, it is particularly suitable when there is a need to address global challenges in areas that are essentially within the domestic jurisdiction of the State. The GCM itself recognizes that 'no State can address migration alone', but reaffirms, at the same time, 'the sovereign right of States to determine their national migration policy'.<sup>15</sup> Second, soft law allows States a high degree of flexibility in the drafting of both primary and secondary rules. As the Global Compact on Migration clearly shows, a non-binding instrument may provide a number of quite broad guiding principles and goals, while preserving States' discretion to choose the method of implementation and the degree of compliance that they are

Refugees' (2018) 20 *Intl J Refugee L* 1-7 and A Betts, 'The Global Compact on Refugees: Towards a Theory of Change?' (2018) 20 *Intl J Refugee L* 1-4.

<sup>12</sup> UN Doc A/RES/73/151 para 23. The General Assembly also 'underscore(s)d its importance as a representation of political will and ambition of the international community to operationalize the principle of burden-and responsibility sharing'.

<sup>13</sup> Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, Marrakesh (10-11 December 2018). The conference was organized on the basis of UN General Assembly (UNGA) resolution A/RES/71/280 (17 April 2017).

<sup>14</sup> GCM (n 1) para 7.

<sup>15</sup> *ibid* para 15 (c).



willing to give to the agreement. Third, the adoption of soft law instruments allows States to rapidly clarify their positions and expectations on heated topics, avoiding the time-consuming process of both the conclusion of a treaty and domestic ratification. This is the case for the Global Compact on Migration: within a couple of years, a more or less transparent picture of the actual reality of States' attitudes and willingness toward the regulation of the transnational movement of migrants has become clear. Finally, the adoption of soft law instruments could at times also be seen as an advantage for non-state actors. The process of soft law creation may provide them with access to a wider and more inclusive ability to participate. As already mentioned, civil society organizations, academic institutions, the private sector, and numerous actors potentially interested in the regulation of international migration, were active participants in several phases of the GCM's drafting process.

The fact that the GCM is of a soft law character brings with it the problem of determining its actual legal authority. The debate over soft law's position in the sources of international law is a long-standing one. Some scholars consider the term soft law to be too 'generic' and somehow a 'misleading simplification'.<sup>16</sup> Others highlight that soft law instruments 'are impossible to bring ...within any of the existing categor[ies] of international law'.<sup>17</sup> Admittedly, to establish a clear-cut line of demarcation between hard law and soft law, or between law and non-law, seems impractical and at times even impossible.<sup>18</sup> To say the least, this demarcation

<sup>16</sup> C Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 ICLQ 850.

<sup>17</sup> RR Baxter, 'International Law in "Her Infinite Variety"' (1980) 29 ICLQ 556. See, similar considerations in relation to art 38 of the Statute of the International Court of Justice, M Bothe, 'Legal and Non-Legal Norms. A Meaningful Distinction in International Relations?' (1980) 11 Netherlands YB Intl L 76.

<sup>18</sup> See some interesting reflections on this point made by C Chinkin, 'The Challenge' (n 16): 'It is no longer possible to assume that a proposition is either legally binding norm or not, for that ignores the different status that might be claimed for a proposition according to its context and desired goal'. Chinkin, however, underlines that this fact 'plays havoc with juristic concepts and creates conceptual uncertainty' and continues by stating that this means 'an abandonment of the concept of legal ordering as an autonomous means of international control distinct from other means of social control and allows an interplay between law and non-law'. See also A Pellet, 'Les raisons du développement du *soft law* en droit international: choix ou nécessité?' in P Deumier, J-M Sorel (eds), *Regards croisés sur la soft law en droit interne, européen et international* (LGDJ/Lextenso: 2018) 177-192.

tends often to be quite nuanced. It suffices to recall that there are multiple binding agreements of a soft character, whose material content is mainly of an exhortatory or programmatic nature.

A reasonable starting point is to recognize that the soft law character of the GCM does not per se imply that its legal impact is minimal, if any.<sup>19</sup> In this regard, the heated debate accompanying the General Assembly's endorsement of the GCM is in itself proof of the fact that States do take soft law quite seriously. The reason behind their attitude is certainly related, at least in part, to the fact that soft law may have an impact on both existing and developing hard law.

That being said, it is not an easy task to determine the nature and the scope of this impact. The wording of the text undoubtedly plays a prominent role but the legal weight of soft law instruments may depend on a variety of other factors and their combination. It is, for example, relevant the fact that the Global Compact on Migration resulted from an extensive and multi-phased discussion involving a plurality of actors. This element is discernible in the same document that is deemed to be the 'product of an unprecedented review of evidence and data gathered during an open, transparent and inclusive process'.<sup>20</sup> It is also telling that the GCM was endorsed (albeit not adopted or affirmed), with a large majority, by an authoritative organ, such as the UN General Assembly.<sup>21</sup> On the contrary, it may have a weakening effect on the GCM's legal impact that consensus was not reached and further that there was in fact manifest opposition from some States. From a forward-looking perspective, a decisive role can be played by the creation and concrete functioning of re-

<sup>19</sup> G Abi-Saab, 'Discussion' in A Cassese, J Weiler (eds), *Change and Stability in International Law-Making* (de Gruyter & Co 1988) 76. it is probably a more sensible attitude to consider 'not so much the vehicle, but to what extent this vehicle reflects consensus' and Abi-Saab meant consensus 'not in the formal sense of a procedure of adopting texts, but in the political and substantive sense of consensus as the element, or rather the threshold, of emergence of a rule of law'. Famous examples are human rights resolutions of the General Assembly and particularly, of course, the Universal Declaration of Human Rights. See also A Boyle, 'Soft Law in International Law-Making' in M Evans (ed), *International Law* (OUP 2014) 120. As Boyle pointed out, in fact, it is precisely 'once soft law begins to interact with binding instruments' that 'its non-binding character may be lost or altered'.

<sup>20</sup> GCM (n 1) para 10.

<sup>21</sup> On the importance of this element, see G Gaja, 'Discussion', in Cassese, Weiler (n 19) 77.

view mechanisms, particularly through their capacity to influence subsequent State practice. Beyond its status as a non-binding agreement, it is by weighing the relevance of these factors that one may try to assess to what extent the GCM could impact on existing and developing international migration law.

3. *The Global Compact on Migration and the existing law: Evidence, interpretive means or delegitimizing factor?*

Soft law instruments may affect existing law in at least three different ways. First, soft law may confirm the existence of a certain rule, reaffirming and strengthening its normative value. Secondly, soft law may be of some help in construing the meaning of international norms. Lastly, soft law may reduce certainty about the existence of an international rule, thereby softening its legal status.<sup>22</sup>

As regards the first function, it is worth underlining that the Global Compact on Migration does not in any way intend to lower current standards of protection of collective and individual human rights. The GCM makes quite clear in fact that the agreement ‘upholds the principle of non-regression’.<sup>23</sup> The latter, as is well-known, enshrines the idea that once a human right is recognized, it cannot be removed or restricted.

In an early draft of the GCM there was indeed no allusion to the principle of non-regression.<sup>24</sup> Its final inclusion in the document – as a human rights guiding principle – was the result of intense activity on the part of

<sup>22</sup> On the possible interactions between soft-law and hard-law, see, among others, G Shaffer, MA Pollack, ‘Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance’ (2010) 94 Minnesota L Rev 709; V Chetail, ‘The Transnational Movement of Persons under General International Law’ in V Chetail, C Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 7 and S Lagoutte, T Gammeltoft-Hansen, J Cerone (eds) *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 1-24.

<sup>23</sup> GCM (n 1) paragraph 15(f).

<sup>24</sup> See, in particular, Revised draft of the Global Compact for Safe, Orderly and Regular Migration (26 March 2018); Zero draft plus of the Global Compact for Safe, Orderly and Regular Migration (5 March 2018); Zero draft of the Global Compact for Safe, Orderly and Regular Migration (5 February 2018) <<https://refugeesmigrants.un.org/intergovernmental-negotiations>>.

several non-governmental organizations.<sup>25</sup> Some States, in fact, have shown a certain unease with this principle. Denmark and Norway, for example, needed to specify that their ‘national policies and legislation may ... be adjusted and are not affected by the Compact’s reference to the principle of non-regression’.<sup>26</sup>

However, these very States, as well as many others, also clarified that any legislative ‘adjustment’ will be done ‘within the boundaries set by international law’.<sup>27</sup> These boundaries obviously include customary human rights law. Ultimately, GCM’s reference to the principle of non-regression leads to the confirmation and consolidation of the importance of the standards of human rights protection already granted by existing customary norms. As we will see, this result should not be understated, since existing standards of human rights protection seem to be contested by some States.

The Global Compact on Migration also reiterates the distinction between refugees and migrants. The relevance of this distinction for States can be easily inferred from the very choice to adopt two separate global compacts. The GCM itself reminds us that ‘migrants and refugees are distinct groups governed by separate legal frameworks’ and that ‘only refugees are entitled to the specific international protection defined by international refugee law’.<sup>28</sup>

The distinction is so plainly formulated that it may be surprising to note a large number of States concerned by the GCM’s potential conflating of refugees and migrants, namely economic migrants. By way of example, Lebanon raised a ‘reservation’ to the non-binding agreement specifically regarding the ‘need to distinguish between migrants and refugees’.<sup>29</sup> Iran stressed that ‘nothing in the agreement should be construed

<sup>25</sup> See, in particular, the call of more than forty non-governmental organizations <[www.madenetwork.org/sites/default/files/An\\_NGO\\_call\\_re\\_non-refoulement\\_and\\_climate\\_displacement\\_in\\_GCR\\_and\\_GCM\\_FINAL\\_DRAFT\\_%281%29%5B1%5D.pdf](http://www.madenetwork.org/sites/default/files/An_NGO_call_re_non-refoulement_and_climate_displacement_in_GCR_and_GCM_FINAL_DRAFT_%281%29%5B1%5D.pdf)>.

<sup>26</sup> Draft resolution submitted by the President of the General Assembly on a Global Compact for Safe, Orderly and Regular Migration (19 December 2018) Statement by Denmark <[www.rijksoverheid.nl/documenten/rapporten/2018/12/20/tk-bijlage-stemverklaring-gcm-resolutie](http://www.rijksoverheid.nl/documenten/rapporten/2018/12/20/tk-bijlage-stemverklaring-gcm-resolutie)>.

<sup>27</sup> *ibid.*

<sup>28</sup> GCM (n 1) para 4.

<sup>29</sup> UN General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants (19 December 2018) UN Press release GA/12113 <[www.un.org/press/en/2018/ga12113.doc.htm](http://www.un.org/press/en/2018/ga12113.doc.htm)> Lebanon.



in a way that confuses migrants with refugees'.<sup>30</sup> And Jordan clarified 'the importance of the distinction between refugees and migrants, as they fall under a different set of laws'.<sup>31</sup>

States' need to reaffirm this distinction can be related to a single passage in GCM concerning both refugees and migrants. The GCM recalls, in fact, that both categories 'are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times'.<sup>32</sup> Therefore, States' fears that the GCM could water down this distinction are likely related to human rights protection, especially social rights. The declaration on the GCM of the United States seems somehow to be telling. The US government indeed pointed out that the 'United States does not have international obligations pertaining to the provision of social services to aliens who are not refugees'.<sup>33</sup> Still, both the GCM's clear wording and States' declarations on the need to maintain this distinction do no more than reaffirm its centrality in international law. As is evident – and as will be seen below in the discussion on the principle of *non-refoulement* – the real question is not so much related to a potential conflation of these categories, but rather on the law applicable to them.

The GCM also restates a few basic principles concerning administrative detention. One of the goals of the GCM is in fact to ensure that States employ immigration detention 'as a measure of last resort only'.<sup>34</sup> More generally, States commit to making sure that detention in the context of international migration 'follows due process, is non-arbitrary, is based on law, necessity, proportionality and individual assessments, is carried out by authorized officials and is for the shortest possible period of time'.<sup>35</sup> This seems to be perfectly in line with principles already recognized and affirmed by the UN Working Group on Arbitrary Detention. In its recent works, the UN Working Group clearly stated that the detention of migrants 'must be applied as an exceptional measure of last resort, for the

<sup>30</sup> *ibid* Iran.

<sup>31</sup> *ibid* Jordan.

<sup>32</sup> GCM (n 1) para 4.

<sup>33</sup> United States Mission to the United Nations, National Statement of the United States of America on the Adoption of the Global Compact for Safe, Orderly, and Regular Migration (7 December 2018) <<https://usun.state.gov/remarks/8841>>.

<sup>34</sup> *ibid* objective 13.

<sup>35</sup> *ibid*.

shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt'.<sup>36</sup> Other principles emerging from GCM's commitments on detention – such as the best interests of the child or the respect for family life and unity – also reflect recognized standards of human rights protection.<sup>37</sup>

Only one State, Poland, declared in very broad terms that the agreement 'includes some objectives that are difficult to implement for her country, such as detention standards'.<sup>38</sup> Both the absence of other oppositions to these standards and the clear alignment between the GCM and the work of the UN Group on Arbitrary Detention seem finally to confirm and strengthen the legal value, as customary law, of these principles and standards of protection.

As regards the hermeneutic function, it is possible to maintain that some of the principles inspiring the GCM can be seen as having a useful interpretative function in relation to existing international migration law. The abovementioned principle of non-regression, for example, can always be employed to prevent an interpretation of human rights law impinging on the current standards of protection. In principle, this should reduce fears of a dilution of human rights protection.

The GCM also 'recognizes that respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance'.<sup>39</sup> As a consequence, all actors involved in the migration process must be 'accountable to laws that are publicly promulgated'.<sup>40</sup> No State challenged these principles. Their plain statement may thus be of use for domestic judges in order to construe the meaning of their national legislation. For example, these principles may take on particular relevance in evaluating the validity of national measures of implementation of readmission agreements. In fact, the content of these agreements, especially

<sup>36</sup> UN Working Group on Arbitrary Detention, Deliberation No 5 (7 February 2018) para 13.

<sup>37</sup> *ibid.*

<sup>38</sup> UNGA Press release (n 29).

<sup>39</sup> GCM (n 1) para 15.

<sup>40</sup> *ibid.*

in recent State practice, may at times be quite opaque specifically as regards their own enforcement and accountability.<sup>41</sup>

Moreover, GCM's goals may influence interpretation as regards the lawfulness of certain conducts related to both the rescue of migrants at sea and domestic migration procedures. For example, objective 8 affirms that States must 'save lives and establish coordinated efforts on missing of migrants'.<sup>42</sup> Even if the discussion on the existence of an individual right to be rescued at sea is still ongoing,<sup>43</sup> the GCM's call to 'keep migrants out of harm's way' may foster an extensive interpretation of State obligations to protect lives on the high seas and to provide a safe harbour to migrant rescue ships.<sup>44</sup> Objective 12 meanwhile asserts that States should 'increase legal certainty and predictability of migration procedures'. The language is more exhortatory than prescriptive. Still, this principle may be of guidance for domestic judges in interpreting national legislation concerning migration procedures. This is especially important if one considers the ever-increasing rate of legislative interventions in this area. By way of example, it is worth noting that the Italian *Corte di Cassazione* was recently called upon to decide the destiny of thousands of applications for 'humanitarian protection residency permit' (*permesso di soggiorno per motivi umanitari*) prior to the entry into force of the Decree-law no 113 of 4 October 2018 (converted, with amendments, into Law no 132 of 1 December 2018) on Immigration and Security. This kind of permit has since been abolished, but the Italian legislator had failed to clarify the terms of the transitional regime and the eventual protection

<sup>41</sup> F De Vittor, 'Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di 'accordi' per il controllo extraterritoriale della migrazione' (2018) 12 *Diritti Umani e Diritto Internazionale*, 5-27 and S Carrera, *Implementation of EU Readmission Agreements* (Springer 2016).

<sup>42</sup> GCM (n 1) para 13.

<sup>43</sup> See the interesting debate between ED Papastavridis, 'Is There a Right to Be Rescued at Sea? A Skeptical View' (2014) 4 *QIL-Questions Intl L* 17-32 and S Trevisanut, 'Is There a Right to Be Rescued at Sea? A Constructive View' (2014) 4 *QIL-Questions Intl L* 3-15.

<sup>44</sup> Especially in construing the meaning of art 98 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, Regulation 33.1 of the International Convention for the Safety of Life at Sea, (adopted 1 November 1974, entered into force 25 May 1980, as amended) 1184 UNTS 278 and Chapter 2.1.10 of the International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985, as amended) 1405 UNTS 118.

afforded to those applicants whose requests were pending. A reference to the principles of certainty and predictability of migration procedures, as enshrined in the GCM, could have further fostered the decision of the *Corte di Cassazione* to prevent any retroactive application of the new Italian legislation.<sup>45</sup> Indeed, this would have been the case, even if Italy did not sign the GCM, since the principle of legal certainty and predictability enshrined in the GCM – as many other principles therein – is a general principle of law common to all legal systems. In other words, the GCM does nothing more than recall the (sometime neglected) relevance of this legal principle in migration procedures.

Finally, the GCM may also have the effect, at least in relation to certain aspects, of weakening the normative value of international migration rules and principles. The GCM, for example, only captures the essence of (albeit not mentioning it explicitly) the principle of non-refoulement in its objective 21, where States commit to uphold ‘the prohibition of collective expulsion’ and refrain ‘from returning migrants when there is a real and foreseeable risk of death, torture, or other irreparable harm’.<sup>46</sup>

However, it is somehow puzzling that such a well-established and fundamental principle has not been included among the guiding principles of the GCM. It is also surprising that the GCM’s objectives related to the search and rescue operations (objective 8) and the management of national borders (objective 11) do not enshrine such a principle.<sup>47</sup> In this respect, one should take into account the fact that in an early draft of the GCM the importance of abiding by this principle in relation to the search and rescue operations was explicitly recognized, but then removed.<sup>48</sup> The removal of such a reference to the principle of *non-refoulement* appears to be the result of the opposition of some States, asserting that the application of the principle should be limited to refugees. China made this point explicit at the intergovernmental conference in Marrakesh, stating

<sup>45</sup> Corte di cassazione (19 February 2019) n 4890/2019.

<sup>46</sup> GCM (n 1) para 37.

<sup>47</sup> See A Spagnolo, “‘We are tidying up’: The Global Compact on Migration and its Interaction with International Human Rights Law” (1<sup>st</sup> March 2019) EJILTalk! <[www.ejiltalk.org/we-are-tidying-up-the-global-compact-on-migration-and-its-interaction-with-international-human-rights-law/#more-16946](http://www.ejiltalk.org/we-are-tidying-up-the-global-compact-on-migration-and-its-interaction-with-international-human-rights-law/#more-16946)>.

<sup>48</sup> See objectives 8 and 21 of the Second Draft of the Global Compact for Safe, Orderly and Regular Migration (28 May 2018) <[https://refugeesmigrants.un.org/sites/default/files/180528\\_draft\\_rev\\_2\\_final.pdf](https://refugeesmigrants.un.org/sites/default/files/180528_draft_rev_2_final.pdf)>.

that ‘since migrants and refugees fall under different legal categories, the *non-refoulement* principle should not be applied to migration issues’.<sup>49</sup>

There is no doubt that the prohibition of *non-refoulement* is a well-established principle under international law, deriving from other obligations owed by States *erga omnes*, such as the prohibition of torture and inhuman and degrading treatment. Moreover, should one retain that the principle of *non-refoulement* is also a fundamental right of the individual, the abovementioned principle of non-regression would prevent any restrictive application of this human right. Nevertheless, the absence of a firm and wide affirmation of the principle in the GCM, as resulting from the opposition of some States, might downgrade the centrality of States’ *non-refoulement* obligations in managing international migration and can be seen as an attempt to progressively reduce their scope of application.

A more specific example of the GCM’s potential role in waning international migration principles and rules relates to child detention. In the part of GCM concerning administrative detention, there is no provision on the need to prevent child detention, a principle recognized by the UN Committee on the Rights of the Child. The latter retains in fact that the detention of children due to ‘their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child’.<sup>50</sup> The Global Compact on Migration seems thus to drop into a vacuum the following UN Committee’s call on States to ‘expeditiously and completely cease the detention of children on the basis of their immigration status’<sup>51</sup> and waters down the corresponding rule on the prohibition of immigration detention of children. Egypt underlined this risk by emphasizing its disappointment at the

<sup>49</sup> Statement of Ambassador Li Li, Leader of the Chinese Delegation and Chinese Ambassador to the Kingdom of Morocco, at the Intergovernmental Conference to Adopt the Global Compact For Safe, Orderly and Regular Migration, Marrakech (11 December 2018).

<sup>50</sup> UN Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration (28 September 2012) para 78. And more recently, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment No 23 (2017) and Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the context of International Migration in Countries of Origin, Transit, Destination and Return, General Comment No 4 (2017). See also V Muntarbhorn, ‘The Global Compacts and the Dilemma of Children in Immigration Detention’ (2019) 20 Intl J Refugee L 1-6, at 4.

<sup>51</sup> UN Committee on the Rights of the Child (n 50) para 78.

GCM's failure to employ 'stronger language ... on the elimination of child migrant detention'.<sup>52</sup>

Since the GCM has the ambition of somehow gathering all relevant principles in international migration management, a lack of reference to some principles, whose exclusion has even been the subject of discussion among States, may lead to an undermining of their normative value, increasing uncertainty about their existence and scope of application.

#### 4. *The Global Compact on Migration as an instrument for the development of customary international law*

Soft law may have a paramount role in the development of customary international law. The adoption of a non-binding instrument, in fact, could be at the heart of a process of norm-creation. In other words, soft law may have a so-called 'catalytic effect',<sup>53</sup> as it frequently represents 'a vital intermediate stage towards a more rigorously binding system'.<sup>54</sup> In addition, non-binding instruments are sometimes crucial in filling the gaps of extant international law, thereby also contributing to the development of customary international norms.<sup>55</sup> In very broad terms, Turkey supported this possible role for GCM, arguing that 'the agreement will fill an important gap by creating a minimum set of standards'.<sup>56</sup>

In principle, a non-binding agreement, endorsed by a General Assembly resolution with a majority of more than one hundred and fifty States, may certainly form the basis of the formation of customary international rules or contribute to their consolidation.<sup>57</sup> This mainly depends

<sup>52</sup> UNGA Press release (n 29) Egypt.

<sup>53</sup> C Chinkin, 'Normative Development in the International Legal System', in D Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (OUP 2003) 31.

<sup>54</sup> ME O'Connell, 'The Role of Soft Law in a Global Order', in Shelton (n 53) 100.

<sup>55</sup> See A Peters, 'The Global Compact for Migration: to sign or not to sign?' (21 November 2018) EJILTalk! <<https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/>>. And, more generally, E Tramontana, 'Il soft-law e la resilienza del diritto internazionale' (2017) 2 *Ars Interpretandi* 56.

<sup>56</sup> See UNGA Press release (n 29).

<sup>57</sup> There are instead no grounds for assuming that the GCM could create instant customary law. In general, the very idea of this immediate process of formation of customary international norms is hard to reconcile with the often innovative and tentative character of soft-law instruments. In any case, it is worth noting here that the Global

on the wording of the document, on States' positions and declarations – as evidence of their *opinio juris* – and on the instrument's capacity to influence State practice.<sup>58</sup>

As regards its text, at first sight the CGM has quite strict wording. In the whole document, there is in fact frequent recourse to the term 'commit' and at times to verbs such as 'must' and even 'shall'. A certain 'ambiguity of language' was indeed emphasised by some States that were likely concerned to avoid any compulsory effect of the GCM's provisions. Norway, for example, noted that it 'does not need to change any national laws or practices as a result of the agreement's adoption'.<sup>59</sup>

GCM's commitments are in fact quite vague. Despite their conclusive wording in fact, GCM's goals have a generic formulation and do not prescribe any precise conduct. Quite interestingly, for example, the GCM endeavours to pay due attention to the so-called 'pushing factors' of migration, namely climate change and environmental degradation.<sup>60</sup> However, no reference is made to the need for protection for the (new) category of climate migrants, whose number is undoubtedly (and steadily) increasing. It all comes down to the commitment to 'cooperate to identify, develop and strengthen solutions'.<sup>61</sup> Indeed, almost any commitment seems formulated so as to give broad discretion to States to determine whether and to what extent they will take steps in order to achieve the

Compact on Migration lacks at least one fundamental element for the eventual creation of instant customary rules: the adoption by consensus, see Boyle (n 19) 130.

<sup>58</sup> As many scholars pointed out, however, distinguishing between the two constituent elements of customary international law is often quite difficult and mainly depends on the very definition of practice and *opinio juris* adopted. See, among others, MB Akehurst, 'Custom as a Source of International Law' (1977) 47 British YB Intl L 1. For an opposite view A D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971). Admittedly, it is even possible to infer evidence of both elements from the same act, especially General Assembly resolutions, see International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* (Merits) [1986] ICJ Rep 14, paras 183-184. Thus, also the GCM could be evidence of both *opinio juris* and State practice. States' vote and attitude towards the GCM could also be considered as proof of the material element, especially for those States that have no 'practice open to them'. H Thirlway, *The Sources of International Law* (OUP 2014) 80. Therefore, the position of States not essentially affected by migration may also be relevant practice in order to assess the status of customary international law.

<sup>59</sup> UNGA Press release (n 29) Norway.

<sup>60</sup> GCM (n 1) para 12.

<sup>61</sup> *ibid* para 21 (h).



common goals.<sup>62</sup> This drafting can hardly be evidence of a widespread acceptance of a certain rule or principle as part of customary international law and also has little chance of determining a possible future pattern of State behaviour.

States' declarations are also indicative of a certain caution with respect to the GCM's capacity to contribute to the development of international migration law. Some States, for example, pointed out that the pact 'does not envisage creating new human rights'.<sup>63</sup> In particular, many States were concerned about the potential recognition of a 'right to migrate'. Austria, Estonia, New Zealand, Namibia, Croatia, Liechtenstein and France emphasized in fact that 'there is no right to migration' and that 'the agreement does not create such a right'.<sup>64</sup>

Admittedly, everyone's right to leave any country, including his/her own, is a fundamental right of the individual.<sup>65</sup> These States are likely denying the existence or the potential affirmation of a right to enter another country. However, the GCM does not recognize any individual right to migration of this sort and no State took a stand on its recognition. It would thus be difficult to infer from both the text of the document and States' position on its adoption an attempt to give birth to such a right. Just to be safe, the abovementioned declarations are explicitly aimed at hampering any possible future formation of an individual right of this sort by way of a customary-making process.

Another example relates to GCM's objective 16 concerning migrant integration in host countries. Its drafting history reveals the tendency of States to thwart potential development of certain customary international norms. It is worth mentioning, in fact, that the reference to the importance of facilitating 'access to regularization options' was deleted in

<sup>62</sup> Reference can be made here to the so-called 'escape clauses' as drawn up by Gruchalla-Wesierski, 'A Framework for Understanding Soft Law' (1984) 30 McGill L J 50-51.

<sup>63</sup> UNGA Press release (n 29) Romania. In a similar vein, Norway.

<sup>64</sup> *ibid* see the declarations of the abovementioned States.

<sup>65</sup> Several international instruments provide for a fundamental right to leave any country. See, for example, art 13 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA RES/217 A (III) and art 12 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.



the final version of the GCM.<sup>66</sup> Under customary international law, it is indeed hard to identify both a State obligation to regularize migrants and an individual right of access to regularization. Still, the choice to remove this commitment is likely aimed at avoiding the possibility that the GCM could somehow spark a process of norm-creation, namely of a customary international rule enshrining a State obligation or an individual right to regularization.

Beyond these specific examples, a number of States' declarations are supposedly aimed at hampering any development of customary international law as a consequence of the GCM's adoption. For example, the representative of Denmark, speaking also for Iceland, Malta and the Netherlands underlined that 'the agreement creates no new legal obligations for States nor does it further international customary law or treaty commitments'.<sup>67</sup> The United Kingdom also emphasised that the GCM 'does not seek to create customary law'.<sup>68</sup> These statements clearly refer to the whole document, not only to its human rights dimension.

One may wonder what is the legal relevance to be attached to such generic statements. These States are likely stressing that their concurrent vote cannot be considered as evidence of their *opinio juris* for the formation of new customary rules. In other words, the fact that they supported the adoption of the GCM cannot in any way be seen as a contribution to a process of norm-creation.

The fact that these declarations exclusively refer to the potential creation of *new* customary rules leaves open the possibility that the GCM plays a role in reaffirming existing human rights law. In other words, States expressed their concerns on the eventual creation of new law, but they did not take a stand against established customary rules. Only the United States overtly questioned that the GCM could reflect the body of international human rights obligations already existing. This State declared in fact that the GCM 'creates false representations of the actual

<sup>66</sup> (Deleted) Objective 16 (g) of the Global Compact for Safe, Orderly and Regular Migration, Zero Draft (5 February 2018) recited as follows: 'Facilitate access to regularization options as a means to promote migrants' integration into society and fully harness their contributions to sustainable development, as well as to reduce the stigmas that may be associated with irregular status'.

<sup>67</sup> UNGA Press release (n 29) the representative of Denmark, speaking also for Iceland, Malta and the Netherlands.

<sup>68</sup> *ibid* United Kingdom.

rights represented in relevant international human rights instruments'.<sup>69</sup> As this position remains isolated, one can maintain that States' support for the GCM is evidence of their *opinio juris* as regards the customary status of existing human rights.

All of this does not automatically mean that the GCM would be completely meaningless in the process of norm-creation. In principle, it may influence subsequent State practice. This mainly depends on the capacity of the review mechanisms provided for in the GCM to encourage and persuade States to behave in a certain way. To this end, a key role will be played by the International Migration Review Forum that will 'take place every four years beginning in 2022' with the express purpose 'to discuss and share progress on the implementation' of the GCM.<sup>70</sup> Also the Secretary-General is requested to biannually report to the General Assembly on the GCM's implementation.<sup>71</sup> In addition, States 'invite' relevant regional actors 'to review the implementation' of the agreement and the Global Forum on Migration and Development 'to provide a space for annual informal exchange on implementation'.<sup>72</sup> These mechanisms of reviewing and reporting could progressively, albeit perhaps slowly, lead to the enhancement of the chances of GCM's enforcement. However, as regards States' actions for implementation, the GCM is not particularly demanding: it simply 'encourage(s)' States to advance 'as soon as practicable' national responses for implementation.<sup>73</sup> This notwithstanding, some States explicitly stressed that they do not need to change their national legislation as a consequence of the GCM's adoption.<sup>74</sup>

At the moment it is obviously impossible to establish to what extent States will develop common practice on managing international migration, thus possibly contributing to the creation of new customary international rules. At first sight, however, both the softness of the review mechanisms and States' explicit intention to preserve their discretion on the adoption of implementation measures seem to limit the GCM's capacity to influence State practice.

<sup>69</sup> United States Mission to the United Nations (n 33).

<sup>70</sup> GCM (n 1) para 49.

<sup>71</sup> *ibid* para 46.

<sup>72</sup> *ibid* para 51.

<sup>73</sup> *ibid* para 53.

<sup>74</sup> See Norway's declaration (n 29).

## 5. *Final remarks*

Assessing legal implications of States' declarations and behaviour is at times a complex exercise. Political aims often obscure the real opinion of individual States on a specific legal issue. This applies especially to the adoption of General Assembly resolutions.<sup>75</sup> In practice, it is not always clear whether governments are assuming a definite legal position on the content of an international document or are rather talking to their public in a bid for electoral support. Obviously, this complicates the ascertainment of soft law's normative effect on customary international law, especially for a politically sensitive subject matter as migration.

Be that as it may, multiple elements call for some caution on the GCM's potential to contribute to international migration law. First, the normative content of the document is not revolutionary, as it mainly restates some basic principles and rules of customary and treaty law. Second, the wording of the text is not particularly precise as regards the concrete conduct States are supposed to put in place. Third, the General Assembly simply endorsed the GCM, whereas it could have adopted or affirmed it – as it actually did for the Global Compact on Refugees. Fourth, there are a number of States who opposed the adoption of the non-binding agreement. Fifth, States supporting the GCM also tried in different ways to underline the limited scope of application and impact of the document. Lastly, review mechanisms seem to be too soft to exert any significant pressure on future State behaviour.

Regardless of its limited normative impact, soft law may potentially possess another kind of substantial power, that is to 'name and shame' States or other specific actors. This policy instrument may have considerable strength, since it can serve the purpose of isolating countries that do not share certain basic universal values. Sooner or later, 'naming and shaming' should induce their alignment.

In current times, however, the potential of this means of leverage seems to vanish. Indeed, the opposite trend can be detected: States appear less and less attracted to legal cooperation through participation in

<sup>75</sup> CC Joyner, 'UN General Assembly Resolutions and International Law: Rethinking Contemporary Dynamics of Norm-creation' (1981) 11 *California Western Intl L J* 445, 461.

multilateral binding instruments. The numerous examples of States withdrawing from international treaties are the most glaring sign of this trend.<sup>76</sup> The GCM's adoption can be seen as a further symptom of the decline of multilateralism. In fact, unlike other soft law instruments in the past, the GCM could hardly be seen as a first step towards a more binding instrument. On the contrary, both the GCM's drafting history and States' attitude towards its adoption seem to confirm the current trend in States' disengagement from international law.

<sup>76</sup> It suffices to recall here Brexit, African States' threat to withdraw from the International Criminal Court and the US withdrawal from the Paris Climate Agreement, see J Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81 *Modern L Rev* 1. Statements of some political leaders concerning the GCM's adoption appear to confirm the trend. Just to give two striking examples, US President, Donald Trump, claimed before the UN General Assembly that 'migration should not be governed by an international body, unaccountable to our own citizens', see Remarks by President Trump to the 73<sup>rd</sup> Session of the United Nations General Assembly (25 September 2018). A full transcript of the speech is available at <[www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/](http://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/)>. The Hungarian Prime Minister, Viktor Orban, declared instead that 'the UN is valuable, but we must not let it establish principles that go against Hungary's interest'. A report of the speech is available at the website of the Hungarian government <[www.kormany.hu/en/the-prime-minister/news/the-un-s-migration-scheme-looks-like-it-has-been-copied-from-the-soros-plan](http://www.kormany.hu/en/the-prime-minister/news/the-un-s-migration-scheme-looks-like-it-has-been-copied-from-the-soros-plan)>.

