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The politics of soft law: progress and pitfall of the global compact for safe, orderly, and regular migration

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The Global Compact for Safe, Orderly and Regular Migration (GCM) epitomizes the potential and the limits of soft law in promoting global migration governance. While being a catalyst of multilateralism, the use of soft law remains highly ambiguous and must thus be approached with caution. At the same time, the GCM operates as a counter-narrative to populism insofar as it proposes a collaborative framework to develop global migration governance. Yet, its implementation record remains disappointing, and the last review carried out within the UN General Assembly signals a return of *realpolitik*. This calls for a vigilant plea toward a principled implementation of the GCM with due regard to the commitments of states contained therein, as well as to their legal duties under international law. Following this stance, soft law and hard law are not mutually exclusive, but rather mutually reinforcing, provided they are implemented in a cogent and integrated way. The GCM can make a difference on the ground if, and only if, it works in tandem with legally binding norms and instruments. If not, it may eventually become nothing else than a mere smokescreen, if not a masquerade, for the patent violations of migrants' rights.

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soft law, global compact, migrants, human rights, public international law, international migration law, governance

1. Introduction

The Global Compact for Safe, Orderly and Regular Migration (GCM) was endorsed by the United Nations General Assembly on 19 December 2018 in an inauspicious and divisive atmosphere. Its adoption, by a broad majority of 152 UN member states, was a tour de force given the politically toxic context surrounding migration, the opposition of the United States (US) administration and a virulent campaign orchestrated by the extreme right in many countries. This intergovernmental instrument is not binding *per se*, even if international law has an important role to play in framing and implementing it (Peters, 2018; Wouters and Wauters, 2019; Chetail, 2020a). The GCM is nothing more, but nothing less, than a soft law instrument, namely a non-binding instrument adopted by states to frame their future actions within a common line of conduct.

Although it is easy for lawyers to be condescending toward soft law, the adoption of the GCM should not be taken for granted. With a sensitive and polarized topic like migration, the alternative was not between a binding instrument and a non-binding instrument, but between a non-binding instrument and no instrument at all. Five years after its adoption, the GCM epitomizes the potential and the limits of soft law in promoting global migration governance. While reflecting the reluctance of states toward legally binding instruments,

it operates as a coordinating device to frame their behaviour through a rather comprehensive set of mutually agreed actions. As such, it shows that soft law is both a vehicle of convergence and a factor of stabilization in a decentralized society composed of sovereign states.

Yet, the use of soft law is highly ambiguous and political by nature. As I have discussed in detail elsewhere, soft law remains a double-edged sword for international migration law and must be thus approached with caution (Chetail, 2019, p. 283–300). The GCM is no exception. It could be an instrument for change or an attempt to maintain the status quo. The GCM is arguably both. The political nature of this intergovernmental instrument does unveil its dual role as a counter-narrative to populism (Section 2) and a collaborative framework to develop global migration governance (Section 3). Yet, the implementation record remains mixed—if not disappointing—and the International Migration Review Forum (IMRF), which took place within the United Nations General Assembly (UNGA) in May 2022, has signaled a return of *realpolitik* (Section 4). This calls for a vigilant plea toward a principled implementation of the GCM with due regard to the commitments of states and their duties under international law (Section 5).

2. The global compact for migration as a political project: a counter-narrative to populism and unilateralism

The GCM is in essence a political project to further develop multilateralism and governance in the complex and sensitive field of migration. This intergovernmental instrument expresses a “collective commitment to improving cooperation on international migration” and relies on “a comprehensive approach [...] to optimize the overall benefits of migration, while addressing risks and challenges for individuals and communities in countries of origin, transit and destination” (GCM, 2018, paras. 8 and 11). As apparent from this ambitious endeavor, the Compact is primarily prospective; it must not be seen as a final product but as a road map to frame the international agenda.

Hence, by its very nature, the GCM is fundamentally political. It provides a new impetus for multilateralism as a counter-system to unilateralism and populism. It lays down the grounds for a balanced and dispassionate narrative on migration that is shaped by inclusive dialogue, evidence-based information sharing and the rule of law. International law is obviously part of the picture, but it is conceived as one particular ingredient among many others to achieve a broader political purpose.

Overall, the main contribution of the Compact is to crystallize the consensus of the international community on the most topical issues associated with migration. While expressing the collective commitment of states to improve cooperation, the Compact paves the way for a counter-narrative to populist rhetoric. This counter-narrative is well captured by the following extract from the GCM:

Migration has been part of the human experience throughout history, and we recognize that it is a source of prosperity, innovation and sustainable development in our globalized world, and that these positive impacts can be

optimized by improving migration governance. The majority of migrants around the world today travel, live and work in a safe, orderly and regular manner. Nonetheless, migration undeniably affects our countries, communities, migrants and their families in very different and sometimes unpredictable ways. It is crucial that the challenges and opportunities of international migration unite us, rather than divide us (GCM, 2018, paras. 8–9).

This common vision is aimed at “dispelling misleading narratives that generate negative perceptions of migrants,” while “addressing risks and challenges for individuals and communities in countries of origin, transit and destination” (GCM, 2018, paras. 10–11). Following this stance, the very first objective of the GCM is to collect and utilize accurate data as a basis for evidence-based policies and well-informed public discourse. Among other examples, in Objective 17 of the GCM, states commit to eliminate all forms of discrimination, racism and xenophobia and to promote an open and evidence-based public discourse on migrants that generates a more realistic, human and constructive perception.

While shedding light on the complex reality of migration as a worldwide and natural phenomenon, the Compact also highlights the positive contribution of migrants throughout the document, following well-documented evidence about their important role in countries of both destination and origin (Chetail, 2019, p. 1–5). This counter-narrative to populism does explain—to a large extent—the reasons why some states rejected its adoption and continue to do so. For instance, Hungary—which voted against the GCM in 2018—reaffirmed in 2022 that “it cannot share the view presented in the Compact that migration is the best solution for labor market and demographic problems of countries of destination” and it does “not agree with highlighting the positive elements of migration and the importance of facilitating this dangerous and harmful phenomenon either” (Hungary, 2022).

The political function of the GCM as a counter-narrative to xenophobia and populism is also well exemplified by the changing position of the US following the presidential elections. Whereas the Trump administration withdrew the US from the negotiations of the Global Compact in 2017, the Biden administration announced in 2021 the US support for the GCM in the following terms:

Because our national values align closely with those reflected in the GCM, the United States supports the vision of the Global Compact for Safe, Orderly and Regular Migration and will seek to achieve many of its objectives within the structure of the U.S. Constitution, domestic laws, and international obligations as described in this statement (USA, 2021, p. 2).

This support from a superpower that is the country with the highest number of migrants in the world is particularly significant and welcome. It remains, however, truly ambiguous. The US is indeed both within and outside the GCM. This approach follows a longstanding strategy used, for instance, with regard to the Statute of the International Criminal Court, which the US has signed but never ratified. According to the calculated wording of Biden’s statement, the US does not endorse the GCM as a whole

but, more opportunistically, its vision and many—but not all—of its objectives. As discussed below in Section 5, this selective endorsement is in contradiction with the very rationale of the GCM, based on a “comprehensive approach” to migration (GCM, 2018, para. 11). This makes it clear that the US will influence the ongoing discussions about the implementation of GCM to reflect its own interests and its minimalist vision of international migration law.

Nonetheless, the political agenda of containment, promoted for decades by the US and Western states, is now channeled and constrained by the commitments endorsed in the GCM. As a soft law instrument, the Compact does represent a central supplement to the universally binding rules of international migration law. The GCM not only reaffirms several fundamental principles of international migration law, including the prohibition of collective expulsion, the principle of *non-refoulement*, the prohibition of arbitrary detention, the best interests of the child and the principle of non-discrimination. It also upholds the political vision of global migration governance, as agreed on by states and implemented by a substantial amount of 23 commitments.

It is true however that, as any other intergovernmental instrument, the GCM is not a perfect instrument. Similarly, the narrative promoted by the Compact is obviously not free from ambiguities (Pécoud, 2021; Panizzon and Luzia, 2023). Like many other intergovernmental instruments, the Compact is a compromise between competing interests following the anthological tension between national sovereignty and human rights (GCM, paras. 15c and f). As a product of interstate negotiations, its content is inevitably consensual and thus not ground-breaking. This is hardly surprising: one should not expect states to be creative in the area of migration.

Yet, the multilateralization of migration governance, as prompted and framed by the GCM, has quite significant implications that should not be underestimated. Migration is acknowledged as a common good. The GCM endorses migration as a question of shared responsibilities, which calls for a global approach, because “no country can address the challenges and opportunities of this global phenomenon on its own” (GCM, 2018, para. 11). While being a compromise between traditional countries of destination and of origin, the GCM does represent a significant political constraint for the Global North. Any future development of global migration governance must cope with a detailed list of commitments and related actions endorsed in the GCM by a vast number of states.

3. The global compact for migration as a collaborative framework: a policy without politics?

The GCM primarily intends to facilitate mobility (Crépeau, 2018). Its overall purpose is “to facilitate safe, orderly and regular migration, while reducing the incidence and negative impact of irregular migration through international cooperation and a combination of measures put forward in this Global Compact” (GCM, 2018, para. 11). Its overall tone and content still remain ambiguous: the objective of promoting pathways for regular

migration coexists with the aim of minimizing the adverse drivers and structural factors that compel people to leave their country of origin (GCM, 2018, Objectives 2 and 5).

The cardinal means to achieve the ambitious project of the GCM is multilateralism. The Compact presents itself as “a non-legally binding, cooperative framework that [...] fosters international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone, and upholds the sovereignty of States and their obligations under international law” (GCM, 2018, para. 5). The GCM is, accordingly, a facilitator of international cooperation and, as such, a catalyst of global migration governance. Its ambition is to generate consensus and confidence-building among states around a list of non-divisive issues agreed on by them and considered as the priorities to be addressed in a collective way.

The Compact identifies for this purpose a detailed set of 10 guiding principles, 23 objectives and 187 related actions. The guiding principles inform the content and implementation of the whole Compact. These cross-cutting and interdependent guiding principles endorse the central features of the GCM as an intergovernmental instrument, being structured by the following key considerations: (a) people-centered, (b) international cooperation, (c) national sovereignty, (d) rule of law and due process, (e) sustainable development, (f) human rights, (g) gender-responsive, (h) child-sensitive, (i) whole-of-government approach and (j) whole-of-society approach. While being framed by these principles, each objective contains a specific commitment of states, followed by a range of relevant actions to achieve it. This layered design results in the Compact appearing both complex and piecemeal. There is no clear articulation or priority between the 23 objectives.

Furthermore, the objectives vary in terms of scope and nature: some are primarily legal (such as Objective 13: Use migration detention only as a measure of last resort), whereas others are more political (Objective 23: Strengthen international cooperation and global partnerships). While most are a combination of legal, political and operational considerations, some are quite technical and narrow (such as Objective 20: Promote faster, safer and cheaper transfer of remittances), whereas others are much broader and open-ended (like Objective 19: Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries).

Similarly, the actions that are supposed to be taken by states to implement these objectives are eclectic. Some actions are legal and call for the development of new international agreements or the review of domestic legislation in line with the objectives of the Compact. Most of the actions are, nonetheless, purely operational, but resource-intensive, and include information-sharing, awareness-raising campaigns, technical assistance and training of states’ civil servants.

As such, this complex mix of legal, operational and institutional elements, comes close to, as I have developed elsewhere (Chetail, 2020a), a kaleidoscope. Its multifaceted elements are constantly changing and creating different patterns depending on the angle of the relevant issue and the related objective. While shedding light on the multidimensional reality of migration, the patterns displayed by the objectives and actions are so varied and interconnected that the overall picture remains segmented and distorted. Like a

kaleidoscope, the GCM breaks the vision down into a multitude of different but interrelated components of the same cross-cutting phenomenon.

While reflecting the composite nature of migration, the variety of the GCM objectives requires “a comprehensive and integrated approach to facilitate safe, orderly and regular migration,” as underlined by the Compact itself (GCM, 2018, para. 39). Its objectives make sense only when they are implemented together in a holistic manner. By underlining states’ commitment to ensure an “effective implementation of the Global Compact” as a whole, the GCM devotes an entire section to its implementation (GCM, 2018, paras. 39c and 40–47). The implementation of its commitments is mainstreamed through the establishment of three new mechanisms specifically established for this purpose: a capacity-building mechanism to support UN Member States in their implementation through knowledge-sharing and assistance in funding; a UN network on migration, bringing together UN agencies and related organizations on migration to ensure system-wide support to implementation; and a follow-up process to review their progress within the UNGA.

4. The international migration review forum: a return of realpolitik?

The establishment of a review mechanism represents an important innovation of the GCM to assess the progress made by states in its implementation. Indeed, it is not common for a soft law instrument to be accompanied by such a mechanism in charge of assessing its implementation. This represents an important change on its own, which was hardly imaginable one decade ago in the field of migration. This state-led process—called the “International Migration Review Forum”—takes place every 4 years within the UNGA. Its role is to serve as “the primary intergovernmental global platform for Member States to discuss and share progress on the implementation of all aspects of the Global Compact” (GCM, 2018, para. 49).

The first of these quadrennial reviews took place on May 16–20, 2022 in New York. In preparation of the first IMRF, 92 States had presented contributions reviewing the actions undertaken to implement the GCM. This engagement is not negligible, with a majority of the 152 states that adopted the GCM at the UNGA contributing to the review process. These contributions adopted different strategies of implementation—some states drafted new action plans and policies specific for promoting the GCM, others incorporated the GCM into existing domestic frameworks, and others indicated that the GCM’s objectives were already reflected in the frameworks in place (UN General Assembly, 2021).

There are, however, notable discrepancies in the quality and thoroughness of these contributions. At times, these discrepancies are evident within the same contribution, with some actions being thoroughly developed and others just briefly mentioned. Likewise, the level of detail varied significantly from one contribution to another. Certain actions and the results achieved were described in great detail, such as Argentina’s establishment of community sponsorship programmes to facilitate the welcoming of individuals fleeing armed conflict under Objective 5 (Argentina, 2021), Cameroon’s establishment of programmes to promote

the economic inclusion of women and their access to jobs under Objectives 2 and 7 (Cameroon, 2022), and Germany’s implementation of an action plan for the integration of migrants in accordance with Objective 16 (Germany, 2020).

Nevertheless, many of the contributions were not detailed and specific. Many only indicated the actions taken in general terms, mentioning for instance the existence of laws ensuring migrants’ access to certain services, but without addressing practical barriers migrants might face, like language difficulties and *de facto* discrimination (Colombia, 2020; Ivory Coast, 2021), the adoption of capacity-building programmes without specifying what kind of training and investments were provided (Canada, 2020; Gabon, 2022), the implementation of awareness-raising campaigns without indicating how they were carried out and which groups were targeted (Vietnam, 2020; Serbia, 2022). This practice renders it more difficult to assess states’ progress in the implementation of the Compact and the reality migrants face in those states. It also creates the risk that states present too favourable an image of how the GCM is implemented, ignoring or minimizing any problems (see also Farahat and Bast, 2022, p. 9–10). In fact, very few contributions incorporated criticism from non-state stakeholders and there is no clear information on the contributions submitted by these actors.

The contributions and other materials prepared by states and other stakeholders were discussed in four roundtables, each focused on a set of GCM objectives, and later in policy debates and plenary meetings. The results of these discussions inform the adoption by states’ representatives at the IMRF of a Progress Declaration, which intends to represent a consolidated summary and evaluation of their efforts to implement the GCM. The adoption of the Progress Declaration by consensus—and not by vote—sent an important signal of a commitment to furthering multilateral cooperation. The price to pay for this adoption by consensus was, however, high when it comes to the content of the declaration and, with the only exception of the US, it did not change the position of states that had rejected the adoption of the Compact. It is nonetheless worth mentioning that several states which abstained from the vote in 2018, such as Algeria and Chile, have subsequently endorsed the GCM during the IMRF.

The main interest of the Progress Declaration is to reaffirm the continuing relevance and importance of the GCM in framing global migration governance. Besides this, the declaration did not break new ground and may even appear as a step backwards when compared to the text of the Compact. Colin Rajah, the coordinator of the Civil Society Action Committee, called the adoption by consensus of the Progress Declaration “a bittersweet moment,” which evoked conflicting emotions following governments’ affirmation of the GCM’s underlying principles going forward alongside a weakened commitment to the landmark agreement’s objectives (Civil Society Action Committee, 2022).

Despite some positive references to systemic racism, wage theft and regularization, the overall content of the Declaration remains weak and disappointing. It also lacks any concrete guidance regarding the effective implementation of the Compact on the ground. The least one can say is that the Declaration is far below the expectations raised in 2018 just after the adoption of the Compact. Rajah (2022) explained in this sense that:

The GCM wasn't perfect, but it gave us hope and a direction to move forward, something we could build on in the years to come. Four years later, we feel that we are actually regressing. We then become more disappointed with the language of the next drafts of the declaration, and with how substantive issues were being dealt with.

He further observed that, during the drafting process of the Progress Declaration:

Around the second or third negotiations, Algeria began presenting an extreme position, rejecting many critical items of the draft in a very anti-migrant and anti-rights way. This gave other States, particularly some EU Member States, the U.S., and Australia, the opportunity to press for less ambitious language while appearing reasonable in comparison. [...] In the final stages of negotiations, we saw countries like the U.S. and Australia, who are ironically not GCM signatories, pushing for the idea that the Progress Declaration must be "inclusive," meaning that it should appeal to countries that haven't signed the GCM. That means that the declaration would have to be watered down even further from the GCM language. Words like "commitments" were replaced with "ambitions". The detention of children was one of the most fought over aspects of the declaration. [...] Overall, the Progress Declaration and the negotiations have been indicative of the global political climate. It's a symptom of a larger issue around global migration policy and governance taking place within the UN framework over the last 4 years (ibid.)

It is true that the main reason for the poor achievements of the Progress Declaration is clearly political and reflects the prevailing atmosphere after almost 3 years of the pandemic. Although the Compact is relevant and, in fact, well-equipped to address the numerous challenges of COVID-19, the reactions of states were at the opposite of the collaborative and rights-based approach promoted by the GCM. COVID-19 has witnessed the resurgence of unilateralism, the rise of discrimination against migrants and the multiplication of illegal entry bans in violation of international law (Chetail, 2020b; World Health Organization, 2021). In times of crisis, border closures provide a typical avenue for governments to reassure their citizens and bolster a national sense of belonging while providing an ideal scapegoat for their own failure and negligence. COVID-19 also offered a formidable pretext for populists to experiment with their nationalist agenda, as exemplified by Trump's gesticulation in the US.

In such a politically toxic climate, the very fact that UN member states have reaffirmed the enduring relevance of the Compact during the IMRF may be viewed as an achievement on its own. Nevertheless, the political context should not be seen as an excuse for inaction or, even worse, a tactic to mask violations of migrants' rights. The risk inherent in such a trend is to return to business as usual as if the GCM had not been adopted. Despite its own drawbacks as an intergovernmental instrument, the Compact still has a vital role to play in promoting mobility and defending the cause of migrants' rights.

5. The way forward to a principled implementation of the global compact for migration

Whatever the limited results achieved in the first IMRF, the Progress Declaration cannot change the commitments made by states in the Global Compact. Given the volatile political context of our times, it is better to maintain the focus on the principles and commitments of the GCM, while paying due regard to the specific role and nature of soft law in global migration governance.

5.1. A commitment is a commitment

A key characteristic of the GCM is to express 23 specific commitments of states for each of the objectives identified therein. The very term "commitment" signals a stronger sense of engagement when compared to other soft law instruments, which are merely rhetorical devices with vague and open-ended formulations. After all, a commitment remains a commitment. States are supposed to comply with it, even if it is not legally enforceable before a court. This is exemplified in many different fields of international law, where it is further recognized that "compliance with non-binding norms and instruments is extremely good and probably would not have been better if the norms were contained in a binding text" (Shelton, 2010, p. 163).

Inversely, the violation of a legally binding commitment at the international level is rarely followed by a legal sanction, because, in contrast with domestic law, the enforcement regime of international law remains decentralized and primarily depends on the reaction of the injured states. As observed by the *International Court of Justice* (1966, para. 86), "in the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception".

Furthermore, the fact that a given instrument has no binding force does not mean that it has no legal effect, even if lawyers often confuse the two. As I have discussed elsewhere, a soft law instrument adopted by states may have several legal effects, depending on its wording and conditions of adoption (Chetail, 2019, p. 283–300). An important legal effect of soft law is to raise an expectation of compliance, unless the state concerned clearly expresses its intention not to follow it. Put differently, states are expected to do what they have agreed on and declared to do in a soft law instrument. Joseph Gold well summarizes this subtle—albeit frequently misunderstood—effect of non-binding instruments: "the essential ingredient of soft law is an expectation that the states accepting these instruments will take their content seriously and will give them some measure of respect," because "a common intent is implicit in the soft law as formulated, and it is this common intent, when elucidated, that is to be respected" (Gold, 1983, p. 43). This expectation of compliance does not concern all soft law instruments, but only those exhibiting a clear commitment that has been agreed on by states.

The expectation of compliance remains relatively high for the GCM simply because its very *raison d'être* is to agree upon commitments which lead to actions and are to be implemented

by states. States have repeatedly expressed their determination to implement the Compact in practice. In stark contrast with previous soft law instruments adopted in this field, the Compact has been adopted with a view to “ensuring that the words in this document translate into concrete actions for the benefit of millions of people in every region of the world” (GCM, 2018, para. 14). Their commitment to ensure the “effective implementation of the Global Compact” has been reaffirmed on several occasions (GCM, 2018, paras. 39 c and 40–47).

If a state fails to honor its commitments, it has to give reasons for its departure from the line of conduct agreed on in the relevant instrument (Virally, 1956, p. 86–91; Amerasinghe, 2010, p. 177–178). When discussing the legal value of the UNGA resolutions, Judge Lauterpacht explained in the *Voting Procedure Case of the International Court of Justice* (1955, p. 118–119), “a Resolution recommending [...] a specific course of action creates *some* legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation [...]” The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If [...] it decides to disregard it, it is bound to explain the reasons for its decision’ (International Court of Justice, 1955). The expectation of compliance remains a key reminder for states to comply with their commitments in implementing the GCM.

5.2. The global compact is not a *menu à la carte*

In addition to reminding states of their commitments and the legal effects attached to them, another strategic avenue to promote a principled implementation of the Compact is to ensure that it is applied as a whole. The GCM is not a *menu à la carte*. All the 23 commitments must be taken into account and implemented as a whole in accordance with the very purpose of the Compact which underpins “the centrality of a comprehensive and integrated approach to facilitate safe, orderly and regular migration” (GCM, 2018, para. 39; see also paras. 11–15).

The comprehensiveness of the GCM is inherent in its very rationale: it “offers a 360-degree vision of international migration and recognizes that a comprehensive approach is needed to optimize the overall benefits of migration, while addressing risks and challenges for individuals and communities in countries of origin, transit and destination” (GCM, 2018, para. 11). This all-encompassing approach represents the hallmark of the GCM and its main added value when compared to the other binding and non-binding instruments in the field of migration. The inclusive scope of the Compact is well reflected by its broad thematic coverage, which addresses a vast number of topical issues throughout the migration cycle, be it upon departure from the country of origin, during migrants’ journey (including in transit countries), upon arrival and stay in the country of destination, or upon return to the country of origin.

Yet, the first IMRF revealed the temptation of states to adopt a much more selective and fragmented approach. Many states did not address all objectives of the GCM, choosing instead to focus on those deemed as a priority within their national contexts (see

for instance: Finland, 2022; Greece, 2022). Such selective reporting hinders an effective evaluation of those states’ progress and of the GCM’s overall impact. More fundamentally, it does raise the concern that states may choose to implement only some of the Compact’s objectives while ignoring others (see also Farahat and Bast, 2022, p. 9–11; Lavenex, 2020, p. 686–687). The selective focus of states during the last IMRF represents a dangerous trend, which is in blatant contradiction with the very rationale of the GCM.

This policy of pick and choose not only creates a double standard, but it also exacerbates the divide between countries of origin and countries of destination. Typically, the most referred to objective in Western states’ contributions are those related to border security and migration control, such as objectives 1 (collection and use of disaggregated data), 5 (enhancing pathways for regular migration), 9 (strengthening the response to smuggling of migrants), and 10 (preventing, combatting, and eradicating trafficking in persons). In contrast, many contributions from countries of origin focus on the actions taken to implement the GCM in relation to their own nationals abroad, saying little or nothing about the condition of migrants within those states (see for instance Bhutan, 2020; Guatemala, 2020).

Although this kind of selective reporting does not necessarily mean that no measures for the implementation of other objectives have been adopted, it does raise the concern that states may be cherry-picking those objectives on which they have advanced the most, downplaying challenges and shortcomings that exist in relation to other objectives. More generally, the reporting mechanism, which was meant to consolidate the implementation of the GCM, may risk devaluing or diluting this ambition and the consensus around which the Compact is built because of the selective and deflective reporting of some states. It calls for an inclusive and ambitious implementation with due regard to the letter and spirit of the Compact.

5.3. Human rights of migrants are not negotiable

The commitments of states under the GCM shall not be carried out at the expense of migrants’ rights. The human rights of migrants are not negotiable, because migrants’ rights are human rights and, as such, they are legally binding for all states under both treaty law and customary international law. One should acknowledge that the GCM does reaffirm in clear-cut terms the “overarching obligation to respect, protect and fulfil the human rights of all migrants, regardless of their migration status” (GCM, 2018, paras. 11 and 15 c). Interestingly, the principle of non-regression is endorsed by the GCM among the guiding principles underpinning the whole Compact (GCM, 2018, para. 15 f).

More generally, due respect for international law, in general, and for human rights law, in particular, is reaffirmed 56 times across the 35 page-long document. Although there is nothing comforting in this, the renewed commitment of states toward the human rights of all migrants represents an important acknowledgement, if not the main accomplishment of the Compact. In too many countries, abuses and mistreatments committed against migrants

have become an integral component of their national migration policies. Against this background, reaffirming the human rights of migrants is all but trivial. Many commitments of the GCM focus on some of the most basic rights, such as the prohibition of racism and discrimination, the best interests of the child as a primary consideration in all situations concerning migrant children, the right to family life, access to basic services, the prohibition of arbitrary detention, as well as due process guarantees at the border and in the context of return (Gest et al., 2019; Guild et al., 2019; Chetail, 2020a; Desmond, 2020).

However, it is crucial that the implementation of the Compact does not erode existing obligations that are legally binding under international human rights law. Soft law can be used to weaken the authority of established legal rules. States may water down their binding commitments through several means. This strategy of evasion can be done either in a barefaced way, by formulating soft norms that are contrary to legally binding norms, or in a subtler manner, by circumventing legally binding norms through the endorsement of concurrent non-binding norms or with the adoption of an alternative interpretation of binding ones.

The position of the US on the GCM is the epitome of this strategy. For instance, it asserts, in blatant contradiction with the text of the Compact and the current state of international law, that the principle of *non-refoulement* is confined to Article 33 of the Convention relating to the Status of Refugees and Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (USA, 2021, p. 2). It also argues, despite indications to the contrary, that the references of the GCM to due process and other protections, including for migrants in US government custody and in the context of forced removals, are consistent with the international legal obligations of the US (ibid).

Too frequently, the rhetoric of soft law is a mask of hard practice. The use of soft law starkly contrasts with the poor record of compliance with hard law. Another example may be given by Kuwait during the regional review reporting process of the GCM. When referring to the measures taken to implement Objective 4 (Ensure that all migrants have proof of legal identity and adequate documentation), the report overtly emphasizes that: “In Kuwait, article 12 of Law No. 68/2015 on domestic workers stipulates that ‘employers are prohibited from keeping any identification pertaining to domestic workers...’” (Arab Regional GCM Review Report, 2022, p. 20). This legislation not only predates the GCM but remains poorly implemented in practice.

Similarly, the Global Compact shall not become an excuse for not adopting a binding instrument or not ratifying existing conventions. This is particularly the case when it comes to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), which has only 58 ratifications, without any ratifications by Western states. The Western politics of non-ratification of this UN convention is well documented and represents an important missed opportunity to develop a sound and comprehensive approach to labor migration (Chetail, 2019, p. 238–250). It is intriguing that the

GCM does not explicitly call for its ratification, whereas it does so for the Palermo Protocols against human trafficking and the smuggling of migrants. The ICRMW is only mentioned once and in a footnote of the GCM’s preamble referring to, in very general terms, “the other core international human rights treaties.” This raises the question of whether the GCM is not used as a deliberate strategy of Western states to avoid any binding commitments on labor migration.

Against this background, the ICRMW risks being further sidelined as discussion on migration becomes channeled through the GCM. One way to prevent its marginalization is to reaffirm the importance of the ICRMW in implementing the GCM. Indeed, there is nothing incompatible between the two instruments. While the GCM is more comprehensive than the ICRMW, their respective content converges in a very substantive way (Desmond, 2022). Ratifying the ICRMW may become an important measure to implement the GCM given that many of its commitments concern migrant workers and labor mobility. Interestingly, the GCM is even going one step further than the ICRMW, as the former commits to facilitate labor mobility (GCM, 2018, Objective 5), whereas the latter does not contain any provision on the admission of migrant workers and, in fact, defers to national sovereignty on this issue (ICMRW, 1990, article 79). The GCM’s call for developing international law in the area of labor mobility is reinforced and supplemented by several other objectives dedicated to migrant workers. In particular, states commit to facilitate fair and ethical recruitment (objective 6), to enhance mutual recognition of skills, qualifications and competences of migrant workers (Objective 18) and to ensure the portability of their social security entitlements and earned benefits (Objective 22) (Cholewinski, 2020).

6. Conclusion

Despite its aspirational nature, the GCM has forged a common understanding among states about the challenges and opportunities of migration, as well as the ways to go forward in addressing them, through a detailed range of commitments and related actions. Notwithstanding its shortcomings, it is more needed than ever as a counter-narrative to the politically toxic debates surrounding migration at the domestic level. Despite its ambiguities and limitations, the GCM sanctions a common vision of global migration governance and identifies the means to achieve it. It has the potential to improve the situation on the ground provided its implementation is taken seriously by states and with due regard to their legally binding obligations under international law.

While reaffirming the rule of law as an integral component to migration governance, the GCM does exemplify the complex and ambiguous relations between soft law and hard law. Soft law and hard law are not bound to be mutually exclusive. They may be mutually reinforcing provided they are implemented in a cogent and integrated way with due regard to their specificities and commonalities. The GCM can make a difference on the ground if, and only if, it works in tandem with legally binding norms and instruments. If

not, it may eventually become nothing else than a mere smokescreen, if not a masquerade, for the patent violations of migrants' rights.

Data availability statement

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the author.

Author contributions

The author confirms being the sole contributor of this work and has approved it for publication.

References

- Amerasinghe, C. F. (2010). *Principles of the Institutional law of International Organizations*. Cambridge: CUP.
- Arab Regional GCM Review Report. (2022). Available online at: https://migrationnetwork.un.org/system/files/docs/Arab%20Regional%20Global%20Compact%20for%20Migration%20Review%20Report_EN.pdf (accessed June 14, 2023).
- Argentina. (2021). *Review Report*. Available online at: <https://www.un.org/sites/un2.un.org/files/imrf-argentina.pdf> (accessed June 14, 2023).
- Bhutan (2020). *National Voluntary Review (Department of Multilateral Affairs, Ministry of Foreign Affairs, 2020)*. Available online at: https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/bhutan_voluntary_gcm_survey_report.pdf (accessed June 14, 2023).
- Cameroon (2022). *Rapport D'examen National Volontaire de la Mise en œuvre du Pacte Mondial pour des Migrations Sûres, ordonnées et régulières*. Available online at: <https://www.un.org/sites/un2.un.org/files/imrf-cameroon.pdf> (accessed June 14 2023).
- Canada (2020). *GCM Regional Review – Canada's Submission of Voluntary Input*. Available online at: https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/goc_response-voluntary_inputs_to_gcm_regional_review-final.pdf (accessed June 14, 2023).
- Chetail, V. (2019). *International Migration Law*. Oxford: Oxford University Press.
- Chetail, V. (2020a). The global compact for safe, orderly and regular migration: a kaleidoscope of international law. *Int. J. Law Context* 16, 253–268. doi: 10.1017/S1744552320000300
- Chetail, V. (2020b). Crisis without borders: what does international law say about border closure in the context of Covid-19?. *Front. Polit. Sci.* 2020, 1–6. doi: 10.3389/fpos.2020.606307
- Cholewinski, R. (2020). The ILO and the global compact for safe, orderly and regular migration. *Int. J. Law* 16, 304–320. doi: 10.1017/S174455232000336
- Civil Society Action Committee. (2022). *Civil Society Expresses Mixed Emotions on Adoption by Consensus of IMRF Progress Declaration*. Available online at: <https://csactioncommittee.org/civil-society-expresses-mixed-emotions-on-adoption-of-imrf-progress-declaration/> (accessed June 14, 2023).
- Colombia (2020). *Revisión Regional sobre la Implementación del Pacto Mundial para la Migración Segura, Ordenada y Regular en América Latina y el Caribe (Presidencia de la República de Colombia - Gerencia para la Frontera y la Migración desde Venezuela, 2020)*. Available online at: https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/colombia.pdf_rr_0.pdf (accessed June 14, 2023).
- Crépeau, F. (2018). Towards a mobile and diverse world: "facilitating mobility" as a central objective of the global compact on migration. *IJRL* 30, 650. doi: 10.1093/ijrl/eeey054
- Desmond, A. (2020). A new dawn for the human rights of international migrants? Protection of migrants' rights in light of the UN's SDGs and global compact for migration. *Int. J. Law Context* 16, 222–38. doi: 10.1017/S1744552320000282
- Desmond, I. (2022). From complementarity to convergence: the un global compact for migration and the UN migrant workers convention. *Verfassung und Recht Übersee* 83, 1–6. doi: 10.5771/0506-7286-2022-1-83
- Farahat, A., and Bast, J. (2022). A global view on the global compact for migration – introduction. *Verfassung und Recht Übersee* 3, 1–3. doi: 10.5771/0506-7286-2022-1-3
- Finland (2022). *Finland's Voluntary Input to Contribute to the Regional Review for the Global Compact for Safe, Orderly and Regular Migration (GCM)* (Ministry of Foreign Affairs and Ministry of the Interior, 2022). Available online at: <https://www.un.org/sites/un2.un.org/files/imrf-finland.pdf> (accessed June 14, 2023).
- Gabon (2022). *Bilan de la mise en œuvre du Pacte mondial pour des Migrations Sûres, Ordonnées et Régulières*. Available online at: <https://www.un.org/sites/un2.un.org/files/imrf-gabon.pdf> (accessed June 14, 2023).
- GCM (2018). *Global Compact for Safe, Orderly and Regular Migration (A/RES/73/195)*.
- Germany (2020). *Global Compact for Safe, Orderly and Regular Migration Regional Review Contribution by the Federal Republic of Germany*. Available online at: <https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/germany.pdf> (accessed June 14, 2023).
- Gest, J., Kyse, I., and Wong, T. (2019). Protecting and benchmarking migrants' rights: an analysis of the global compact for safe, orderly and regular migration. *Int. Migr.* 60, 635. doi: 10.1111/imig.12635
- Gold, J. (1983). Strengthening the soft international law of exchange arrangements. *AJIL* 77, 443. doi: 10.2307/2201074
- Greece (2022). *First International Migration Review Forum on the UN Global Compact for Safe, Orderly and Regular Migration: Voluntary GCM Review by Greece* (Ministry of Migration and Asylum, 2022). Available online at: <https://www.un.org/sites/un2.un.org/files/imrf-greece.pdf> (accessed June 14, 2023).
- Guatemala (2020). *Revisión Regional sobre la Implementación del Pacto Mundial para la Migración Segura, Ordenada y Regular en América Latina y el Caribe* (Ministerio de Relaciones Exteriores, 2020). Available online at: https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/guatemala_-_cuestionario_sin_datos_personales.pdf (accessed June 14, 2023).
- Guild, E., Basaran, T., and Allinson, K. (2019). From zero to hero? An analysis of the human rights protections within the global compact for safe, orderly and regular migration. *Int. Migr.* 43, 609. doi: 10.1111/imig.12609
- Hungary (2022). *Explanation of Position by Hungary Adoption of the Progress Declaration of the International Migration Review Forum*. Available online at: https://migrationnetwork.un.org/system/files/docs/Hungary_EoP_IMRF_Progress%20Declaration.pdf (accessed June 14, 2023).
- ICMRW (1990). *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (A/RES/45/158)*.
- International Court of Justice (1955). *South-West Africa—Voting Procedure (Advisory Opinion) 1955 ICJ Rep 67 Separate Opinion of Judge Lauterpacht*, 118–119
- International Court of Justice (1966). *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) Second Phase (Judgment of 18 July 1966) ICJ Report* 6.
- Ivory Coast (2021). *Examen et la mise en œuvre du Pacte mondial pour des migrations (PMM) sûres, ordonnées et régulières en Côte d'Ivoire (Office National de*

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The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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- la Population and Ministère du plan et du développement, 2021). Available online at: <https://migrationnetwork.un.org/resources/cote-divoire-gcm-voluntary-national-report-regional-review-africa> (accessed June 14, 2023).
- Lavenex, S. (2020). The UN global compacts on migration and refugees: a case for experimentalist governance? 26 *Global Gov.* 673, 4009. doi: 10.1163/19426720-02604009
- Panizzon, M., and Luzia, J. (2023). Through the looking-glass: the IOM recasting the safe, orderly and regular migration narrative at the UN and in West Africa. *Geopolitics* 17, 1–32. doi: 10.1080/14650045.2023.2212239
- Pécoud, A. (2021). Narrating an ideal migration world? An analysis of the global compact for safe, orderly and regular migration. *Third World Q.* 42, 16–33. doi: 10.1080/01436597.2020.1768065
- Peters, A. (2018). *The Global Compact for Migration: To Sign or Not to Sign*. EJIL: Talk! Available online at: <https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/> (accessed June 14, 2023).
- Rajah, C. (2022). "On the Global Compact, We Can and Need To Do Better." Available online at: <https://csactioncommittee.org/on-the-global-compact-we-can-and-need-to-do-better/> (accessed June 14, 2023).
- Serbia (2022). *Addendum to the Voluntary Contribution of the Republic of Serbia to the Status of Implementation of the Global Compact for Safe, Orderly and Regular Migration submitted in 2022*. Available online at: <https://www.un.org/sites/un2.un.org/files/imrf-serbia.pdf> (accessed June 14, 2023).
- Shelton, D. (2010). International law and relative normativity. *Int. Law* 163, 6. doi: 10.1093/ie/9780199565665.003.0006
- UN General Assembly (2021). *Global Compact for Safe, Orderly and Regular Migration, Report of the Secretary General*. UN Doc A/76/642.
- USA (2021). *Revised National Statement of the United States of America on the Adoption of the Global Compact for Safe, Orderly and Regular Migration December 17, 2021*. Available online at: <https://www.state.gov/wp-content/uploads/2021/12/GCM.pdf> (accessed June 14, 2023).
- Vietnam (2020). *Vietnam's Response to the Voluntary GCM Review*. Available online at: https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/viet_nams_response_to_gcm_voluntary_review.pdf (accessed June 14, 2023).
- Virally, M. (1956). La valeur juridique des recommandations des organisations internationales. *Annuaire Français Int.* 6, 66 doi: 10.3406/afdi.1956.1226
- World Health Organization (2021). *Refugees and Migrants in Times of COVID-19: Mapping Trends of Public Health and Migration Policies and Practices*. Available online at: <https://www.graduateinstitute.ch/library/publications-institute/refugees-and-migrants-times-covid-19-mapping-trends-public-health> (accessed June 14, 2023).
- Wouters, J., and Wauters, E. (2019). *The UN Global Impact for Safe, Orderly and Regular Migration: Some Reflections*. Working Paper N° 210