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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

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Abstract

This paper undertakes a sceptical analysis of the significance for the protection of migrants' rights represented by the Sustainable Development Goals (SDGs) 2030 and the UN Global Compact for Migration (GCM). Despite the positive view taken by many of these frameworks, I argue that, taken together, the SDGs and the GCM represent an acknowledgement of the failure of the international system of human rights protection to deal effectively with the protection of migrants' rights. With particular reference to the UN Migrant Workers Convention, I argue that adoption of the GCM underscores a decisive shift from the realm of binding international law to soft law for the purposes of dealing with migrants' rights. While acknowledging some of the signal benefits of this new regime, I highlight some of the many signs suggesting that these twin international developments do not guarantee progress on the road to the protection of migrants' rights.

Keywords: human rights; migration; soft law; UN Migrant Workers Convention (ICRMW); Global Compact for Safe, Orderly and Regular Migration; International Organisation for Migration (IOM)

1 Introduction

The Global Compact for Safe, Orderly and Regular Migration (GCM),¹ endorsed by the UN General Assembly in December 2018, has been heralded as a milestone by the UN (GCM, para. 6) and assessed by scholars as 'innovative' (Kälin, 2018, p. 664), 'an excellent foundation' (Klein Solomon and Sheldon, 2018, p. 590), 'a remarkably strong and coherent' conceptual framework for facilitating mobility (Crépeau, 2018, p. 656) and 'a unique endeavour without equivalent among all the other ... instruments on migration' (Chetail, 2019, p. 331). Similarly, many have highlighted the fact that, with the adoption of the 2030 Agenda for Sustainable Development² in 2015, the main feature of which are the Sustainable Development Goals (SDGs), the global development agenda for the first time contains explicit commitments on migration (Kraly and Hovy, 2020, p. 2; Klein Solomon and Sheldon, 2018, p. 584; Piper, 2017). These twin international developments, which I term the post-2015 migrants' rights protection regime, are of more than academic interest, as they affect a large and growing number of people: it is estimated that international migrants today number 272 million and constitute 3.5 per cent of the world's population (UN DESA, 2019, pp. 1, 7).

I begin the paper by acknowledging the progress and positive potential represented by the SDGs and the GCM in relation to the protection of migrants' rights at the international level. I then put forward the argument as to why the post-2015 migrants' rights protection regime created by both

¹Global Compact for Safe, Orderly and Regular Migration, GA (11 January 2019) UN Doc A/RES/73/195 (2019).

²Transforming our world: the 2030 Agenda for Sustainable Development, GA (21 October 2015) UN Doc A/RES/70/1 (2015) (Agenda 2030).

frameworks represents an acknowledgement of the failure of binding international law to secure protection of migrants' rights. I draw on the overlap between the GCM and the UN Migrant Workers Convention (ICRMW) to explain how the move to what is essentially an overt international-level acceptance of soft law as the primary vehicle for dealing with migrants' rights is largely consistent with states' treatment of migrants' rights in the past, but bodes ill for future rights protection prospects. Finally, I use the new relationship between the UN and the IOM and the IOM's role in implementation of the GCM to illustrate the continuing risk that migrants' rights issues will be dealt with informally under the radar of the UN and its related human rights standards, despite the progress represented by conclusion of the GCM within the UN and the centrality of human rights in the GCM itself.

2 Migrants' rights from shadow to light? The 2030 Sustainable Development Agenda and the GCM

2.1 The 2030 Sustainable Development Agenda

The failure to achieve the broad aim of the eight UN Millennium Development Goals (MDGs)³ to reduce poverty (Hulme, 2009) by the target date of 2015 led the international community to adopt a successor blueprint for future global prosperity, namely the 2030 Agenda for Sustainable Development. The 2030 Agenda, which seeks to eliminate poverty and facilitate realisation of the human rights of all persons by 2030, was an important milestone on the long road to recognition and protection of migrants' rights at the international level. While the MDGs had been directed at countries in the developing world, and silent on the topic of international migration (McGregor, 2020), the 2030 Agenda is global in its application and explicitly addresses the issues of migration and migrants' rights. It expressly acknowledges 'the positive contribution of migrants for inclusive growth and sustainable development' while pledging 'international cooperation to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status' (Agenda 2030, para. 29).

Furthermore, migrants' needs are overtly referenced in two of the Agenda's seventeen goals, with the international community committing to: protect labour rights and promote safe work for all, including migrant workers, in particular women migrants; facilitate orderly, safe, regular and responsible migration, including through the implementation of planned and well-managed migration policies; and reduce to less than 3 per cent the transaction costs of migrant remittances by 2030 (Goals 8.8; 10.7; 10.c). Arguably, most of the seventeen SDGs and associated 169 targets are of direct relevance to migrants, even where their particular needs are not explicitly invoked (McGregor, 2020). Indeed, the objective of the Agenda to achieve the SDGs 'for all' and to ensure that no one is left behind mean that, even in the absence of any direct reference to migration or migrants, the rights and needs of international migrants must be given specific attention if the SDGs are to be meaningfully realised. Failure to ensure that goals such as gender equality, decent work and the availability of water and sanitation are achieved with respect to migrants will mean that such goals will, by definition, not have been achieved.

The historical tendency to overlook the protection of migrants' rights at the international level is both produced and exacerbated by their lack of a strong political voice (Crépeau, 2017, p. xiv; Pécoud, 2017, p. 36) and the limitations of data on the numbers of migrants in any given state at any given time (GCM, para. 17). The traditional pattern of neglect discernible at the international level towards the topic of migrants' rights means, therefore, that the energetic efforts that secured the explicit inclusion of migrants in the 2030 Agenda (McGregor, 2020, pp. 287–288) must be applauded.

Achieving the SDGs with respect to migrants, however, poses particular challenges. The very fact of being outside their country of citizenship puts many international migrants in a situation of

³United Nations General Assembly (2000), United Nations Millennium Declaration, Resolution adopted by the General Assembly, A/RES/71/1, A/RES/55/2, 18 September.

vulnerability. Those in an irregular status are at heightened risk of abuse and exploitation.⁴ International migrants are therefore amongst the groups most likely to be overlooked as states put in place action plans for implementation of the SDGs. Indeed, recent SDG monitoring found that only slightly more than half of the 105 countries surveyed have policies on migrants' rights (UN, 2019, pp. 13, 43) while a similarly low percentage of a similar number of states has in place a comprehensive set of policy measures to facilitate orderly, safe, regular and responsible migration (UN, 2020, p. 45). The risk of migrants' being neglected is particularly pronounced in states in the developing world where infrastructure and resource constraints mean that such countries often fail to secure even the basic needs of their own citizens. Indeed, the deteriorating human rights situation in states across the Global South as a result of the COVID19 pandemic⁵ is having a particularly adverse effect on migrants (UN, 2020, pp. 15, 58).

2.2 The GCM

The explicit incorporation of migration into global development policy that occurred with the adoption of the Sustainable Development Agenda in 2015 (Piper, 2017, p. 232; Thompson, 2015) coincided with a migration and refugee 'crisis' that prompted the international community to come together under the auspices of the UN in 2016 to adopt the New York Declaration for Refugees and Migrants⁶ – a product of the first-ever UN General Assembly meeting to be devoted entirely and specifically to the issue of migration (Chetail, 2019, p. 323). The Declaration, notable for the priority it affords to human rights, articulated the commitment of the international community to protecting people on the move and set in motion a process of consultations and inter-governmental negotiations that culminated in December 2018 in the endorsement by the UN General Assembly of the GCM and a separate Global Compact on refugees.

Heralded by the UN as 'the first-ever UN global agreement on a common approach to international migration in all its dimensions',⁷ the GCM is an ambitious document that appears to be all things to all people. It seeks to facilitate a co-operative international approach so as to maximise the overall benefits of migration, while also addressing its challenges, for individuals and communities in countries of origin, transit and destination. It seeks to reduce 'irregular and involuntary migration by addressing conditions that prevent people from achieving the SDGs; and ensure that migration that occurs does so in a safe, orderly and regular manner' (Aleinikoff and Martin, 2018, p. 15). The co-operative framework for ensuring safe, orderly and regular migration rests on the GCM's ten guiding principles and its twenty-three objectives, the latter to be realised through implementation of the 187 actions identified in the document. The document therefore contains both detailed, practical recommendations as well as vaguely formulated commitments to protecting migrants.

The GCM is firmly rooted in, and therefore draws on various branches of, international law, including human rights. It rests on the purposes and principles of the UN Charter (which include the promotion of human rights) and the key treaties protecting human rights (GCM, paras 1, 2). Indeed, the Compact is replete with references to human rights, with one of its ten guiding principles being respect, protection and fulfilment of the human rights of all migrants. At the same time, however, it reflects the long-standing tension between the international legal principle of state sovereignty and protection of human rights (Caportorti, 1983) – a tension that is particularly pronounced in

⁴Committee on Migrant Workers, General Comment 2 on the rights of migrant workers in an irregular situation and members of their families, CMW (28 August 2013) UN Doc CMW/C/CG/2 (2013), para. 2.

⁵'Global monitor of COVID-19's impact on democracy and human rights', *International Institute for Democracy and Electoral Assistance*. Available at <https://www.idea.int/gso-d-indices/about-covid19>. All Internet sources were accessed on 1 August 2020.

⁶New York Declaration for Refugees and Migrants, GA (3 October 2016) UN Doc A/RES/71/1 (2016).

⁷See e.g. Intergovernmental Conference on the Global Compact for Migration. Available at <https://www.un.org/en/conf/migration/global-compact-for-safe-orderly-regular-migration.shtml>; and UN Refugees and Migrants: <https://refugeemigrants.un.org/migration-compact>.

the case of migrants' rights claims that often fall in the face of states' sovereign exclusionary powers (Bosniak, 1991). The GCM accordingly 'upholds' the sovereignty of states and 'reaffirms' their sovereign right 'to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law' (GCM, paras 7, 15, 27). The notable absence from the Compact of a specific objective on human rights (Pécoud, 2020a) indicates that it will leave undisturbed the tendency to resolve the tension between state powers of migration control and migrants' rights in favour of the former.

Similarly, though the GCM notes that refugees and migrants may face many common challenges and similar vulnerabilities and are entitled to the same universal human rights and fundamental freedoms, it maintains the long-standing and problematic dichotomy between migrants and refugees (Cawley and Skleparis, 2018; Costello, 2018; Motomura, 2020, pp. 479, 495) by noting that they are distinct groups governed by separate legal frameworks (GCM, paras 3–4). Thus, while ambitious in terms of its human rights-based co-operative framework for addressing international migration within the UN, the GCM is at the same time a strong endorsement of the status quo concerning states' sovereign powers of migration control and the existing legal regimes regulating different categories of migrant. Beyond reflecting the status quo, however, the GCM also indexes a definitive transfer of migrants' rights protection from the realm of hard law to that of soft law.

2.3 The fatal flaw?

There are cast-iron linkages between the Sustainable Development Agenda and the GCM. Indeed, the very title of the GCM is taken directly from one of the aspirations articulated in the former document (Agenda 2030, para. 29). Both documents are 'grounded in' international human rights law. The GCM seeks to achieve Objective 2 on the reduction of adverse factors forcing people to leave their country of origin through, inter alia, implementation of all SDGs, and notes that migration contributes to realising the goals of the 2030 Agenda (GCM, para. 15).

However solid their respective bases in international human rights law, and however concordant their mutually referential framework, both documents ultimately fall within the realm of soft law. The greatest consequence of these internationally agreed documents is their singular potential for lack of consequence: neither the SDGs nor the GCM imposes any binding legal obligation on states. The global consensus articulated in the Sustainable Development Agenda on the need for a comprehensive international response to ensure safe and regular migration, and the unprecedented flurry of international activity that generated the GCM, have essentially resulted not in enforceable rights for migrants, but in the articulation of the global community's aspirations for the rights-respecting co-ordination of international migration. This does not necessarily bode well for the protection of migrants' rights.

3 The ineluctable retreat of migrants' rights to the realm of soft law

While binding or 'hard' law concerning relations between and among states comprises rules of customary international law and treaties (Shaw, 2017, p. 5), the international arena has been home to a surge of 'soft' law developments in recent decades (Chetail, 2019, pp. 280–281). Soft law – important and influential but ultimately non-binding documents that are not subject to formal legal implementation (Shaw, 2017, pp. 87–88) – appears to be the sphere to which the protection of migrants' human rights has been ineluctably confined. This relegation of migrants' human rights to the realm of unenforceable goal-setting frameworks and soft law cannot, however, come as much of a surprise to seasoned observers of the treatment of migrants' rights at the international level. While the foundation stone of the international human rights regime was laid in 1948 when the UN General Assembly adopted the Universal Declaration of Human Rights⁸ (Glendon, 2001), the following two decades

⁸Universal Declaration of Human Rights (UDHR), GA Res 217A (12 December 1948) UN8 Doc A/810 (1948).

of human rights discussions at the UN were marked by an almost complete silence on the issue of migrants' rights (Grant, 2011, p. 32). It was not until 1985 that the UN General Assembly adopted a resolution focused on the universal protection of migrants' rights. The Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live⁹ was brief and, by its very nature, without binding legal force. It is noteworthy, however, for recognising not only the rights of those who were lawfully present in a host state, but also the rights of irregular migrants.

The acceptance of the need to make specific provision for migrants in the international system of rights protection did ultimately generate a binding international treaty that would impose migrant-specific obligations on ratifying states. The 1990 UN International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families (UN ICRMW),¹⁰ however, failed to gain the same wide endorsement from the international community as other core human rights treaties elaborated for other constituencies at particular risk of rights violations, as I discuss presently. States' aversion to formal multilateral engagement on international migration (Desmond, 2017a, pp. 300–304; Oelgemöller, 2011) has led them instead to address such migration through soft law. The informal dialogue and voluntary, non-binding processes outside the UN preferred by states, however, facilitates a lack of accountability, monitoring and oversight¹¹ that is problematic from the perspective of rights protection (Crépeau and Atak, 2016) and risks exacerbating the fragmentation of international migration law (Chetail, 2014, p. 9).

4 The UN ICRMW and the GCM: redundant repetition or smooth symbiosis?

4.1 The UN ICRMW: understanding its adoption and rejection

Adopted by consensus by the UN General Assembly in 1990, the UN ICRMW is one of the ten core international human rights instruments and the most comprehensive international treaty in the field of migration and human rights. The overall structure and underlying rationale of the ICRMW are similar to those of the other core international human rights treaties adopted since the late 1970s. Like the Conventions on the Rights of the Child (CRC)¹² and Persons with Disabilities (CRPD),¹³ the ICRMW takes the rights set out in the International Bill of Human Rights, namely the UDHR, ICCPR¹⁴ and ICESCR,¹⁵ and codifies them in relation to a particularly vulnerable constituency, in this case migrant workers and members of their families.

Though the initial proposals for the ICRMW were prompted by concern for human rights abuses being suffered by migrants, the Convention has its roots in labour protection. Indeed, some were of the view that there was no need for elaboration of a UN human rights treaty dedicated to migrant workers given the existence of the International Labour Organisation (ILO), the specialised UN agency responsible for the world of work that had already adopted a number of migrant-specific conventions (Cholewinski, 2017, p. 158). While the unhappiness of many developing countries with the ILO led to the choice of the UN as the venue for drafting what would become the ICRMW, the ILO provided input during the drafting process and the Preamble to the ICRMW makes explicit reference to ILO experience, expertise and conventions on migrant workers. The ICRMW must therefore be understood not only as one of the core international human rights instruments, but also as an important element of the international labour law framework concerned with the rights of migrants (Cholewinski, 2017).

⁹UN General Assembly (13 December 1985) UN Doc A/ RES/40/144 (1985).

¹⁰1990, 2220 UNTS 3.

¹¹UN Special Rapporteur on the Human Rights of Migrants, *Report by the Special Rapporteur on the Human Rights of Migrants, François Crépeau: Global Migration Governance*, GA (5 August 2013) UN Doc A/68/283 (2013), 22, para. 121.

¹²UN Convention on the Rights of the Child 1989, 1577 UNTS 3.

¹³UN Convention on the Rights of Persons with Disabilities 2006, 2515 UNTS 3.

¹⁴UN International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

¹⁵UN International Covenant on Economic, Social and Cultural Rights 1966 993 UNTS 3.

The international community that spent a decade negotiating the text of the ICRMW before adopting it in 1990 has proved remarkably reluctant to sign up to the binding obligations enshrined in the treaty. This has made the ICRMW the single least successful of all core UN human rights instruments. It took thirteen years for the ICRMW to attract the twenty ratifications necessary for it to enter into force. Contrast this with the 1989 UN CRC. Adopted a year ahead of the ICRMW, it entered into force less than twelve months after its adoption and currently has 196 states parties. The ICRMW has been ratified by just fifty-five states, most of which are located in the Global South. Even the two most recent universal human rights instruments, namely the CRPD and the Convention on protection against enforced disappearance,¹⁶ quickly overtook the ratification record of the ICRMW after their adoption in 2006.

None of the foregoing alters the fact, however, that the ICRMW represents an internationally negotiated statement of basic minimum standards of human rights protection to which international migrants, regardless of their status, should be entitled. It is a comprehensive document that requires collaboration between states (ICRMW, Arts 45, 64, 65, 67, 68) and covers the entire migration process from pre-departure in the country of origin, through travel in countries of transit, to entry and residence in the destination state and return to the country of origin. This belies the claim that the GCM is ‘the first-ever UN global agreement on a common approach to international migration in all its dimensions’.¹⁷

This, of course, gives rise to the question as to why the international community devoted such resources and fanfare to the negotiation and endorsement of the GCM in 2018, given that an internationally agreed blueprint for the human rights-compliant management of migration already existed. The answer may partly lie in the visibility problem that has dogged the ICRMW since its adoption. Described as the best-kept secret in the UN (De Guchteneire and Pécoud, 2009, p. 14), the ICRMW was the object of neglect not just by states, but within academia (Desmond, 2017b, p. 4) and the UN system itself (Taran, 2009, p. 164; Grange and d’Auchamp, 2009, pp. 76–77).¹⁸ Lack of awareness of the ICRMW has been advanced as one of the reasons for its uniquely slow and low rate of ratification (MacDonald and Cholewinski, 2007; Pécoud, 2017, pp. 30–31).

An understanding of the blind eye turned by many states to the ICRMW may also be deepened by taking a ‘hard-nosed’ political-economy perspective (Ruhs, 2013, p. 15). On this view, it is simply not in the interests of popular destination states to grant migrants an extensive catalogue of rights, as evidenced by the prevailing real-world situation whereby states tend to restrict migrants’ rights as part of their labour-immigration policies (Ruhs, 2013). The ICRMW is therefore an example of the best being the enemy of the good. Insisting on according a wide range of protections to all migrants, as the ICRMW does, would discourage states from allowing admission of larger numbers of migrants because of the cost that would be incurred by the destination state. The price of an expansive entry policy is therefore a restricted rights regime: limiting specific rights that generate net costs for host states would increase incentives to admit low-skilled migrant workers (Ruhs, 2013).

On the face of it, this rights-admission trade-off holds a certain explanatory power for states’ tendency to ignore or reject the ICRMW. It fails, however, to take account of the fact that the rights codified in the ICRMW are largely guaranteed to migrants by the more widely ratified human rights instruments and therefore already bind the majority of the world’s states (see Section 6). Furthermore, the argument that migrants should accept a limited set of core rights in exchange for lawful admission is anathema to an international community that subscribes to the tenet that all human rights are universal, indivisible and interdependent, and must be protected by all states, regardless of their political, economic and cultural systems.¹⁹

¹⁶UN International Convention for the Protection of All Persons from Enforced [D]isappearance 2006, 2716 UNTS 3.

¹⁷Intergovernmental Conference on the Global Compact for Migration. Available at <https://www.un.org/en/conf/migration/global-compact-for-safe-orderly-regular-migration.shtml>; and UN Refugees and Migrants: <https://refugeesmigrants.un.org/migration-compact>. See also the paper by Grange and Majcher in this Special Issue.

¹⁸For an account of what the authors argue has been the systematic sidelining of the ICRMW within the UN, see Section 2.2 of the paper by Grange and Majcher in this Special Issue.

¹⁹Vienna Declaration and Programme of Action, GA (12 July 1993) UN Doc A/CONF.157/23 (1993).

A more rounded understanding of the preference for a soft-law instrument on migrants' rights is facilitated by reference to the migration-management paradigm that emerged in the 1990s as a dominant framework for conceptualising and addressing international migration (Geiger and Pécoud, 2010, p. 2). Migration management 'is fundamentally about making migration economically beneficial' and tends to eschew international human rights law in favour of informal norms such as 'recommendations' or 'best practices' (Geiger and Pécoud, 2010, pp. 13–14). The rise of such an approach in the years immediately following adoption of the UN ICRMW will have adversely impacted its chances for wide ratification.

4.2 *Obvious overlap in the move from hard law to soft law*

There is a striking, but perhaps unsurprising, degree of overlap between the ICRMW and the GCM. They bear similarities in terms of scope, content, structure and the strongly divergent responses they elicit from states. They are both concerned with the protection of migrants' rights and seek to establish a comprehensive framework for a rights-based approach to international migration. The tension central to any discussion of migrants' rights between obligations to protect those rights and states' sovereign entitlement to control migration is encapsulated in the acknowledgement in both documents of states' right to determine their national migration policy and establish the criteria governing admission of migrants (GCM, paras 7, 15, 27; ICRMW, Art. 79). Similarly, both documents treat the oftentimes nebulous distinction between refugees and economic migrants as cut-and-dried legal certainty (GCM, para. 4; ICRMW, Art. 3) and clearly distinguish between regular and irregular migrants (GCM, Objectives 7, 8, 9, 10, 13; ICRMW, Parts III, IV), noting the particular difficulties faced by the latter.

Despite both documents' clear distinction between regular and irregular migration, and their acknowledgement of each state's right to decide its own migration policy and admission criteria, they have been the subject of similar misunderstandings, misconceptions and misrepresentation. Some of the reasons advanced by states for non-ratification of the ICRMW include the argument that ratification would limit a state's powers to decide who can enter and remain on its territory (MacDonald and Cholewinski, 2007, pp. 51–53) and the claim that the Convention fails to distinguish between lawfully and unlawfully present migrants (Desmond, 2015, pp. 48–49; MacDonald and Cholewinski, 2007, p. 82). In a similar vein, a number of states indicated, shortly before its adoption in 2018, that they would not endorse the Global Compact, as it would violate their sovereignty²⁰ and force them to admit migrants.²¹ The degree of political upheaval engendered in some countries by the GCM is remarkable,²² given that it is 'the softest of soft law' (Newland, 2018, p. 660), and indicates just how politically sensitive and divisive an issue migration and migrants' rights remains. In light of the GCM's aim to dispel misleading narratives about migration (GCM, para. 10), it is somewhat ironic that some states appear to have withheld support on account of national campaigns of misrepresentation that weaponised the Compact to stir up public concern about loss of control of borders and future 'invasions' of migrants.²³

²⁰National Statement of the United States of America on the Adoption of the Global Compact for Safe, Orderly, and Regular Migration', *United States Mission to the United Nations*, 7 December 2018. Available at <https://usun.usmission.gov/national-statement-of-the-united-states-of-america-on-the-adoption-of-the-global-compact-for-safe-orderly-and-regular-migration/>.

²¹'The UN Global Compact for Migration is endangering the security of the Hungarian people', *Ministry of Foreign Affairs and Trade*, 6 November 2018. Available at <https://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/the-un-global-compact-for-migration-is-endangering-the-security-of-the-hungarian-people>.

²²'Belgium sets up minority government after migration dispute breaks coalition', *Politico*, 9 December 2018. Available at <https://www.politico.eu/article/belgium-sets-up-minority-government-after-migration-dispute-breaks-coalition/>.

²³'Under far-right pressure, Europe retreats from UN migration pact: populists seize chance to put favorite issue on agenda ahead of EU vote, causing ructions among governments', *Politico*, 30 November 2018. Available at <https://www.politico.eu/article/migration-un-viktor-orban-sebastian-kurz-far-right-pressure-europe-retreats-from-pact/>.

Given the numerous parallels that can be drawn between the GCM and the ICRMW, the near-complete silence surrounding the ICRMW before, during and after conclusion of the GCM is somewhat puzzling. The ICRMW is mentioned once in the GCM, cited in a footnote along with ‘the other core international human rights treaties’ on which the GCM is said to rest (GCM, para. 2). While the New York Declaration had called on states that had not yet done so to consider ratifying the ICRMW (para. 48), the GCM makes no such recommendation. Such neglect of the ICRMW may be partly attributable to the aforementioned widespread lack of awareness of the document and/or its content. The sidelining of the ICRMW in the GCM context also, I suggest, represents a definitive preference for dealing with migrants’ rights in soft-law settings and indexes the international community’s rejection of binding multilateral agreements for the protection of migrants’ rights.

One of the key differences between both agreements lies, of course, in their legal value. While the ICRMW is a treaty, legally binding on states parties, the GCM is a soft-law document. This very fact also provides part of the answer as to why the international community seemingly ignored the existence of the ICRMW when adopting in 2018 the ‘first’ UN global agreement on a common approach to international migration in all its dimensions.

4.3 The added value of the GCM

Despite, and sometimes because of, its soft-law status, the GCM does have some signal interrelated advantages for migrants over the ICRMW. The level of public and political awareness of the GCM, even before its adoption in 2018, had already surpassed that of the ICRMW. This will increase the likelihood of securing meaningful engagement and compliance efforts from states. Familiarity with the GCM across a broad range of stakeholders was ensured by the inclusive nature of consultations and negotiations preceding its adoption (GCM, para. 10; Kraly and Hovy, 2020, pp. 2, 25–26) and is further ensured by the Compact’s recruitment of a wide variety of actors to the implementation process. Although the review process for evaluating progress on implementation is to be state-led (GCM, para. 48), the GCM contains a non-exhaustive list of implementation partners that includes migrant, diaspora and faith-based organisations, local communities, the private sector, academia, the media and, crucially, migrants themselves (GCM, para. 44).

While some may see the GCM’s review mechanisms as too soft to exert any real influence on state behaviour, there is potential for loud ‘naming and shaming’ (Hafner-Burton, 2008; Murdie and Davis, 2012; Bufalini, 2019, p. 23) to nudge some states into line with standards set out in the GCM. Certainly, any ‘naming and shaming’ that might be conducted during review of states’ implementation of the GCM is likely to gain far wider attention than any equivalent criticism expressed in the context of the far less high-profile dialogues that take place during UN human rights treaty bodies’ examination of states’ compliance with the treaties they have ratified.

While there is obvious potential for the ICRMW to be deployed amongst states as a lobbying tool and yardstick against which to evaluate the rights compliance of migration law and policy (Caron *et al.*, 2017, pp. 227–228; Grange and d’Auchamp, 2009), similar use of the GCM is more likely given the greater levels of awareness it enjoys. Its visibility, non-binding nature and buy-in across a multiplicity of stakeholders all combine to make it more difficult for states to ignore it in the same way as has been so detrimental to the ICRMW and, ultimately, migrants themselves.

A further potential advantage of the GCM over the ICRMW is the Compact’s accommodation and reflection of important developments over the three decades since adoption of the ICRMW. The GCM takes account of innovations such as the Internet and acknowledges recent global concern with migrants’ deaths and climate change. It also contains a gender perspective and child-rights approach that are conspicuously absent from the text of the ICRMW. In terms of its modernity, it is certainly true that the GCM goes beyond the ICRMW.²⁴ A similar welcome must be extended to the impetus

²⁴See also Section 4 of Cholewinski’s paper in this Special Issue for the view that the GCM is considerably broader in scope than legally binding migration-specific instruments such as the ICRMW.

given by the GCM's Objective 1 to activities to collect accurate, reliable data for a robust global evidence base on international migration (Kraly and Hovy, 2020). Addressing 'the profound paucity of accurate and disaggregated data about migration' may facilitate the production of data that can be harnessed to 'prod states into applying the GCM in a way that promotes more consistent and effective protection of migrants' rights' (Gest *et al.*, 2019, pp. 66, 61).²⁵

Perhaps the key advantage of the GCM lies in the role it may play in reframing the narrative around migration – a role that will be facilitated by the high visibility of the Compact. Often viewed primarily as a problem (Boswell, 1995; Georgopoulou *et al.*, 2017, p. 150; Williams, 2020, pp. 52–53), migration of course brings manifold benefits to origin and destination states as well as migrants themselves (Legrain, 2006; Piper, 2017, p. 231). This latter point is typically ignored in public and political discourses all too easily dominated by simplistic anti-immigrant rhetoric (Krzyżanowski *et al.*, 2018) that exerts a hold on public opinion that politicians find difficult to ignore, sometimes even succumbing to the opportunity to exploit such public fear for political gain.

The GCM, by contrast, boldly casts migration as a positive feature of humanity. It notes that migration, a defining feature of the contemporary world, has been part of the human experience throughout history and recognises it as 'a source of prosperity, innovation and sustainable development in our globalized world' (GCM, paras 8, 10). Furthermore, it calls for evidence-based, clear information about migration, with a view to dispelling misleading narratives that generate negative perceptions of migrants (GCM, para. 10). Indeed, Objective 17 of the Compact outlines an actionable commitment to eliminate all forms of discrimination, xenophobia and related intolerance against all migrants and explicitly addresses the key roles played in this context by the media and political elections (GCM, para. 33(c), (g)). Efforts to realise Objective 17 may go some way to addressing the influence of those who scapegoat migrants for various ills, particularly in times of economic recession, by providing simplistic explanations concerning migration as a response to complex problems (Boswell, 1995, pp. 1476, 1506; Krzyżanowski *et al.*, 2018, p. 6; Motomura, 2020, pp. 534–536).

4.4 Whither the ICRMW?

Despite the advantages of the GCM and the ongoing refusal of important migrant-destination states to consider ratification of the UN ICRMW (Desmond, 2015; Lyon, 2017), the best-kept secret in the UN, rather than being a 'dead duck' (Crépeau, 2017), may go on to play an increasingly important role in the protection of migrants' rights. The aforementioned potential for the ICRMW to be used as a lobbying tool amongst non-states parties may lead to the Convention's being ratified more widely. If it is true that lack of awareness of the Convention is one of the factors hindering its ratification, this problem may be partly addressed by the GCM itself. While the GCM is effectively silent on the topic of the ICRMW, and no formal role is yet envisaged for the Committee on Migrant Workers (CMW) in review of the Compact, the Compact's implementation process will provide opportunities for the ICRMW to be drawn on in shaping the contours of compliance with the requirements of the newer agreement, thereby bringing the ICRMW to the attention of a wider audience and helping to dispel some of the misconceptions surrounding this core human rights instrument. In this sense, the GCM-implementation process may provide a forum for states in the Global South to highlight the relevance of the ICRMW for non-states parties in the Global North, as has been occurring during the UN's universal periodic review procedure since it began operating in 2008 (Desmond, 2015).

As a source of binding law, the ICRMW is already coming into its own. While it is true that most of the fifty-five states parties to the Convention are located in the Global South, it is equally true that recent years have seen south–south migration exceed south–north migration (IOM, 2015, p. 6). Although many of the countries bound by the ICRMW were primarily states of origin at the time

²⁵See also the contribution of Holliday to this Special Issue for discussion of continuing deficiencies in collection and availability of data concerning, in particular, women migrant workers.

of ratification, this is no longer the case. This means that countries that are now important migrant-transit and -destination states are bound by the obligations set out in the Convention and must report on their compliance with these obligations in their submissions to the CMW, the treaty body that monitors states parties' implementation of the ICRMW. The Committee, operating since 2004 (Edelenbos, 2009), has begun to interpret the ICRMW in ways that respond to the evolving trends in international migration and rights violations suffered by migrants (Ryan, 2013; Chetail, 2019, pp. 224–227).

Similarly, the Committee has made efforts to secure ICRMW-based input into implementation of the Sustainable Development Agenda and negotiations of the GCM.²⁶ The five General Comments produced by the CMW so far have addressed some of the most challenging issues currently impeding the enjoyment and protection of migrants' rights, and have elaborated on the protections of the ICRMW for migrant domestic workers, irregular migrants, child migrants and migrants facing detention.²⁷ Although non-binding, these General Comments represent an authoritative interpretation of the obligations imposed by the ICRMW on states parties, many of which are increasingly important destinations for migrant workers and members of their families.

To further complicate the narrative, while the GCM evinces states' aversion to binding multilateral instruments in the realm of migration, it also at the same time calls for ratification of relevant international instruments related to international labour migration (GCM, para. 22(a)). Similarly, though without specifying a preference for hard law or soft law, the Compact makes numerous recommendations for the conclusion of bilateral, regional and multilateral agreements between states on a range of issues (e.g. GCM, paras 30(c), 34(c)). Hard law and soft law interact and supplement each other (Boyle, 2018, p. 121). There is no formal barrier to interaction between the GCM and the ICRMW to the advantage of the latter. It is clear, therefore, that the ICRMW cannot yet definitively be assigned the status of a dead letter.

5 (Some further) shortcomings of the GCM

In addition to any misgivings that may be expressed concerning the soft-law status of the GCM, it is blighted by a number of potentially serious shortcomings. What follows is by no means an exhaustive analysis of the document's drawbacks, but rather a brief and indicative discussion. An initial, broad criticism can be made of the overall content of the Compact. While one of the early advocates of a GCM noted that such a document 'could bundle agreed norms and principles into a global framework agreement',²⁸ the Compact adopted in 2018 bundled together *some* of the agreed rules concerning international migration. It is therefore not a comprehensive document, despite UN fanfare celebrating it as an outline of 'a common approach to international migration in all its dimensions'. The exclusion of some key rules of international migration law such as the right to leave any country (Chetail, 2019, pp. 77–92) could be interpreted as instituting a hierarchy, with the rules included in the GCM enjoying global support and those excluded no longer finding favour in the post-2015 regime.²⁹ This could ultimately have the effect of undermining the authority of what are currently well established and widely accepted as binding rules of international law (Gest *et al.*, 2019, p. 65) – a danger inhering in soft-law documents (Chetail, 2019, pp. 293–294; Klabbers, 1998).

The GCM also appears to send mixed messages about the criminalisation of migration that has featured increasingly strongly in states' approach to migration over the past two decades (e.g. EU

²⁶E.g. *Contribution to the 2030 Sustainable Development Goals in Response to a Call for Inputs by the High-Level Political Forum on Sustainable Development*, 19 April 2018; *Statement by the Chair of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Mr. José Brillantes, on the need for ensuring a human rights based approach to the Global Compact on Migration*, 20 October 2017. Available at <https://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIndex.aspx>.

²⁷See https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=7&DocTypeID=11.

²⁸UN Special Representative, *Report of the Special Representative of the Secretary-General on Migration*, A/71/728 (3 February 2017), para. 87.

²⁹See also, on the specific point of the right to leave, the contributions of Chetail and Guild to this Special Issue.

Agency for Fundamental Rights, 2014). While the GCM explicitly calls for the non-criminalisation of migrant victims of trafficking and of provision of assistance ‘of an exclusively humanitarian nature’ (GCM, paras 26(g), 24(a)), its call for non-criminalisation of migrants for ‘having been the object of smuggling’ allows ‘potential prosecution for other violations of national law’ (GCM, para. 25). The most clear-cut failure of the GCM in this context concerns one of the central pillars of criminalisation, namely migration detention, and specifically detention of migrant children.³⁰

While the GCM appears to squarely reject the use of immigration detention as a tool of deterrence in states’ efforts to control and manage migration (GCM, para. 29(c)), it accepts continued use of the immigration detention of children by failing to identify it as unacceptable under international human rights law and instead calling for states to ‘work to end the practice of child detention in the context of international migration’ (GCM, para. 29(h)). This puts the GCM at odds with the position articulated by the CMW and the Committee on the Rights of the Child that the immigration detention of children should be prohibited completely³¹ and indicates the potential aggravating effect that the GCM may have on the already fragmented nature of international migration law and international human rights standards. Finally, it is worth noting that the overall approach to criminalisation evinced by the GCM measures up quite poorly against the more energetic efforts of the CMW to combat this corrosive practice.³²

6 Implications for migrants’ rights protection of conclusion of the GCM under the auspices of the UN and inclusion of migration in the SDGs

As mentioned in Section 3, states have long evinced a marked preference for dealing with international migration in informal settings outside the UN. Indeed, proposals in the 1990s for a UN migration conference to agree common approaches to migration elicited such opposition and indifference from states (Chamie and Mirkin, 2011) that, in 2003, the then-UN Secretary-General encouraged states to address the issue of international migration outside the UN, through a Global Commission on International Migration, to attempt to win ‘broad acceptance for a normative framework that has human rights at its heart’ (Grant, 2006, pp. 14–15).

Against this background, the conclusion of the GCM within the UN is a remarkable achievement, not least for the potential it holds for nudging international migration management into line with the UN’s normative human rights framework. Indeed, the GCM, with its dozens of references to human rights, may come to be viewed as a transformative moment that loosened the stranglehold on global migration-governance discourse exerted by the twin concerns of migration management and the migration–development nexus (Pécoud, 2020b).³³ These policy concerns focus on migration control and economic benefit ‘while paying lip service to the human rights of migrants’ (Piper, 2017, p. 233). Disturbing this dominant trend would certainly justify the GCM’s self-description as ‘a milestone in the history of the global dialogue and international cooperation on migration’ (GCM, para. 6).

The UN’s normative human rights framework extends far beyond the aforementioned UN ICRMW. The UN has facilitated the development and production of a wide range of human rights standards and protection mechanisms that are applicable to migrants. While, in 1990, there was some uncertainty as to the practical applicability of universal human rights to migrants (Grant,

³⁰Immigration detention is discussed in detail in the contribution of Grange and Majcher to the Special Issue. See also the contributions of Chetail and Molnár.

³¹CMW and CRC (2017), Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the 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, CMW/C/GC/4-CRC/C/GC/23, para. 5.

³²See e.g. General Comment 2, *supra* note 4; and CMW, *Concluding Observations on Algeria*, CMW/C/DZA/CO/1 (19 May 2010), paras 18, 21, 38, 40, 41.

³³See, by way of contrast, the contribution of Guild to this Special Issue for the view that the GCM creates a risk that international migration may be submerged in the ‘profoundly non-legal’ development framework.

2011), the intervening decades have seen UN human rights actors clarify the inclusion of migrants within the scope of protection of the ICCPR, ICESCR and other core documents setting out human rights standards for particularly vulnerable groups (Grant and Lyon, 2017, p. 107; Satterthwaite, 2005; Weissbrodt, 2008).

These standards, explicitly acknowledged in the GCM itself (GCM, para. 2), can be harnessed to guide states' compliance with the GCM and to evaluate that compliance during the quadrennial review process. These standards are equally relevant to SDG-implementation monitoring. The Sustainable Development Agenda is 'grounded' in international human rights treaties and is 'to be implemented in a manner that is consistent with the rights and obligations of states under international law'. It specifically namechecks the UN CRC and 'the labour standards of ILO' (Agenda 2030, paras 10, 18–19, 67). The conclusion of the GCM under the auspices of the UN and inclusion of migration in the SDGs therefore mean that the post-2015 regime has the potential to reorient international co-operation on migration towards a meaningful compliance with human rights standards.

6.1 The review processes

Implementation of the GCM is to be conducted in a manner that is consistent with international law (GCM, para. 41) and international co-operation on implementation will be aligned with the 2030 Agenda for Sustainable Development (GCM, para. 42). Follow-up and review of progress on implementation of the GCM are to be supported by the establishment of a 'groundbreaking new UN network' (Klein Solomon and Sheldon, 2018, p. 589), namely the United Nations Network on Migration (GCM, para. 45). The Network, comprising around forty members of the UN system with migration-related mandates, will rely on the IOM as its co-ordinator and secretariat (GCM, para. 45(a)).

An inclusive, global review of progress on implementation of the GCM is to occur every four years, beginning in 2022, at the International Migration Review Forum (IMRF). This Forum will serve as the primary inter-governmental platform for states to discuss and share progress on the implementation of all aspects of the Compact, including as it relates to the 2030 Agenda for Sustainable Development. Each Forum will result in a Progress Declaration, which may be taken into consideration by the High-Level Political Forum on Sustainable Development (GCM, para. 49).

Evaluation of progress on the implementation of the SDGs is also to be state-led. Rather than monitoring by an international mechanism, however, progress on realisation of the SDGs is (sometimes) self-assessed by means of Voluntary National Review Reports (VNRs) that allow states to identify the targets they wish to focus on. This voluntary and optional approach of the VNRs, while undoubtedly popular with states for the flexibility and prioritisation possibilities it affords them, carries with it the risk that migrants' rights may effectively be ignored in states' self-monitoring activities, particularly given that many do not currently have in place any policies on migrants' rights (UN, 2019, pp. 13, 43).³⁴

6.2 The IOM

The conclusion of the GCM was accompanied by a loud red flag indicating that the Compact should not in fact be readily interpreted as disclosing a willingness on the part of states for consequential scrutiny during the review process of their treatment of migrants and conduct concerning migrants' rights. This red flag was raised by the closer relationship between the UN and the IOM cemented in 2016 with the adoption by the UN General Assembly of an agreement between the IOM and the UN, making the former a 'related organisation' of the latter.³⁵ As noted above, the IOM will serve as

³⁴For in-depth analysis of SDG-implementation monitoring and disquieting evidence of failure to adequately include migrants, see the paper by Holliday in this Special Issue.

³⁵Resolution adopted by the General Assembly on 25 July 2016 (without reference to a Main Committee (A/70/L.57)), 70/296. Agreement concerning the Relationship between the United Nations and the International Organization for Migration, UN Doc A/RES/70/296, 5 August 2016.

co-ordinator and secretariat of the UN Network on Migration. This is a cause for concern, given the nature of the IOM's work and its human rights mandate.

Established in 1951, the IOM describes itself as the leading inter-governmental migration organisation that 'works closely with governmental, inter-governmental and non-governmental partners' and is dedicated to the 'orderly and humane management of migration'.³⁶ Its reach is global, numbering 173 Member States and offices in over 100 countries. With a budget of over \$1.7 billion for 2019³⁷ and a staff of 12,000 in 2018,³⁸ it is clearly a formidable actor in the international migration landscape. It is therefore commendable that the long-standing paucity of research into this organisation (Klabbers, 2019, pp. 383, 389; Pécoud, 2018, pp. 1622–1623) is currently being addressed (e.g. Bradley, 2020; Geiger and Pécoud, 2020). The adjustment in the formal status of the IOM and its role vis-à-vis the GCM, both during pre-adoption negotiations and post-adoption implementation and review, make it particularly important that the precise contours of its role and nature be investigated and elucidated (Pécoud, 2018, p. 1635).

The IOM has been implicitly censured in the past for 'acting essentially as a service provider' to states and for its assisted voluntary-return programmes 'not being genuinely voluntary, particularly when offered to migrants kept in detention centres'.³⁹ The organisation has similarly drawn criticism for involvement in questionable detention practices in Australia (Pécoud and Grange, 2018). The nature of the IOM and its work that such commentary illustrates is explained by a number of factors. The IOM suffers from a constitutional silence on human rights and is constitutionally mandated to carry out its functions in conformity with the national law of the states for which it is providing services.⁴⁰ Furthermore, it is an organisation that has historically depended on voluntary contributions from its Member States to carry out specific projects.

These features combine to produce a picture of an organisation that might, with good reason, be keen to pander to states' priorities without even paying lip service to migrants' human rights. Indeed, given the absence of a human rights mandate, it might be difficult to find fault with the IOM for such an approach. The fact that, following the closer UN–IOM relationship inaugurated in 2016, the IOM continues to be a non-normative organisation indicates that there was little appetite for integrating human rights into its activities. The UN–IOM agreement does include an 'undertaking' by the IOM to conduct its activities in accordance with the UN Charter and with due regard for the policies of the UN and other relevant instruments in the international migration and human rights fields. It remains to be seen, however, whether this will be sufficient to address the legitimate human rights concerns to which the IOM's new role and continued non-normative status give rise (Guild and Grant, 2017).

The IOM's new role, combined with the non-binding nature of the IMRF, create the possibility for the sidelining or dilution of the issue of migrants' rights. It suggests that, while the GCM has formally brought international migration within the UN and its normative framework, it simultaneously allows states to (continue to) evade human rights obligations owed to migrants. Further scope for continuing to keep discussion of migration and human rights outside the UN and in the realm of informal discussion is the GCM's explicit invitation to the Global Forum on Migration and Development and other consultative processes to provide a space for informal exchange and sharing of best practice on implementation of the Compact (GCM, paras 47, 51).

³⁶See <https://www.iom.int/about-iom>.

³⁷IOM, Standing Committee on Programmes and Finance, Twenty-Fourth Session, Resolution No. 21, Revision of the Programme and Budget for 2019, Doc S/24/RES/21, 19 June 2019. Available at <https://governingbodies.iom.int/system/files/en/scpf/24th/S-24-RES-21%20-%20Revision%20of%20the%20Programme%20and%20Budget%20for%202019.pdf>.

³⁸IOM, Standing Committee on Programmes and Finance, Twenty-Fourth Session, Statement by the Director General, Doc S/24/10, 18 June 2019. Available at <https://governingbodies.iom.int/system/files/en/scpf/24th/S-24-10%20-%20Statement%20by%20the%20Director%20General.pdf>.

³⁹UN Special Rapporteur on the Human Rights of Migrants, *supra* note 11, paras 38, 58, 59.

⁴⁰See the IOM Constitution. Available at <https://www.iom.int/constitution#chl>.

It is regrettable that the once-in-a-lifetime momentum that generated the New York Declaration and the Global Compacts was not exploited to undertake some of the more radical institutional change mapped by some of the leading commentators on international migration (Goodwin-Gill, 2016; Chetail, 2019). It is equally disappointing, from the perspective of migrants' rights, that a deaf ear was turned to recommendations to revise the IOM's mandate to provide it with an international human rights framework⁴¹ and to recruit it as an institutional champion for the UN ICRMW, allowing it to play a role akin to that performed by UNICEF vis-à-vis the UN CRC.⁴²

7 Conclusion

Very little time has passed since the adoption of the GCM and the conspicuous introduction into the global development policy landscape of international migration and migrants' rights. Related legal and policy developments and academic commentary are therefore all still in their infancy. It is impossible to predict with pinpoint accuracy how the dynamics between the global system of human rights protection and international migration management will continue to evolve. This paper, however, has identified serious causes for concern in relation to the impact of recent soft-law, political and institutional developments on the protection of migrants' rights. The state-led structure of both the IMRF and the review of implementation of the SDGs, coupled with the ongoing non-normative nature of the IOM, contain obvious risk for backsliding or inaction with respect to rights protection. If the post-2015 regime does represent a new dawn for the human rights of international migrants, it is a dawn dewed with risk.

While the related frameworks of political economy and migration management provide useful prisms through which to view and understand the long-standing and ever-expanding appetite for a soft-law approach to international migration and migrants' rights, this should not obscure the existence of states' binding legal obligations vis-à-vis migrants nor the nature of human rights as inalienable and universal. While the interests, strategies and powers of states and other actors cannot be ignored, they are context-dependent and susceptible to change in a way that human rights are not. This is why it is so important to leverage the opportunities presented by the post-2015 regime to reorient international co-operation on migration towards a meaningful compliance with human rights standards.

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⁴¹UN Special Rapporteur on the Human Rights of Migrants, *supra* note 11, para. 112.

⁴²UN Special Rapporteur on the Human Rights of Migrants, *Report of the Special Rapporteur on the human rights of migrants*, GA (20 July 2016) UN |Doc A/71/40767 (2016), para. 120.

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