International Journal of Law in Context (2020), **16**, 253–268
doi:10.1017/S1744552320000300

ARTICLE

The Global Compact for Safe, Orderly and Regular Migration: a kaleidoscope of international law

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Abstract
The Global Compact for Safe, Orderly and Regular Migration has prompted an intense political debate at both the international and domestic levels. Most controversies focus on its legal stance and highlight the hybrid character of the Compact as a soft-law instrument. While acknowledging the political nature of the Compact, this paper delves into its legal dimensions from the perspective of international law. This inquiry into its normative content discloses three main features: (1) the Compact is not a codification of international legal norms governing migration; it is an instrument of both (2) consolidation and (3) expansion of international law to foster inter-governmental co-operation and promote safe, orderly and regular migration.

Keywords: international migration law; soft law; Global Compact for Safe; Orderly and Regular Migration; human rights

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. Despite the politically toxic context surrounding migration, a broad majority of 152 UN Member States voted in favour to five against (Czech Republic, Hungary, Israel, Poland, US) with twelve abstentions (Algeria, Australia, Austria, Bulgaria, Chile, Italy, Latvia, Libya, Liechtenstein, Romania, Singapore, Switzerland).[1] Its adoption has raised many controversies and misunderstandings about its very nature as a non-binding instrument and its impact on international law.

The Global Compact for Migration is in essence a political project to further develop multilateralism and governance in this complex and sensitive field. It basically 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, paras 8, 11). As is apparent from this ambitious endeavour, the Compact is primarily prospective in nature. It must not be seen as a final product, but as a road map to frame the international agenda.

This does not mean that international law has nothing to say about the Compact, its content and its implementation. The Global Compact 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. 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, para. 7).

Despite the ambiguity inherent in the very notion of soft law, the non-binding form of a given instrument does not necessarily prejudice its binding content and vice-versa. Following this distinction

[1]GA 60th plenary meeting, A/73/PV.60 (2018), 14–15.

between form and substance, a treaty may fail to entail any sense of a legal duty when its provisions are too vague or merely contemplate a total freedom of action for states parties. Conversely, a soft-law instrument may be mandatory in substance when its content reflects and reinforces a binding rule of international law (for further discussion about soft law in the context of migration, see Chetail, 2019, pp. 280–339; Wouters and Wauters, 2019; Peters, 2018).

From this stance, the Compact restates the typical balancing act of international migration law between the national sovereignty of states and the human rights of migrants. It 'reaffirms the sovereign right of States to determine their national migration policy …, in conformity with international law' and acknowledges the 'overarching obligation to respect, protect and fulfil the human rights of all migrants, regardless of their migration status' (GCM, paras 11, 15(c)). The Compact is accordingly based on and framed by international law. As highlighted in its preamble, it rests on the Charter of the United Nations, the Universal Declaration of Human Rights, the core international human rights conventions and a broad list of specific treaties, including the Palermo Protocols against human trafficking and the smuggling of migrants, the International Labour Organization (ILO) conventions on promoting decent work and labour migration, as well as other general agreements related to climate change (GCM, paras. 1–2).

More importantly, the commitment of states to international law permeates the whole Compact: due respect for international law in general and for human rights law in particular is reaffirmed fifty-six times across the thirty-five-page document. Although there is nothing comforting in this, the renewed commitment of states towards binding rules of international law represents an important acknowledgement on its own and one of the main achievements of the Compact. In some countries, abuses committed against migrants and violations of international law have even become an integral component of their national migration policies. The gap between law and reality is so important that positivists may appear as activists for the better and the worse. Against this background, reaffirming due respect for the rule of law and human rights is all but trivial (GCM, para. 15(d), (f)).

Despite this much-needed reminder, international law is acknowledged as one means among many others towards a broader political end to promote safe, orderly and regular migration. The Compact identifies for this purpose a detailed set of ten guiding principles, twenty-three objectives and 187 related actions. The guiding principles inform the content and implementation of the whole Compact and each objective contains a specific commitment of states, followed by a range of relevant actions to achieve it. The overall design resulting from this superposition of layers remains complex and piecemeal. There is no clear articulation of priority between the twenty-three objectives. 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 agreements or the review of domestic legislation in line with the objectives of the Compact. Most of the others are purely operational and include, for instance, information-sharing, awareness-raising campaigns, technical assistance and training of states' civil servants.

When assessed as a whole, the Compact looks like a kaleidoscope; it is made up of a complex mix of multi-faceted elements that are constantly changing and create 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 its objectives and actions are so varied and interconnected that the overall picture remains segmented and distorted. Like a kaleidoscope, the Compact breaks the vision down into a multitude of different but interrelated components of the same cross-cutting phenomenon.

This kaleidoscopic vision of migration is well apparent from the uneven and variegated use of international law to achieve its numerous objectives. The Compact addresses international law in an indirect and oblique way. It sheds light on some rules but not others, with the result that several pieces of international migration law are missing (Section 2). Yet, the Compact was never intended to provide an exhaustive picture of the various legal norms governing migration. Its partial account of international law discloses the political priorities of states to achieve their objectives as well as the functions they assign to soft law as a supplement to hard law.

Despite the obvious limits inherent to any non-binding instrument, the role of international law in the Compact is more substantial than it appears at first sight. The legal relevance of the Compact is twofold. On the one hand, it restates some of the most basic principles of international law governing the movement of persons across borders, such as the prohibition of collective expulsion and of arbitrary detention, the principle of non-discrimination and the best interests of the child (Section 3). On the other hand, it provides a road map towards the progressive development of international law in a significant range of areas, including the long-neglected issue of labour migration (Section 4).

2 The missing pieces of the Global Compact for Migration

The Global Compact is far from providing a comprehensive and coherent vision of international migration law. This was not its purpose. Instead, the Compact sheds light on some rules that are perceived by states as being the most relevant to achieve their political objectives. As a result of this specific ethos, lawyers and activists should not overestimate the legal significance of the Compact. Its purpose is not to codify international migration law and even less to create new rules. Because of its non-binding character, it is unable on its own to establish any new legal norms. Furthermore, like many other inter-governmental instruments, the Compact is a compromise between competing interests following the ontological tension between national sovereignty and human rights. 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 sensitive area of migration.

Clearly, states were not ready to go beyond existing rules of international law. Although the Compact insists on the due respect for international law many times, the legal norms restated therein are dispersed across the whole document in a piecemeal and arguably inconsistent fashion. The overall logic remains puzzling and several important pieces of international migration law are lacking.

The applicable rules and binding conventions are indeed rarely identified and restated in a cogent and comprehensive manner. Among other instances, Objective 8 to save lives and prevent migrants' deaths, through search-and-rescue operations, fails to mention the law of the sea and the time-honoured customary-law duty to rescue persons in distress at sea, as codified in the 1974 Convention for the Safety of Life at Sea, the 1979 Convention on Maritime Search and Rescue, and the 1982 Convention on the Law of the Sea. Similarly, Objective 14 to enhance consular protection, assistance and co-operation does not refer to the most relevant and widely ratified treaty, namely the Vienna Convention on Consular Relations adopted in 1963.

The most glaring and substantive omission of the Compact concerns the right to leave any country. This omission is all the more surprising for the right to leave is the most truly universal rule on migration that is binding on every UN Member State. It has been endorsed in twelve human rights conventions[2] and it is nowadays a rule of general international law. The customary-law nature of the right to leave (with the usual lawful restrictions based on national security and public order) finds strong support in the large number of widely ratified treaties restating this basic right and its endorsement in a plethora of interstate resolutions and domestic constitutions (for further discussion, see Chetail, 2019, pp. 77–92).

The silence of the Compact exemplifies the common confusion among policy-makers between the right to leave and other related – albeit distinctive – notions, such as freedom of movement or

[2]International Covenant on Civil and Political Rights (ICCPR, Art. 12(2)); International Convention on the Elimination of All Forms of Discrimination (ICERD, Art. 5(d)(i)); International Convention on the Suppression and Punishment of the Crime of Apartheid (Art. 2(c)); Convention on the Rights of the Child (CRC, Art. 10(2)); International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICMRW, Art. 8(1)); Convention on the Rights of Persons with Disabilities (CRPD, Art. 18(1)(c)); Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, Art. 2(2)); American Convention on Human Rights (ACHR, Art. 22(2)); African Charter on Human and Peoples' Rights (ACHPR, Art. 12(2)), Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (CIS, Art. 22(2)); Arab Charter on Human Rights (Arab CHR, Art. 27(a)).

https://doi.org/10.1017/S1744552320000300 Published online by Cambridge University Press

admission into the territory of foreign countries. Several states emphasised that the Compact 'does not establish a human right to migrate'.[3] This assertion calls for an important caveat. Although international law does not acknowledge a general right to immigrate, the right to emigrate constitutes an internationally protected right on its own. Emigration and immigration are conceived and recognised by international law as two distinct spheres governed by their respective set of legal norms and responsibilities. The duty-holder of the right to leave is the state of departure, whereas admission remains the responsibility of the state of destination.

As notably restated by the Human Rights Committee in line with the prevailing interpretation,[4] freedom to leave any country applies to everyone – that is, both nationals and non-nationals – regardless of their lawful presence within the territory of a state. Due respect for the right to leave implies a twofold duty for the state: a negative obligation not to impede departure from its territory and a positive obligation to issue travel documents. Yet, restrictions are permissible under Article 12(3) of the International Covenant on Civil and Political Rights (ICCPR), when they are provided by law, necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, and consistent with the other rights recognised in the Covenant (such as in the case of criminal prosecutions, and other obligations related to military service, fiscal taxes or maintenance allowances).

The silence of the Compact about this well-established right starkly contrasts with the New York Declaration for Refugees and Migrants, which was approved in September 2016 by all UN Member States and which restates the right to leave any country alongside a vast number of General Assembly resolutions.[5] Obviously, the very fact that a soft-law instrument does not refer to an existing rule of international law does not affect the legal standing of the latter. The binding force of the right to leave under both treaty law and customary law remains accordingly unchanged. Nonetheless, the Compact exemplifies a risk that is frequently associated with the resort to soft-law instruments. Soft law may undermine binding rules of international law and weaken their legal authority in the long run (for further discussion, see Chetail, 2019, pp. 292–294).

The risk of undermining international law also attaches to the Global Compact by failing to restate the right to leave any country, a cardinal principle of international migration law. The lack of any reference to this fundamental right reveals the political agenda followed by states in agreeing upon the Compact. While promoting safe, orderly and regular migration, the Compact is also aimed at addressing its root causes following a preventive approach to migration. As underlined in its preamble, states 'must work together to create conditions that allow communities and individuals to live in safety and dignity in their own countries' (GCM, para. 13). In echo to the 2030 Agenda for Sustainable Development, acknowledging the positive contribution of migrants works in tandem with the need to address the drivers of the movements of persons across borders, on the ground that 'migration should never be an act of desperation' (GCM, para. 13).

An entire objective of the Compact is dedicated to minimising the adverse drivers and structural factors that compel people to leave their own country. This Objective 2 represents, however, the most aspirational one among the twenty-three objectives of the Compact. Mitigating the drivers of migration remains a long-term endeavour that presupposes a particularly ambitious and truly comprehensive programme of actions. This objective goes far beyond sustainable development and labour opportunities in countries of origin. It overlaps with many other cross-cutting and enduring challenges, including peace and security, climate change, democratic governance and the rule of law, trade and investment.

The right to leave any country is not the only binding rule of international migration law that is not reaffirmed in the Compact. For instance, there is no reference to the sophisticated body of rules

[3]Denmark, on behalf of Iceland, Lithuania, Malta, the Netherlands and Denmark, UN General Assembly, Seventy-third session, official Records, A/73/PV.60 (2018), 24. See also *ibid.*, Namibia, speaking on behalf of the African Group, 9; Austria, 18; Slovenia, 1; and UK, 22.

[4]HRC, *General Comment No. 27: Freedom of Movement* (1999) UN Doc CCPR/C/21/Rev.1/Add.9.

[5]*New York Declaration for Refugees and Migrants* (2016) UN Doc A/RES/71/1, para. 42.

https://doi.org/10.1017/S1744552320000300 Published online by Cambridge University Press

governing migration for the purpose of trade, services and investment, as notably enshrined in the law of the World Trade Organization. Likewise, although the Compact is permeated by human rights with some ninety references throughout the text, it curiously says nothing about freedom of religion. Religion is merely mentioned in passing among the prohibited grounds of discrimination in the specific context of access to basic services (GCM, para. 31(a)).

Although the Compact is not aimed at codifying the broad variety of all applicable legal norms, its partial and selective account of international law highlights the ambiguity inherent to soft law as an alternative to hard law. On the one hand, its focus on some existing rules while ignoring others exhibits the political priorities of states to achieve their objectives. This exacerbates the fragmentation of existing rules and may also weaken international law in emphasising informal co-operation at the expense of binding rules of law. On the other hand, the missing rules of the Compact remain utterly mandatory for states. International law is not a *menu à la carte*. It is binding as a whole and it makes sense only when its rules are understood and applied in their totality.

3 The Global Compact for Migration: a consolidation of the basic principles of international law

Despite its missing pieces, the Global Compact restates some of the most basic principles of international law governing the movement of persons across borders. While reaffirming the sovereign right of states to determine their national migration policy, the Compact provides a clear reminder about their binding duties and displays a didactic exposure of the most salient international legal norms. More fundamentally, their reaffirmation acknowledges the continuing relevance of international law to frame migration and represents the most substantive part of the Compact.

Although they are dispersed across the whole document in an erratic way, the principles listed therein may be classified into two main categories. Some of them refer to general rules of international law that are contextualised in the specific situation of migration. They include the principle of non-discrimination, the prohibition of arbitrary detention, the right to family life and the best interests of the child. Other principles are specific to migration and mainly refer to the principle of *non-refoulement*, the prohibition of collective expulsion and the right to return to one's own country.

The range of legally binding principles restated in the Compact is significant, even if their endorsement is not always free from ambiguity. Quite tellingly, as developed above, the Compact is much more insistent and detailed on the general rules of international law than with regard to those that are specific to migration.

3.1 The principle of non-discrimination

The principle of non-discrimination is by far the most emblematic binding rule that is restated and contextualised by the Compact. This principle epitomises both the cardinal role of international law and the enduring gap between law and practice in the field of migration. Migrants are the most vulnerable to discrimination and racism, whereas the prohibition of discrimination constitutes the cornerstone upon which the whole edifice of human rights protection is built. This existential premise of human rights is firmly embedded in both customary law and treaty law. The prohibition of discrimination is indeed one of the very few international legal norms that has been unanimously sanctioned by all UN Member States. It is in fact the only human right specifically identified as such in the UN Charter, thereby binding upon every Member State. It is further embodied in all human rights treaties, be they concluded at the regional or universal level, including the widely ratified ICCPR and International Convention on the Elimination of Racial Discrimination (ICERD).

The Global Compact reasserts the centrality of this general rule of international law as one of the ten guiding principles that underpin all the twenty-three objectives and their implementation (GCM, para. 15(f)). The guiding principle devoted to human rights further contextualises non-discrimination by underlying its main normative impact on migrants' rights. It requires states to 'ensure effective respect for and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle' (GCM, para. 15(f)).

https://doi.org/10.1017/S1744552320000300 Published online by Cambridge University Press

Notwithstanding its lack of binding force, the Compact consolidates and clarifies the current state and understanding of international human rights law when applied to migrants, as previously endorsed by a plethora of inter-governmental recognitions – including the New York Declaration – as well as the practice of UN treaty bodies and regional courts.[6] The Compact reiterates this overarching duty of international law several times throughout its text. It acknowledges by the same token that the possibility for states to distinguish between regular and irregular migration status in their domestic law shall remain in accordance with internationally protected human rights (GCM, para. 15(c); for further discussion, see Guild *et al.*, 2019, pp. 43–59; Gest *et al.*, 2019, pp. 60–79).

The principle of non-discrimination is reinforced by an entire objective specifically dedicated to the eradication of discrimination against all migrants. Objective 17 contains a strong commitment 'to eliminate all forms of discrimination, condemn and counter expressions, acts and manifestations of racism, racial discrimination, violence, xenophobia and related intolerance against all migrants in conformity with international human rights law' (GCM, para. 33). The main legal actions identified by the Compact to achieve this commitment are threefold. They include the criminalisation of hate crimes in domestic law (para. 33(a)), as required by the ICERD (Art. 4) and the ICCPR (Art. 20 (2)). This primary duty of states parties under the above-mentioned and widely ratified conventions is supplemented by two correlative actions pinpointed by the Compact: providing migrants with access to complaints and redress mechanisms, and establishing mechanisms to prevent, detect and respond to racial profiling of migrants by public authorities (GCM, para. 33(d), (e)).

Another particularly relevant objective of the Compact concerns access to basic services. Objective 15 affirms, in rather compelling and straightforward terms, the commitment of states 'to ensure that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services' (GCM, para. 30). This broad and relatively strong commitment nonetheless suffers from two main qualifications. First, although Objective 15 does refer to all basic services, the concrete actions listed therein are limited to education and health only. This carries out the risk of neglecting many other important basic services (such as social assistance, housing and legal aid).

Second, Objective 15 does not guarantee *equal* access to basic services. It refers instead to 'safe' access and underlines that 'nationals and regular migrants may be entitled to more comprehensive service provision, while ensuring that any differential treatment must be based on law, be proportionate and pursue a legitimate aim, in accordance with international human rights law'. Hence, as restated in the first action to implement Objective 15, states shall 'take measures to ensure that service delivery does not amount to discrimination against migrants', even if they may establish 'differential provision of services based on migration status' (GCM, para. 31(a)).

While states retain a significant margin of appreciation in this area, the cautious wording of the Compact fairly reflects the current state of international law: the prohibition of discrimination does not preclude a lawful difference of treatment. Nonetheless, the criteria established by the Committee on Economic, Social and Cultural Rights are more demanding: the proportionality test and the legitimate aim pinpointed in the Compact are included within a broader assessment of the reasonable and objective nature of the differential treatment.[7]

Furthermore, the principle of equality before the law, as notably endorsed in Article 26 of the ICCPR, may require in some circumstances equal treatment between nationals and non-nationals. Although the principle of equality before the law is not mentioned in the Compact, equal treatment between migrants and nationals regarding working conditions and labour rights is reiterated among the actions to realise Objective 6 on fair recruitment and decent work. As codified by the Compact

[6]See, among many others, HRC, *General Comment No. 15: The Position of Aliens under the Covenant* (1986) UN Doc HRI/GEN/1/Rev.9; CERD, *General Recommendation XXX on Discrimination against Non-citizens* (2002) UN Doc HRI/GEN/1/Rev.7/Add.1 (2004); IACtHR, *Juridical Condition and Rights of Undocumented Migrants* (Advisory Opinion) PC-18/03 Series A No. 18 (2003) 99.

[7]CESCR, *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights* (2009) UN Doc E/C.12/GC/20, para. 13.

https://doi.org/10.1017/S1744552320000300 Published online by Cambridge University Press

alongside the International Covenant on Economic, Social and Cultural Rights (ICESCR) and a broad range of ILO conventions, this principle of equality between national and foreign workers typically includes the rights to just and favourable conditions of work, to equal pay for work of equal value, to freedom of peaceful assembly and association, and to the highest attainable standard of physical and mental health (GCM, para. 22(i)). This restatement consolidates and clarifies the basic rights of migrant workers deriving from general labour standards that apply to all workers without discrimination.[8]

3.2 The prohibition of arbitrary detention

The prohibition of arbitrary detention is another general principle of international law that has been reaffirmed and contextualised by an entire objective of the Global Compact. By upholding the use of immigration detention only as a measure of last resort, Objective 13 underscores that the right to liberty shall remain the principle and detention the exception in accordance with international human rights law. Following this stance, enforcement of migration control must not impair the essence of this fundamental freedom by reversing the relation between principle and exception, right and restriction.

The substance of Objective 13 reads as a normative synthesis of the legally binding standards governing immigration detention as grounded on a broad range of conventions and construed by UN treaty bodies and regional courts. States commit in this objective to ensure in accordance with human rights law that any detention of migrants is not arbitrary and based on law following an individual assessment of each particular case with due respect for the principles of necessity and proportionality. As a result of the basic legal standards restated by the Global Compact alongside an extensive body of international jurisprudence, any automatic or indefinite detention of undocumented migrants is prohibited by international law.[9] As notably reaffirmed by the Human Rights Committee, irregular entry does not justify detention on its own and must be accompanied by other factors particular to the individuals, such as the likelihood of absconding and lack of co-operation.[10]

Following this stance, Objective 13 underlines that any deprivation of liberty shall be carried out for the shortest possible period of time and states shall prioritise non-custodial alternatives to detention. Although the Compact does not specify such alternatives, it envisages the development of a repository to disseminate best practices (GCM, para. 29(b)). Alternatives to detention are generally understood to include three main means: first, entrusting a third party with care and/or responsibility for the migrant and his/her case (e.g. community supervision, case management, provision of a guarantor/surety); second, requiring from the migrant the payment of bonds or bail; or, third, limiting liberty of movement with reporting requirements, the establishment of a home curfew, the placement in (semi-)open centres or designated residence, and electronic monitoring.[11]

When there is no alternative to detention that could be effectively applied, the Compact restates the basic procedural guarantees required by international law.[12] They include: the right to be informed about the reasons for the detention, the right to challenge detention before a court, access to free or affordable legal advice and assistance of a qualified and independent lawyer, the right to regular review of a detention order, the right to communicate with consular or diplomatic missions, legal

[8] *ILO Multilateral Framework on Labour Migration: Non-binding Principles and Guidelines for a Rights-based Approach to Labour Migration* (ILO 2006); ILO, *Promoting Fair Migration: General Survey Concerning the Migrant Workers Instruments* (2016), 19–20.

[9] See, among many other restatements, HRC, *A v. Australia* (1997) Communication No. 560/1993 UN Doc CCPR/C/59/D/560/1993, para. 9.4; IACtHR, *Case of Vélez Loor v. Panama*, OAS Series C No. 218 (2010), paras 167–169; ECtHR, *Mathloom v. Greece* (no. 48883/07, 2012), paras. 60–71.

[10] HRC, *A v. Australia*, *supra* note 9, para. 9.4

[11] See e.g. HRC, *C. v. Australia* (2002) CCPR/C/76/D/900/1999, para. 8.2. UNHCR, *Detention Guidelines* (UNHCR 2012), 22–24; *Report of the Special Rapporteur on the Human Rights of Migrants* (2017) UN Doc A/72/173, para. 61.

[12] See inter alia ICCPR, Art. 9; ECHR, Art. 5; ACHR, Art. 7.

https://doi.org/10.1017/S1744552320000300 Published online by Cambridge University Press

representatives and family members (GCM, para. 29(d), (e)).[13] Although the right of any detainees to be treated with humanity is not reiterated explicitly, the Compact underlines and specifies that the conditions of detention shall guarantee physical and mental integrity of migrants and ensure, at a minimum, access to food, health care, assistance and adequate accommodation in accordance with international human rights law (GCM, para. 29(f)).

This detailed and comprehensive restatement of legal standards is far from being trivial given the increasing use of immigration detention as a tool of deterrence in blatant violation of international law. The Compact sends a strong message against this strategy of non-compliance. It not only reminds states about their binding duties in resorting to immigration detention; it also calls for them to revise their legislation in accordance with international law and to ensure that 'immigration detention is not promoted as a deterrent or used as a form of cruel, inhumane or degrading treatment of migrants' (GCM, para. 29(c)).

3.3 The right to family life

The Global Compact reaffirms and underlines the continuing application of the right to family life in the specific context of migration. The right to family life and the correlative duty to protect family unity are mainstreamed across several objectives and related actions. Their relevance in the field of migration is acknowledged in relation to regular pathways (Objective 5), vulnerability of migrants (Objective 7), rescue operations and missing migrants (Objective 8), border management (Objective 11), legal certainty and predictability in migration procedures (Objective 12), immigration detention (Objective 13), inclusion and social cohesion (Objective 16), as well as safe and dignified return (Objective 21).

The Global Compact acknowledges family unity both as a ground for admission and as an obstacle to return alongside the prevailing pattern of international law. As codified in a broad range of conventions, the right to respect for family life includes a positive obligation to protect the family and a negative obligation prohibiting any unlawful and arbitrary interference with the exercise of this right.[14] As restated by the Human Rights Committee, the general obligation to protect the family entails 'the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons',[15] whereas forced removal may amount to an 'arbitrary or unlawful interference' with the right to family life.[16]

Although states enjoy a significant margin of appreciation in implementing this right, the Global Compact underlines the continuing relevance of the legal duty to protect family unity in the context of migration. While 'uphold[ing] the right to family life' as a traditional pathway for regular migration, states commit to 'facilitate access to procedures for family reunification for migrants at all skills levels through appropriate measures that promote the realisation of the right to family life and the best interests of the child' (GCM, Objective 5 and para. 21(i)).

The objective of facilitating family reunification should be achieved 'by reviewing and revising applicable requirements, such as on income, language proficiency, length of stay, work authorization, and access to social security and services' (GCM, para. 21(i)). Most other references to family reunification are made with respect to children in order to 'ensure that … family unity is protected' (GCM, para. 28(d); see also GCM, paras 23(f), 27(e)). This may be viewed as a confirmation of a core duty under customary international law to reunite a minor child with his/her family legally established in a foreign country, when there is no reasonable alternative for exercising family life elsewhere (for further discussion, see Chetail, 2019, pp. 124–132).

[13]Though it is not reaffirmed by the Compact, victims of arbitrary or unlawful detention have also a right to compensation as notably enshrined in Art. 9(5) of the ICCPR.

[14]See e.g. ICCPR, Arts 17, 23; CRC, Arts 9, 10, 16.

[15]HRC, *General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses*, HRI/GEN/1/Rev. 5 (1990), para. 5; *Ngambi v. France* (2004) Communication No. 1179/2003, UN Doc CCPR/C/81/D/1179/2003, para. 6.4.

[16]See, among many others, HRC, *Byahuranga v. |Denmark*, CCPR/C/82/D/1222/2003 (2004), para. 11.7.

https://doi.org/10.1017/S1744552320000300 Published online by Cambridge University Press

3.4 The best interests of the child

Following the same stance, the best interests of the child are restated among the ten guiding principles of the Global Compact as 'a primary consideration in all situations concerning children in the context of international migration' (GCM, para. 15(h)). This well-established principle of customary international law endorsed in the widely ratified Convention on the Rights of the Child (CRC) is contextualised and mainstreamed in a broad variety of situations. In particular, states commit to establish 'robust procedures for the protection of migrant children … in order to ensure that the best interests of the child are appropriately integrated, consistently interpreted and applied in coordination and cooperation with child protection authorities' (GCM, para. 23(c)). This primary duty does apply at all stages of the migration process, whether at the arrival of children in transit or destination states and before any decision is taken about their return (GCM, paras 28(d), 37(g)).

Likewise, unaccompanied and separated children shall have 'access to health-care services, including mental health, education, legal assistance and the right to be heard in administrative and judicial proceedings, including by swiftly appointing a competent and impartial legal guardian, as essential means to address their particular vulnerabilities' (GCM, paras 23(f), 27(c), 28(b)). The Global Compact restates some other fundamental rights of migrant children, including the prohibition of child labour, access to education and the right to a nationality in situations in which a child would otherwise be stateless (GCM, paras 22(e), (f), 21(g), 29(h), 31(f), 20(e)).

As exemplified above, the Compact provides an extensive and robust restatement of the basic rights of migrant children under international law. Yet, this child-sensitive approach suffers from one major drawback: the Compact fails to prohibit the detention of migrant children in contradiction with the prevailing interpretation of human rights conventions, as notably endorsed by the Committee on the Rights of the Child, the Migrant Workers Committee and the Working Group on Arbitrary Detention.[17]

The Compact merely contains an aspirational commitment to 'working to end the practice of child detention in the context of international migration' (GCM, para. 29(h)). As a compromise, states commit nonetheless to 'protect and respect the rights and best interests of the child at all times, regardless of migration status, by ensuring availability and accessibility of a viable range of alternatives to detention' (*ibid.*; see also Muntarbhorn, 2018).

3.5 The prohibition of collective expulsion and the right to due process

Upholding the prohibition of collective expulsion is reaffirmed in Objective 8 with regard to rescue operations and Objective 21 on safe and dignified return. This principle of international migration law is endorsed in a substantial number of instruments.[18] Its restatement in the Global Compact represents a clear-cut confirmation of its customary-law nature. Indeed, 142 states from various regions of the world have ratified at least one of the conventions explicitly endorsing this prohibition, whereas non-states parties – such as China and Iran – have acknowledged that 'collective expulsion was prohibited under international law'.[19]

[17]CRC, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* (2005) UN Doc CRC/GC/2005/6, para. 61; CMW and CRC, *Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 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* (2017) UN Doc CMW/C/GC/4-CRC/C/GC/23, para. 10; *Report of the Working Group on Arbitrary Detention* (2010) UN Doc A/HRC/13/30, paras 58–60.

[18]Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), Art. 22 (1); ACHR, Art. 22(9); ACHPR, Art. 12(5); ECHR Protocol No. 4, Art. 4; Arab CHR, Art. 26(2); CIS, Art. 25(4); EU Charter, Art. 19(1). Though not explicitly mentioned in the ICCPR, the HRC considers that such prohibition is implicit to Art. 13 governing the procedural guarantees of expulsion: HRC, *General Comment No. 15*, *supra* note 6, para. 10. Among other soft-law restatements, see also CERD, *General Recommendation 30*, *supra* note 6, para. 26; Council of Europe, *Twenty Guidelines on Forced Return* (2005), Guideline 3; International Law Commission, *Draft Articles on the Expulsion of Aliens* (2014), Art. 9.

[19]UNGA, 'Report of the International Law Commission on the work of its fifty-seventh session', summary record of the 11 Meeting (23 November 2005) UN Doc A/C.6/60/SR.11, paras 54, 84. For further discussion, see Chetail, 2019, pp. 138–140.

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The impact of this principle is straightforward for states. The prohibition of collective expulsion is absolute and it does apply to any non-nationals who are within the jurisdiction of a state. It requires that each and every decision about admission, interception or removal be taken on the basis of an individual assessment, irrespective of the (un)lawful presence and the number of migrants.[20] This basic principle of international migration law is reinforced by the Global Compact through several procedural guarantees. The Compact makes it clear that all migrants are entitled to a core content of due-process guarantees, whether at the border or before any forcible removal. These procedural guarantees include, most notably, the right to an individual assessment, access to legal assistance and representation in legal proceedings, as well as the right to an effective remedy (GCM, paras 23(g), 24(a), 27 (a), (c), 28, 37, 37(c)). These due-process guarantees are inherent to the general prohibition of collective expulsion and the right to an effective remedy under human rights law.[21]

Their restatement in the Global Compact represents a significant clarification of the current state of international law, given the controversies surrounding the right to a fair trial in migration matters. The applicability of the right to a fair trial has raised some divergent interpretations and its impact accordingly varies from one treaty to another. Under both the American Convention on Human Rights and the African Charter on Human and People's Rights, the right to a fair trial has been construed by their respective treaty bodies as being applicable to migration procedures,[22] whereas the Human Rights Committee and the European Court of Human Rights consider that this right does not apply to decisions on the entry, stay and expulsion of aliens on the disputable ground that they do not concern the determination of civil rights or criminal obligations under the meaning of their respective provisions.[23]

3.6 The principle of non-refoulement

Another significant restatement of international law relates to the principle of *non-refoulement* under human rights law. The Global Compact upholds in its Objective 21:

> 'the prohibition … of returning migrants when there is a real and foreseeable risk of death, torture and other cruel, inhuman and degrading treatment or punishment, or other irreparable harm, in accordance with our obligations under international human rights law.'

This acknowledgement is both significant and ambiguous. On the one hand, the Compact sanctions a crucial principle of international migration law. The scope and content of the principle restated in Objective 21 are broad and straightforward. The prohibition of return applies to all migrants, irrespective of their documentation and the submission of an asylum request. The types of protected harms are also broadly understood. They include a real risk of death, torture and other cruel, inhuman and degrading treatment or punishment, as well as any other irreparable harms.

This restatement fairly reflects the current standing of the principle of *non-refoulement* as endorsed in a broad range of universal and regional conventions, including the UN Convention against Torture (Art. 3), the International Convention for the Protection of All Persons from Enforced Disappearance (Art. 16), the American Convention on Human Rights (Art. 22(8)) and the Charter of Fundamental

[20]See e.g. IACtHR, *Nadege Dorzema et al. v. Dominican Republic*, Series C No. 251 (2012), para. 172; and ECtHR, *Hirsi Jamaa and Others v. Italy*, ECHR 2012-II 97, para. 184.

[21]*Ibid*.; see also HRC, *Maksudov and others v. Kyrgyzstan* (2008) Communication no. 1461, UN Doc CCPR/C/93/D/1461, 1462, 1476, 1477/2006, para. 12.7; HRC, *Al Zery v. Sweden* (2006) Communication No. 1416/2005, UN Doc CCPR/C/88/D/1416/2005, para. 11.8; ECtHR, *GHH and others v. Turkey*, ECHR 2000-VIII 317, paras 34, 36.

[22]IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, *supra* note 6, paras 124–127; *Vélez Loor*, OAS Series C No. 218 (2010), para. 146; ACHPR, *Rencontre africaine pour la défense des droits de l'homme v. Zambia* (1996) Communication No. 71/92, 60, para. 29; *Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Angola* (2008), Communication No. 292/2004, para. 59.

[23]HRC, *General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial* (2007) UN Doc CCPR/C/GC/32, para. 17; ECtHR, *Maaouia v. France*, App no. 39652/98 (2000), para. 40.

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Rights of the European Union (Art. 19(2)). Besides these explicit endorsements, most general human rights conventions have been construed by their treaty bodies as comprising an implicit prohibition of *refoulement* alongside the theory of positive obligations.[24]

From the angle of general international law, the prohibition of return in case of torture, cruel, inhuman and degrading treatment is part of customary international law (Chetail, 2019, pp. 119–124; Costello and Foster, 2015, pp. 273–327). By contrast, when it comes to the risk of death and other irreparable harms, the prohibition of return primarily remains a conventional product under most notably the ICCPR and the CRC. In this case, the endorsement in the Global Compact represents a meaningful recognition by states of the interpretation developed by treaty bodies and this may pave the way for the future development of customary international law.

On the other hand, the Global Compact provides a partial account of the prohibition of *refoulement* as it stands in international human rights law. It is only mentioned once in the objective dedicated to the return of migrants, but it is not restated in the many other relevant objectives related to pathways for regular migration, search-and-rescue operations at sea, vulnerability of migrants and border management. The principle of *non-refoulement* is thus acknowledged merely as an obstacle to removal and not as a ground of protection on its own. This restrictive stance is exacerbated by the absence of any explicit reference to the very term *refoulement* in the Compact.

The confinement of the human rights principle of *non-refoulement* as a mere obstacle to removal establishes a double standard with its refugee-law counterpart under Article 33 of the Geneva Convention relating to the status of refugees. This represents a significant step backward. *Non-refoulement* is an integral component of the protection against torture and inhuman or degrading treatment. It is also acknowledged, at the regional and domestic levels, as a complementary form of protection to the refugee status. Although the human rights principle of *non-refoulement* largely coincides in substance with its refugee-law counterpart, the former provides a broader protection than the latter in three significant regards.

First, its benefit is not subordinated to the five limitative grounds of persecution under the Refugee Convention (race, religion, nationality, political opinion, membership of a particular social group). Second, whereas the refugee definition requires one to be outside the country of origin, the human rights principle of *non-refoulement* does not provide such a limitation: it applies extra-territorially as soon as an individual is under the effective control of a state. Third, the prohibition of *refoulement* is absolute where there is a real risk of torture or inhuman or degrading treatment. It thus applies to asylum seekers and refugees who are excluded from the Geneva Convention in application of the exceptions to the *non-refoulement* principle under Article 33(2) or under the exclusion clauses of the refugee definition contained in Article 1 F.

In spite and because of the fact that the human rights principle of *non-refoulement* is wider than that of the Geneva Convention, states have not yet drawn all the consequences of international human rights law as a vehicle of protection. The resulting gap of protection is aggravated by the deafening silence of the Global Compact on Refugees on this issue. From this angle, the two UN compacts represent a missed opportunity to improve the fate of vulnerable migrants who are not granted refugee protection while facing a similar risk of human rights violations in their own countries.

This drawback is also inconsistent with several objectives of the Global Compact for Migration. In particular, Objective 5 commits states to expand and diversify pathways for regular migration with the view of responding to the needs of migrants in a situation of vulnerability. Objective 7 further reiterates their commitment to assist and protect vulnerable migrants in accordance with their obligations under international law (on these objectives, see Atak *et al.*, 2018).

[24]ECtHR, *Soering v. The United Kingdom* (1989) 11 EHRR 439, paras 87–88; HRC, *General Comment No. 20: Article 7 (Prohibition of Prohibition of Torture and Cruel Treatment or Punishment)* (2008) UN Doc HRI/GEN/1/Rev.9 Vol I, para. 9; CRC, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* (2005) UN Doc CRC/GC/2005/6, para. 27; CEDAW, Communication No. 33/2011 concerning MNN v Denmark (2013) UN Doc CEDAW/C/D/33/2011, para. 8.10.

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3.7 The human right to return and the duty of states to readmit their nationals

Another significant albeit ambiguous restatement of international migration law relates to the human right to return and the duty of states to readmit their own nationals. According to Objective 21, states 'commit to ensure that our nationals are duly received and readmitted, in full respect for the human right to return to one's own country and the obligation of States to readmit their own nationals'. This strong and unqualified wording may be misleading by putting on the same footing – and thus confusing – the human right to return and the state duty of readmission. The relations between these two legal norms are more subtle than assumed in the Global Compact. Objective 21 calls for two caveats regarding their legal basis and normative interactions.

First, although the right to return to one's own country is a well-acknowledged principle of international migration law, the obligation of readmission is more controversial, as exemplified by the long-standing difficulties encountered by EU Member States in concluding readmission agreements with third countries (Coleman, 2009; Carrera, 2016). Second, despite their practical intermingling, the human right to return and the state's duty of readmission are not always correlative. International law draws a distinction between the two, depending on whether the decision to return stems from an individual right or an interstate duty (Noll, 2003, pp. 61–74).

This distinction between the human right to return and the interstate duty of readmission is frequently overlooked, not only in the Global Compact, but by scholars as well (Hailbronner, 1997). It accordingly deserves further clarifications. On the one hand, human rights law clearly requires states to readmit their nationals who are willing to return as a matter of personal choice. This human right to return is endorsed in a vast number of conventions[25] and it is an integral part of customary international law.[26] In the case of a voluntary return, the duty of the state to readmit its nationals is inherent to the individual right to enter one's own country. The two notions thus coincide within the same normative continuum.

On the other hand, there is no such general duty of readmission when a national does not want to return, as it happens for undocumented migrants who are deported against their will in their own countries. In such a case, because of the forcible nature of the return, readmission is no longer a human right between an individual and his/her country of nationality. Instead, it operates as an interstate duty between the sending country and the country of origin that is grounded on treaty law, most frequently bilateral agreements. This interstate duty is not part of customary international law given the need for a treaty to establish the obligation of readmission and the reluctance of many states of origin in concluding such agreements.

Although the Global Compact might influence the future development of customary law in the field of readmission, it does not alter for the time being the current state of international law and the prevailing distinction between the human right to return and the interstate duty of readmission. This is clear from the first action of Objective 21 that simply calls to 'develop and implement … readmission agreements' while ensuring that 'return and readmission of migrants to their own country is … in full compliance with international human rights law' (GCM, para. 37(a)).

4 The Global Compact for Migration: a road map towards the progressive development of international law

While restating some of the most important principles of international law, the Global Compact provides a road map towards the progressive development of international law. Most of its objectives are prospective and thus in essence aspirational. They provide a common line of conduct in order to develop international law as a tool of interstate co-operation. Fostering co-operation and dialogue

[25]ICCPR, Art. 12(4); ICERC, Art. 5(ii); CRC, Art. 10(2); ICRMW, Art. 8; ECHR Protocol No. 4, Art. 3(2); ACHR, Art. 22 (5); ACHPR, Art. 12(2); Art. 27(2), Arab CHR.

[26]European Court of Justice, Case 41-74 *Van Duyn v. Home Office* [1974] ECR 1337, 1351; *Plaintiff M70/2011* and *Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship* (2011) HCA 32 (High Court of Australia).

https://doi.org/10.1017/S1744552320000300 Published online by Cambridge University Press

among states constitutes the very rationale of the Global Compact (GCM, para. 8). Its second guiding principle is devoted to international co-operation and informs all objectives on the obvious ground that 'no state can address migration on its own because of the inherently transnational nature of the phenomenon' (GCM, para. 15(b)). While being mainstreamed across the whole Compact, the commitment of states to 'strengthen international cooperation and global partnerships for safe, orderly and regular migration' is further addressed in the last Objective 23.

The role of international law in fostering inter-governmental co-operation varies, however, from one objective to another, depending on their nature and the correlative actions to implement them. Likewise, the means to develop international law are various. When it comes to treaty law, they traditionally include the ratification of existing conventions and the adoption of new ones. Interestingly, the Global Compact is more vocal in calling for the conclusion of new conventions than in ratifying existing ones. Promoting ratification of existing treaties is mainly limited to three types of instruments, namely the Protocol against the Smuggling of Migrants by Land, Sea and Air (GCM, para. 25(a)), the Protocol to Prevent, Suppress and Punish Trafficking in Persons (GCM, para. 26(a)), as well as the relevant international instruments related to labour migration, labour rights, decent work and forced labour (GCM, para. 22(a)).

The need to expand the number of states parties to existing treaties is more acute in the area of labour migration than for the Smuggling Protocol and the Trafficking Protocol. They are already ratified by 149 and 175 states, respectively, while their core substance is restated in Objectives 9 and 10 of the Compact (see Gauci and Stoyanova, 2018). By contrast, the conventions on migrant workers are conspicuously known for their limited number of ratifications. The 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families counts only fifty-five states parties, while the 1949 Migration for Employment Convention No. 97 gathers fifty states parties and the 1975 Migrant Workers (Supplementary Provisions) Convention No. 143 is ratified by twenty-five states.

Nevertheless, the poor ratification of these specialised treaties does not reflect the reach of international law with regard to migrant workers. Overall, eighty-eight states have ratified one or more of the three UN and ILO conventions on migrant workers. The geographical spread of ratifications embraces all continents and both countries of immigration and emigration. States parties include twenty-nine states from Africa, twenty-six from Latin America and the Caribbean, twenty from Europe and thirteen from Asia and the Pacific region (Chetail, 2019, pp. 247–250). Although this basic account is frequently ignored by scholars and decision-makers, the very fact that eighty-eight states have ratified at least one of these three specialised treaties provides a much more nuanced and substantial picture to take stock of the current binding commitments agreed on by states and their potential for future developments.

Furthermore, the widely ratified general conventions on human rights, such as the ICCPR and the ICESCR, are generally applicable to migrant workers and they overlap in substance with many provisions contained in the specialised instruments on labour migration (Chetail, 2019, pp. 69–71, 235–238; Cholewinski, 2015). Similarly, the vast majority of general labour conventions adopted under the auspices of ILO are applicable to all workers irrespective of their nationality, thus including foreign ones, and they may contain specific provisions on migrant workers. Their ratification is still uneven from one instrument to another. Among some of the most relevant general labour conventions in the field of migration, the 1957 Convention on the abolition of forced labour No. 105 and the 1958 Discrimination (Employment and Occupation) Convention No. 111 have gathered 175 states parties, whereas the 2011 Domestic Workers Convention No. 189 is currently in force for only twenty-nine states.

In addition to promoting the ratification of existing conventions in the fields of labour migration, smuggling and trafficking, the Compact calls for the adoption of new international agreements in a significant range of areas. Some objectives and related actions recommend the conclusion of new agreements in vague and open-ended terms, without elaborating further their overall purpose and design. They concern Objective 14 on consular assistance (GCM, para. 30(a)) and Objective 21 on

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safe and dignified return (GCM, para. 37(a)). By contrast, other objectives and related actions are much more specific to develop international law through the adoption of new treaties.

A telling example is given by Objective 8 to save lives and establish co-ordinated international efforts on missing migrants. The first action to realise this commitment is to develop agreements on the search and rescue of migrants. The Compact specifies that the primary objective of these new agreements is to 'protect migrants' right to life' (GCM, para. 24(a)). It further outlines their core content and basic guarantees, namely 'to uphold the prohibition of collective expulsion, guarantee due process and individual assessments, enhance reception and assistance capacities, and ensure that the provision of assistance of an exclusively humanitarian nature for migrants is not considered unlawful'. This last acknowledgement is particularly important given the increasing temptation of states to criminalise humanitarian assistance for migrants in their domestic legislation.[27]

The most promising avenue for the progressive development of international law is endorsed in Objective 5 and lies in the commitment to enhance and expand pathways for regular migration in a broad range of areas, including labour mobility, education, family unity and vulnerable migrants. Among these various fields, the commitment to facilitate labour mobility is much more developed and detailed than the others. The first three actions of Objective 5 provide the overall direction of the progressive development of international law and sound like a normative agenda:

- 'Develop human rights-based and gender-responsive bilateral, regional and multilateral labour mobility agreements with sector-specific standard terms of employment in cooperation with relevant stakeholders, drawing on relevant International Labour Organization (ILO) standards, guidelines and principles, in compliance with international human rights and labour law';
- 'Facilitate regional and cross-regional labour mobility through international and bilateral cooperation arrangements, such as free movement regimes, visa liberalization or multiple country visas, and labour mobility cooperation frameworks, in accordance with national priorities, local market needs and skills supply';
- 'Review and revise existing options and pathways for regular migration, with a view to optimize skills matching in labour markets, address demographic realities and development challenges and opportunities, in accordance with local and national labour market demands and skills supply.' (GCM, para. 21(a)–(c))

The normative agenda spelt out in Objective 5 relies on a comprehensive approach through a combination of national, bilateral, regional and multilateral actions to be taken in the future (see also Crépeau, 2018). As exemplified above, the first action is very specific and detailed in drawing the contours of new labour-mobility agreements. Whether adopted at the bilateral, regional or multilateral level, their content is supposed to embrace the following parameters: they should include sector-specific standard terms of employment and take into account the needs of national labour markets and skills supply, while being gender-sensitive and informed by the relevant ILO standards and guidelines in accordance with human rights law.

The call for developing international law in the area of labour 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 the skills, qualifications and competences of migrant workers (Objective 18) and to ensure the portability of their social-security entitlements and earned benefits (Objective 22). These objectives cover the main areas in which the need to develop specific instruments is the most acute. The actions listed in the Compact notably include the conclusion of bilateral, regional or multilateral agreements on

[27]For a telling overview of EU Member States' legislation, see European Union Agency for Fundamental Rights, 2014.

https://doi.org/10.1017/S1744552320000300 Published online by Cambridge University Press

the mutual recognition of foreign qualifications and non-formally acquired skills (GCM, para. 34(c)) and on the portability of earned benefits for migrant workers at all skill levels (GCM, para. 38(b)), while calling for improving regulations on public and private recruitment agencies in order to align them with international guidelines and best practices (GCM, para. 22(c)).

Against this background, legalising labour migration represents the new frontier of international law. The commitments endorsed in the Global Compact to frame the future development of the international agenda on this long-neglected issue are both significant and ambitious. They have the potential to improve the lives of migrants and to channel inter-governmental co-operation within a more balanced and comprehensive approach. The commitments agreed on by states remain, however, aspirational by nature. Their full realisation is obviously impossible to predict: the impact of the Compact on the future development of international law depends on whether states will honour their commitments. The crash test of the Compact lies in the ability of states to move from rhetoric to action. If they fail to do so, the recent and unprecedented mobilisation of the international community will be remembered as yet another missed opportunity in the long and turbulent history of migration.

5 Conclusion

The Global Compact epitomises the potential and the limits of soft law in promoting inter-governmental co-operation and global governance. While reflecting the reluctance of states towards legally binding instruments, soft law operates as a co-ordinating device to frame their future actions within a common line of conduct that is mutually agreed upon. Soft law is both a vehicle of convergence and a factor of stabilisation in a decentralised society composed of sovereign states.

Despite the heterogeneity of its objectives and the piecemeal approach followed by its drafters, the Global Compact 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. This must be acknowledged as an achievement in its own right. In a sensitive and polarised 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.

The Compact acknowledges migration as a question of shared responsibilities that calls for a global approach (GCM, para. 11). The very nature of this instrument is thus 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 and 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. Hence, its legal significance should not be overestimated.

Like a kaleidoscope, the Global Compact fractures the vision of international migration law into a multifarious and fragmented juxtaposition of legal norms and interconnected standards. It exhibits a segmented and distorted account of international law alongside the political objectives and priorities of states. Its very content is also ambiguous on several key issues that do not reflect the current reach of international law. This includes most notably the right to leave any country, the detention of children, equal access to basic services and the principle of *non-refoulement*.

Despite its legal limitations, the Compact is more necessary than ever as a counter-narrative to the politically toxic debates surrounding migration at the domestic level. While reaffirming the rule of law as an integral component of migration governance, the Compact is an instrument of both consolidation and expansion of international law. It reinforces a substantial range of binding principles of international law and calls for its future development to address its most obvious lacunae. The Compact underlines by the same token the continuing legitimacy and relevance of international law to frame migration and inter-governmental co-operation.

Conflicts of Interest. None.

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Cite this article: Chetail V (2020). The Global Compact for Safe, Orderly and Regular Migration: a kaleidoscope of international law. *International Journal of Law in Context* **16**, 253–268. https://doi.org/10.1017/S1744552320000300