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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

The alleged tension between the Global Compact for Safe, Orderly and Regular Migration and state sovereignty: 'Much Ado about Nothing'?

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Abstract

In a landmark effort to finally acknowledge the necessity to jointly respond to the global phenomenon of large movements of refugees and migrants, the process initiated in 2016 with the approval of the New York Declaration for Refugees and Migrants eventually led to the adoption of two UN Global Compacts, respectively the Global Compact for Safe, Orderly and Regular Migration (GCM) and the Global Compact on Refugees (GCR). Despite the enthusiastic support shown at first by the international community, the GCM negotiations have been more controversial and ultimately shaken by the clamorous withdrawals of several states. The main argument used by the withdrawing governments to justify the sudden refusal to adopt the GCM was based on the claim that the document – although non-binding – undermines the 'sovereign right' of the state. Such a claim, given the centrality that the principle of state sovereignty has acquired since the Peace of Westphalia, deserves to be further analysed from an international law perspective by resorting to the 'sovereignty test' developed by Schrijver. The present work, after briefly introducing the main tenets of the GCM, applies the 'sovereignty test' to the GCM to dissect the alleged tension between state sovereignty on the one hand and the shared approach to international migration envisaged by the pact on the other. This article's ultimate goal is to prove that the GCM does not aim to restrain state sovereignty; rather, it strives to remind states of existing international commitments already undertaken at the regional and global level.

Keywords: Global Compact for Migration; human rights law; Marrakech Intergovernmental Conference; sovereignty test; state sovereignty

1. Introduction

Migration is a permanent feature of human history that has been framed by international law for ages.[1] Yet, the existing international legal framework, as it currently stands, lacks the ability to address many of the key issues at stake, starting from the absence of a universally accepted definition of 'migrant'. Notably, only some categories of migrants are defined in specialized international instruments; for example a definition of the term 'migrant worker' is enshrined in Article 2(1) of the International Convention on the Protection of the Rights of All Migrant

[1]See D. Kugelmann, 'Migration', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009), 1; V. Chetail, 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel', (2016) 27 EJIL 901; V. Chetail, *International Migration Law* (2019), at 16–36.

Workers and Members of their Families, which, as of the time of publication, has been ratified by only 55 states.[2]

Migration is also one of those themes affecting all countries in the world, whether as states of origin, transit states or as states of destination; a characteristic which *per se* would represent a sufficient reason to develop and enhance stronger co-operation at the global level.[3] Until recently most attempts to increase international co-operation on migration took the form of agreements, bilateral and multilateral,[4] to facilitate the temporary entry of certain categories of workers; a first category of agreements focuses on so-called skilled labour, the second targets less-skilled workers in local short supply.[5] Another typology of agreements, characterized by a significantly broader scope, encompasses those concluded to control, or in some cases outsource,[6] migration flows, e.g., the EU-Turkey Statement.[7] Assuming that shared goals, like countering irregular migration, can be best accomplished through international co-operation,[8] it does not come as a surprise that states have ultimately recognized the necessity to identify new ways to overcome the present dearth of joint efforts.[9]

Finally acknowledging the necessity to respond collectively to the global phenomenon of large movements of refugees and migrants, on 19 September 2016 UN member states unanimously adopted the text of the New York Declaration for Refugees and Migrants (the New York Declaration).[10] The New York Declaration officially inaugurated the beginning of a new phase marked by states' agreement to enhance co-operation in order to address the challenge of large movements of people,[11] still divided in two main legal categories: asylum seekers/refugees and migrants.

[2]1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, UN Doc. A/RES/45/158. The number of ratifications can be consulted at treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4. On the complexity of the existing framework – and the lack of definition of 'migrant' under international law – see, for instance, C. Dauvergne, 'Irregular Migration, State Sovereignty and the Rule of Law', in V. Chetail and C. Bauloz (eds.), *Research Handbook on International Law and Migration* (2014), 78; H. Obregón Gieseken, 'The Protection of Migrants under International Humanitarian Law', (2017) 99 *International Review of the Red Cross* 121, at 123–4.

[3]The co-operation thesis is well known in international legal theory. In his landmark book, *The Changing Structure of International Law*, Friedman affirmed that international law was shifting from a 'law of coexistence' to a 'law of cooperation', the latter described as 'attempts to regulate and promote, by positive co-operation, interests of common concern'. See W. Friedman, *The Changing Structure of International Law* (1964), 9. The co-operation thesis has been recently questioned by Prof. Hakimi in a thought-provoking article: M. Hakimi, 'The Work of International Law', (2017) 58 *Harvard International Law Journal* 1, at 25–33.

[4]Examples of labour migration agreements at the bilateral level abound, see ILO, Bilateral Labour Arrangements (BLAs) on labour migration, available at www.ilo.org/global/topics/labour-migration/policy-areas/measuring-impact/agreements/lang–en/index.htm. At the multilateral level, the WTO General Agreement on Trade in Services (GATS), for example, offers a vehicle for temporary migration commitments in relation to services trade. See 1995 GATS, 1869 UNTS 183.

[5]See A. O. Sykes, 'International Cooperation on Migration: Theory and Practice', (2013) 80 *The University of Chicago Law Review* 315.

[6]See A. de Guttry, F. Capone and E. G. Sommario, 'Dealing with Migrants in the Central Mediterranean Route: A Legal Analysis of Recent Bilateral Agreements Between Italy and Libya', (2018) 56(3) *International Migration* 44.

[7]On the nature of the EU-Turkey Statement see *NF, NG and NM v. European Council* Cases T-192/16, T-193/16 and T-257/16 [2017], at 62–70. See also E. Cannizzaro, 'Denialism as the Supreme Expression of Realism - A Quick Comment on NF v. European Council', (2017) 2 *European Papers* 251.

[8]According to Wolfrum, international co-operation is 'the voluntary coordinated action of two or more States which takes place under a legal régime and serves a specific objective': R Wolfrum, 'International Law of Cooperation', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. 2 (1995), at 1242.

[9]Sykes, *supra* note 5, at 335–6.

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

[11]Previous initiatives – which generally ended in reports and not much else – include the establishment of the Global Migration Group at the UN inter-agency level and the Global Forum on Migration and Development at the inter-state level; the latter is a state-owned consultative process launched in 2007 for strengthening multilateral dialogue and co-operation. See V. Chetail, 'Paradigm and Paradox of the Migration-Development Nexus: The New Border for North-South Dialogue', (2008) 51 *German Yearbook of International Law* 183.

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The Declaration initiated a process that eventually led to the adoption of two UN Global Compacts, respectively the GCM[12] and the GCR.[13] In a nutshell the Global Compacts are non-binding co-operative frameworks which lay out a set of principles, objectives, and partnerships for the governance of refugees and migration. Despite the enthusiastic support showed at first by the international community, the negotiations of the GCM have been deeply shaken by the clamorous withdrawals of states – including members of the EU like Italy, Hungary, Austria, Poland, and Czech Republic – that originally pledged their full support to the initiative and later even refused to attend the Intergovernmental Conference held in Marrakech on 10–11 December 2018, when the GCM was ultimately approved by only 164 states. Shortly after the Marrakech Conference, the GCM was submitted for UNGA endorsement. Only 152 states voted in favour of the Resolution, whereas five voted against it, i.e., Czech Republic, Hungary, Israel, Poland, and the US.[14]

The unexpected 'U-turn' fuelled controversy and risked undermining the value of the efforts undertaken to deal globally with the endemic phenomenon of international migration. Notably, the main argument used by the withdrawing states to justify the sudden refusal to adopt the GCM was based on the claim that the pact undermines the 'sovereign right' of the state.[15] For instance the US, which pulled out of the GCM in December 2017, justified its decision on the grounds that 'the global approach in the New York Declaration is simply not compatible with U.S. sovereignty'.[16] Subsequently, similar announcements have been made by a growing number of governments, also across Europe,[17] rejecting the pact as an unjustified intrusion on national sovereignty.[18]

Such a claim – given the centrality that the principle of state sovereignty has acquired ever since the Peace of Westphalia of 1648,[19] and in light of the Global Compact's declared respect for states' prerogative to govern migration within their jurisdiction[20] deserves to be further analysed from an international law perspective. In order to do so, different approaches could have been resorted to,[21] but it is argued here that the most effective, and thorough, assessment can be conducted by applying to the GCM the 'sovereignty test' originally developed by Professor Nico

[12]UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration: Final Draft', 11 July 2018, available at eapmigrationpanel.org/en/global-compact-safe-orderly-and-regular-migration-final-draft.

[13]UNHCR, 'Global Compact on Refugees: Final Draft', 26 June 2018, available at www.unhcr.org/5b3295167.pdf.

[14]Global Compact on Safe, Orderly and Regular Migration, UN Doc. A/RES/73/195 (2018).

[15]S. Carrera et al., 'Some EU Governments Leaving the UN Global Compact on Migration: A Contradiction in Terms?', (2018) 15 *Policy Insights* 1.

[16]United States Mission to the United Nations, 'Statement: United States Ends Participation in Global Compact on Migration', 2 December 2017, available at usun.usmission.gov/united-states-ends-participation-in-global-compact-on-migration/.

[17]For an overview of the statements made see S. Fella, 'The United Nations Global Compact for Migration', House of Commons Library Briefing Paper No 8459, 5 December 2018, at 12–14, available at commonslibrary.parliament.uk/research-briefings/cbp-8459/. As reported in the briefing, for example, Austrian Chancellor Sebastian Kurz openly expressed fear of 'a danger to our national sovereignty'. Furthermore, according to a statement issued by the Polish Government Information Centre to explain Poland's withdrawal from the pact 'the document did not fulfil Poland's requirements regarding appropriately strong guarantees of the right of a sovereign state to decide who to let in on its territory . . .'; ibid., at 13.

[18]S. Carrera et al., *supra* note 15, at 1–3.

[19]L. Gross, 'The Peace of Westphalia, 1648–1948', (1948) 42 AJIL 20; E. N. van Kleffens, 'Sovereignty in International Law', (1953) 82 *Recueil des cours* 1.

[20]Global Compact for Migration, *supra* note 12, at 2, 4, 18.

[21]Other conceivable approaches encompass, for example, an analysis of the GCM in light of the two functions of sovereignty identified by Neil Walker, according to whom the concept of sovereignty has supplied a stable *frame* through which the legal world as a whole is apprehended and shaped as well as the discursive form of a *claim* variously and sometimes speculatively or contentiously made. See N. Walker, 'Sovereignty Frames and Sovereignty Claims', University of Edinburgh, School of Law, Research Paper Series No. 2013/14. Another possibility is to consider how the GCM interacts with the dimensions of sovereignty, i.e., the external and internal dimension to which some authors add also a distinct territorial one. See N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (1999),

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Schrijver.[22] At that time Schrijver's use of the test was confined to 'new' sources of four fields of international law – i.e., arms control and disarmament, management of the environment, foreign investment, and peace and security – which constituted recent developments addressing crucial concerns in global economic and political relations.[23] The test designed by Schrijver consists of a set of key questions whose answers resulted in an appraisal of the capability of the selected legal instruments, treaties in the first three cases and binding decisions of an international organization in the fourth, to restrain the scope and function of state sovereignty. The questions cover a number of issues 'crucial to an understanding of sovereignty',[24] i.e., the actors involved in the law making process, the definition of sovereignty, the scope of sovereignty, the influence of universal values, the duties of states, the role of international institutions, and the procedures for settlement of disputes.[25]

In this author's view, the application of the 'sovereignty test' to the GCM is a useful exercise to meticulously reflect on the pact's alleged threat to state sovereignty. In fact, even if it is true that much of the virulent animosity towards the GCM's presumed incompatibility with the notion of sovereignty is contradicted by a cursory reading of the text, the 'state sovereignty argument' deserves to be carefully examined against the backdrop of the key issues singled out by Schrijver. The GCM is clearly not a binding instrument, unlike the ones analysed in Schrijver's article, but it is rather dubbed as 'soft law';[26] yet, the application of the 'sovereignty test' is still compelling in light of two main factors. The first factor is represented by the impossibility of drawing a neat line between law and non-law in global governance, which would end up pushing out of the picture 'many interesting and important normative phenomena' that have some normative significance despite their non-binding, non-treaty form.[27] Concerning the second factor, if traditionally soft law was regarded as a way for states to avoid delicate sovereignty-related problems,[28] the reaction triggered by the GCM suggests that nowadays any effort to deal collectively with universal problems could potentially be interpreted as a challenge to state sovereignty. This reading of the GCM is particularly dangerous, and needs to be countered, as it might affect the turn towards soft legalization that in many instances has overcome states' inability to deal with the world's most pressing problems.[29]

The present work, after briefly introducing the main tenets of the GCM, will apply the 'sovereignty test' to the document in order to dissect the alleged tension between state sovereignty on the one hand and the shared approach to international migration envisaged by the pact on the

128–30; R. Perruchoud, 'State Sovereignty and Freedom of Movement', in B. Opeskin, R. Perruchoud and J. Redpath-Cross (eds.), *Foundations of International Migration Law* (2012), 123.

[22]N. Schrijver, 'The Changing Nature of State Sovereignty', (2000) 70 *British Yearbook of International Law* 65.

[23]Ibid., at 67–9.

[24]Ibid., at 78.

[25]Ibid.

[26]A. Peters, 'The Global Compact for Migration: to sign or not to sign?', *EJIL:Talk!*, 21 November 2018, available at www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/.

[27]Ibid., at 4. See also A. Peters, 'Soft Law as a New Mode of Governance', in U. Diedrichs, W. Reiners and W. Wessels (eds.), *The Dynamics of Change in EU Governance* (2011), 21, at 23; K. W. Abbott and D. Snidal, 'Hard and Soft Law in International Governance', (2000) 54 *International Organization* 421, at 423–4; H. Hillgenberg, 'A Fresh Look at Soft Law', (1999) 10 EJIL 499, at 500; L. Blutman, 'In the Trap of a Legal Metaphor: International Soft Law', (2010) 59 ICLQ 605; A. Boyle and C. Chinkin, *The Making of International Law* (2007), 211–29; N. Bayne, 'Hard and Soft Law in International Institutions: Complements, Not Alternatives', in J. J. Kirton and M. J. Trebilcock (eds.), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (2004), 347.

[28]R. R. Baxter, 'International Law in "Her Infinite Variety"', (1980) 29 ICLQ 549; C. M. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', (1989) 38 ICLQ 850.

[29]T. Meyer, 'Shifting Sands: Power, Uncertainty and the Form of International Legal Cooperation', (2016) 27 EJIL 161, at 162–3. The author provides a number of examples of states' failure to come up with formal, binding legal rules on issues ranging from climate change to financial regulation. For instance, he reports how 'when a successor agreement to the Kyoto Protocol could not be immediately negotiated, states adopted the Copenhagen and Cancun Accords, which provide a non-binding framework for continuing cooperation on the reduction of greenhouse gas emissions'.

other. This article's ultimate goal is to prove that the GCM does not aim to restrain state sovereignty; rather, it strives to remind states of existing international obligations already undertaken at the regional and global level.

2. A glance at the Global Compact for Migration

The two Global Compacts are non-legally binding documents that pursue the goal of developing and implementing a common approach to (massive) movements of peoples, maintaining that asylum seekers/refugees and migrants are distinct groups governed by different legal frameworks.[30] The GCM has proved to be most controversial of the two, most likely because whereas a regime of protection for refugees already exists,[31] even though it presents significant gaps,[32] the same is not true for migrants. So far, what has been eloquently described as 'the insulation of migration practices from international law'[33] has de facto hampered the development of a coherent international law of migration. As a result, the various strands of international law that deal with the movement of people across national borders are still not clearly conceptualized as a unified field.[34] Over the past decade international law has especially struggled to provide a coherent approach to mass migration, failing to establish effective mechanisms and helplessly witnessing the escalation of migration emergencies.[35] In such a context, the multiple migration crises and the rather dramatic movement of refugees across Europe in 2015–2016 finally prompted European states to seek more co-ordination on migration and asylum, providing some of the necessary impetus for the New York Declaration first and for the two Global Compacts later.[36] Whereas there were no doubts concerning the legal status of the New York Declaration, i.e., a non-binding document with an aspirational character,[37] questions arose with regard to the nature of the two Global Compacts. The New York Declaration itself did not clarify what kind of documents the Compacts were meant to be, notwithstanding the reference to possible non-binding guiding principles and voluntary guidelines. From the start a number of states have been adamantly against any binding nature for the Compacts, and this approach eventually prevailed.[38]

[30]The distinction between refugees and migrants, maintained in the two Global Compacts, has been widely debated and thoroughly commented upon, see, for instance, R. Karatani, 'How History Separated Refugee and Migrant Regimes: In Search of their Institutional Origins', (2005) 17 *International Journal of Refuge Law* 517; G. S. Goodwin-Gill, 'The International Law of Refugee Protection', in E. Fiddian-Qasmiyeh et al. (eds.) *The Oxford Handbook of Refugee and Forced Migration Studies* (2014), 36; D. S. Weissbrodt, *The Human Rights of Non-citizens* (2008), Chs. 7 and 8.

[31]1951 Convention Relating to the Status of Refugees, 189 UNTS 137.

[32]V. Türk and R. Dowd, 'Protection Gaps', in Fiddian-Qasmiyeh et al., *supra* note 30, at 278; on the possible role of the Global Compact on Refugees in addressing the existing gaps see A. Betts, 'The Global Compact on Refugees: Towards a Theory of Change?', (2018) 30 *International Journal of Refugee Law* 623.

[33]See P. J. Spiro, 'The Possibilities of Global Migration Law', (2017) 111 *AJIL Unbound* 3, at 4. See also T. A. Aleinikoff, 'International Legal Norms on Migration: Substance without Architecture', in R. Cholewinski, E. Macdonald and R. Perruchoud (eds.), *International Migration Law Developing Paradigms and Key Challenges* (2007), 467; V. Chetail, 'The Transnational Movement of Persons under General International Law – Mapping the Customary Law Foundations of International Migration Law', in Chetail and Bauloz (eds.), *supra* note 2, at 1.

[34]J. Ramji-Nogales, 'Migration Emergencies', (2017) 68 *Hastings Law Journal* 609, at 625–6; Chetail (2019), *supra* note 1, at Chs. 3–5; Opeskin, Perruchoud and Redpath-Cross (eds.), *supra* note 21; R. Plender (ed.), *Issues in International Migration Law* (2015).

[35]Ramji-Nogales, ibid., at 654.

[36]E. Guild, 'The Global Compact as a Milestone in Global Governance of Migration', (2018) 18 *Global Social Policy* 325, at 326.

[37]New York Declaration for Refugees and Migrants, *supra* note 10, Annex II, at 24, paras. 14–15.

[38]Guild, *supra* note 36, at 327. The non-binding nature of the Compacts does not infer that they do not have any legal effects or functions. With regard to the GCM see Peters, *supra* note 26; K. Allinson et al., 'GCM Commentary: The Legal Status of the UN's Global Compact for Safe, Orderly and Regular Migration in International and UK Law', *Refugee Law Initiative Blog on Refugee Law and Forced Migration*, 31 January 2019, available at rli.blogs.sas.ac.uk/2019/01/31/gcm-commentary-the-legal-

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Without delving into the process of consultations and negotiations that led to the GCM and that will be discussed later on, it is worth recalling here that the first draft of the GCM was issued on 5 February 2018 (in UN parlance a 'zero' draft). It has been followed by a 'zero+' draft, which was modified a number of times during the intergovernmental negotiations,[39] and then by a first, second, and final draft published on 11 July 2018. The final draft was the one presented and adopted at the Intergovernmental Conference in Marrakech in December 2018 and subsequently endorsed by the UN General Assembly. The coming paragraphs will provide an overview of the structure and content of the document as well as of the main substantive objections, unequivocally connected to state sovereignty, raised by its critics. Whereas the present section pursues the goal of offering a broader picture of the compact and its shortcomings in order to lay the groundwork for the rebuttal of the claim that the GCM undermines state sovereignty, the next one will delve into the issue in depth by applying the sovereignty test to the pact and hence dissecting and discussing its core elements one by one.

2.1 The key tenets of the Global Compact for Migration

The GCM consists of a preamble, which acknowledges the human rights instruments, other international agreements that have a bearing on migration as well as the contributions of previous international discussions on migration, and two main parts. The first part contains 'vision and guiding principles'. The vision of the GCM revolves around three main pillars, i.e., common understanding, shared responsibilities, and unity of purpose regarding migration. Whereas the cross-cutting and interdependent principles that guide the GCM encompass people-centredness, international co-operation, national sovereignty, rule of law and due process, sustainable development, human rights, gender responsiveness, child-sensitiveness, whole-of-government approach, and multi-stakeholder partnerships (presented as 'whole-of-society approach').[40]

The second part of the GCM outlines the 'cooperative framework', which is in turn divided in three sections, i.e., 'objectives and commitments', 'implementation', and the 'follow-up and review'.[41] The 23 objectives represent the core of the document and according to Newland they can be grouped in three different categories.[42] The first one includes objectives that are specific and relatively uncontroversial, such as improving migration data (objective 1), ensuring that all migrants have proof of their legal identity (objective 4), enhancing consular services for migrants (objective 14), and facilitating remittance transfers (objective 20). The second category of objectives encompasses those measures that are both specific and controversial, like widening availability and flexibility of pathways for regular migration (objective 5),[43] strengthen the transnational response to smuggling of migrants (objective 9), better border management and migration procedures (objectives 11 and 12), use immigration detention only as a measure of last resort and work towards alternatives (objective 13), and co-operating in facilitating safe and dignified return and readmission, as well as sustainable reintegration (objective 21). The third group of objectives focuses on very broad and aspirational goals, such as reducing the negative drivers of migration (objective 2), addressing and reducing vulnerabilities in migration (objective 7),

status/. More generally see J. Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law', (2012) 25 LJIL 313, at 320; J. d'Aspremont, *Formalism and the Sources of International Law* (2011), at 129.

[39]E. Guild and T. Basaran, 'The UN's Global Compact for Safe, Orderly and Regular Migration: Analysis of the Final Draft, 13 July 2018, Objective by Objective', November-December 2018, available at rli.sas.ac.uk/sites/default/files/files/Global%20Compact%20for%20Migration_RLI%20blog%20series.pdf.

[40]Global Compact for Migration, *supra* note 12, at 4, para. 15.

[41]Ibid., at 5, para. 16.

[42]K. Newland, 'The Global Compact for Safe, Orderly and Regular Migration: An Unlikely Achievement', (2018) 30 *International Journal of Refugee Law* 657.

[43]Ibid., at 2.

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empowering migrants and societies for full social inclusion and cohesion (objective 16), eliminating all forms of discrimination, and promoting evidence-based public discourse (objective 17).[44]

As emerges from the objectives listed in the GCM, the document was crafted with an eye to the long term and as a result most propositions require 'further negotiation, commitment of resources, and summoning of political will',[45] whereas only a few objectives are subject to immediate implementation, e.g., objective 1 on data collection. The last two sections of the 'cooperative framework' of the GCM address the operational aspects of the document and how to transpose the 23 objectives into practice. Notably, the implementation of the GCM's objectives represents, as will be discussed in the coming paragraph, one of the most problematic aspects identified by the pact's commentators and it also reiterates states' freedom to decide the extent to which they are willing to comply with the pact.

2.2 The main criticism against the Global Compact for Migration: Preserving states sovereignty at all costs?

There are a number of key aspects that the GCM was expected to address in a more effective way and that instead, in order to preserve state sovereignty as much as possible, have disappointed the hopes of many stakeholders. One crucial issue is represented by the impact of climate change on migration as neither the GCM nor the GCR have embedded significant provisions to strengthening the protection offered to those affected by this phenomenon.[46] In relation to the GCM, two objectives, 2 and 5, which according to Newland's categorization fall, respectively, into the third and second group, make reference to climate-induced migration, distinguishing between migrants compelled to leave their country of origin due to 'sudden-onset natural disasters and other precarious situations' and those leaving due to 'slow-onset natural disasters, the adverse effects of climate change and environmental degradation, such as desertification, land degradation, drought and sea level rise'.[47] In the former case, states should develop existing national and regional practices for admission and stay of appropriate durations by providing 'humanitarian visas, private sponsorships, access to education for children and temporary work permits'. In the latter case, the GCM only mentions planned relocation and visa options. Moreover, in the final version of the document an exclusion clause was added to objective 5, restricting the scope only to cases where 'adaptation in or return to their country of origin is not possible'.[48]

Objective 13, which addresses the controversial use of immigration detention and aims to ensure that detention is used solely as a last resort when alternative measures are unavailable, has also been criticized for a number of drawbacks that have persisted into the final draft.[49] In particular, objective 13 imposes no obligation on states to set a statutory maximum period of detention, meaning that detention can potentially be indefinite, moreover, the practice of child detention in the context of international migration has not been abolished outright,[50] and the introduction of accountability for human rights violations is not accompanied by provisions requiring access to remedies for the victims of such breaches.[51] Therefore, if on the one hand the objective has the merit of placing a great emphasis on due process as well as on the need

[44]Ibid.

[45]Guild, *supra* note 36, at 326.

[46]Betts, *supra* note 32, at 627.

[47]K. Groenendijk, 'Objective 5: Enhance Availability and Flexibility of Pathways for Regular Migration', in Guild and Basaran, *supra* note 39, at 19.

[48]Ibid., at 20. See Global Compact for Migration, *supra* note 12, at 12, para. 21(g).

[49]See J. N. Stefanelli, 'Objective 13: Use Immigration Detention only as a Measure of Last Resort and Work towards Alternatives', in Guild and Basaran, *supra* note 39, at 39–40.

[50]Newland, *supra* note 42, at 660.

[51]A. Spagnolo, '"We Are Tidying up": The Global Compact on Migration and its Interaction with International Human Rights Law', *EJIL:Talk!*, 1 March 2019, available at www.ejiltalk.org/we-are-tidying-up-the-global-compact-on-migration-and-its-interaction-with-international-human-rights-law/.

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to prioritize non-custodial alternatives to detention, on the other it is clear that states ultimately retained a significant leeway.

Objective 9, which can also be included amongst the most specific and sensitive aspects according to Newland's taxonomy, raised another major concern represented by the issue of penalization for irregular entry of migrants. In fact, whereas the zero draft called on states to ensure that national legislation reflects irregular entry as an administrative, not a criminal offence, in the final draft, this requirement was eliminated.[52] The position has been aligned to that set out in the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime (UNTOC),[53] meaning that states commit to ensuring that migrants do not become liable to criminal prosecution for having been the object of smuggling, but this 'notwithstanding potential prosecution for other violations of national law', including illegal entry.[54]

As anticipated above, the GCM has faced criticism also for the weak enforcement and monitoring mechanisms envisaged. In comparison with previous drafts of the GCM, the final one is characterized by a stronger emphasis on the central role that states are called to play under the implementation, follow up, and review sections.[55] In particular, states are encouraged to:

> develop, as soon as practicable, ambitious national responses for the implementation of the Global Compact, and to conduct regular and inclusive reviews of progress at the national level, such as through the voluntary elaboration and use of a national implementation plan.[56]

The implementation plans are hence left to the discretion of states, which will enjoy flexibility also when it comes to decide the objectives they want to work on. Moreover, the reviews of progress will be shared with the other participating member states at the International Migration Review Forum (IMRF) that shall take place every four years, beginning in 2022.[57] Besides the striking absence of a roadmap to plan the intermediate steps, it is worth noting that the modalities and organization of the IMRF have not been outlined in the GCM and have been left for future negotiations.[58]

In addition to the stronger emphasis placed on states, the definitive text of the GCM also explains better the role of UN institutions, giving prominence to the International Organization for Migration (IOM).[59] In more detail, IOM has been identified as the co-ordinator of the UN network on migration ensuring 'effective and coherent system-wide support to implementation, including the capacity-building mechanism, as well as follow-up and review of the Global Compact, in response to the needs of Member States'.[60] Whereas the UN Secretary-General is in charge of reporting to the General Assembly, on a biennial basis, on the implementation of the Global Compact, the activities of the United Nations system in this regard, as well as the functioning of the institutional arrangements.[61] In relation to the functions attributed to UN

[52]J. P. Gauci and F. R. Partipilo, 'Objective 9: Strengthen the Transnational Response to Smuggling of Migrants', in Guild and Basaran, *supra* note 39, at 28–9.

[53]2004 Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, 40 ILM 384.

[54]Global Compact for Migration, *supra* note 12, at 16, para. 25.

[55]S. Lavenex, 'GCM Commentary: Implementation, Follow-Up and Review', *Refuge Law Initiative, School of Advanced Study University of London*, 25 October 2018, available at rli.blogs.sas.ac.uk/2018/10/25/gcm-commentary-implementation-follow-up-and-review/.

[56]Global Compact for Migration, *supra* note 12, at 34, para. 53.

[57]Ibid., at 34, para. 49(c).

[58]Ibid., at 34, para. 54.

[59]On the relationship between the UN and IOM see Agreement concerning the Relationship between the United Nations and the International Organization for Migration, UN Doc. A/70/976 (2016).

[60]Global Compact for Migration, *supra* note 12, at 33, para. 45(a).

[61]Ibid., at 33, para. 46. See A. Pécoud, 'What Do We Know about the International Organization for Migration?', (2018) 44 *Journal of Ethnic and Migration Studies* 1621, at 1623–6; M. Cullen, 'The IOM's New Status and its Role under the Global

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institutions, critics have focused mainly on IOM's role, perceived by some as too broad, in spite of the organization lacking both normative mandate and universal membership.[62]

Finally, with respect to the capacity-building mechanism, whose core elements are the connection hub, the start-up fund and the global knowledge platform, information concerning its design and funding are still quite vague. In particular with regard to the start-up fund for safe, orderly and regular migration, the GCM specifies that its purpose is to finance the realization of project-oriented solutions.[63] However, member states, the UN and other relevant stakeholders, including the private sector and philanthropic foundations, are called to contribute technical, financial and human resources on a voluntary basis. Since the capacity building mechanism cannot rely on binding commitments, this entails that its success will depend, as it often happens, on the will of the key actors involved, once again first and foremost states, to fund initiatives to strengthen capacities and foster multi-partner co-operation. Evidently, and also in light of its shortcomings, the agreement of the GCM can be regarded as a milestone, but not as an end-point.[64] Therefore its actual capability to bolster international co-operation in the field of migration could only be assessed over the coming years, by closely monitoring its implementation and, eventually, the 'normative ripples that it may deploy in the future'.[65] Yet, despite its structural limitations and its non-binding character, the GCM has been openly accused of threatening state sovereignty, a claim hastily used by the withdrawing states as a shield to justify their decision without needing to provide additional explanation.

3. The 'sovereignty test' applied to the Global Compact for Migration

As discussed above, a perfunctory look at the GCM already shows the central role of states and the emphasis placed on preserving their sovereignty. However, the lack of tension between the pact and the key tenets of state sovereignty can only be fully ascertained by applying the sovereignty test. In general terms, sovereignty is a foundational principle of international law. In the words of Brownlie it even represents 'the basic constitutional doctrine of the law of nations'.[66] The Latin origin of this concept – *sui juris, esse suae potestatis, superanus or summa potestas* – indicates that sovereignty refers to 'the supreme authority of every state within its territory'.[67] Under international law, the concept of sovereignty is broader as it encompasses both an internal dimension – which refers to the state's right and competence to determine the character of its own institutions, to implement laws of its own choice, and to guarantee respect for and abidance by national laws – and an external one, that concerns the relationship between states.[68] The 1928 *Island of Palmas* arbitration famously set forth the traditional definition of state sovereignty within the international legal framework by affirming that 'sovereignty in the relation between

Compact for Safe, Orderly and Regular Migration: Pause for Thought', *EJIL:Talk!*, 29 March 2019, available at www.ejiltalk.org/the-ioms-new-status-and-its-role-under-the-global-compact-for-safe-orderly-and-regular-migration-pause-for-thought/.

[62]Lavenex, *supra* note 55, at 7–8.

[63]Global Compact for Migration, *supra* note 12, at 32, para. 43. Updates on the start-up fund for safe, orderly and regular migration, which has already been established, are available at www.un.org/development/desa/en/news/population/trust-fund-for-migration.html.

[64]Newland, *supra* note 42, at 661.

[65]See Peters, *supra* note 26, at 1.

[66]I. Brownlie, *Principles of Public International Law* (1998), 289.

[67]R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (2008), 564; M. N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2017), 11. Reference should be made to Jean Bodin's theorization of the idea of sovereignty, see, in particular, J. Bodin (edited by M. Turchetti, Q. Skinner and N. De Araujo), *Les Six Livres De La République: Livre I* (2013) Chs. 1 and 9; W. A. Dunning, 'Jean Bodin on Sovereignty', (1896) 11 *Political Science Quarterly* 82; D. Grimm and B. Cooper, 'Bodin's Significance for the Concept of Sovereignty', in D. Grimm (ed.), *Sovereignty: The Origin and Future of a Political and Legal Concept* (2015), 13.

[68]van Kleffens, *supra* note 19, at 9; N. Walker (ed.), *Relocating Sovereignty* (2006); P. Piirimäe, 'The Westphalian Myth and the Idea of External Sovereignty', in H. Kalmo and Q. Skinner (eds.), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (2010), 64, at 66–9; S. Besson, 'Sovereignty', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2011), paras. 69–73.

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States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other State, the functions of a State'.[69]

Without lingering on the fascinating academic debate that keeps this concept 'glittering and controversial',[70] what is worth underscoring here is that sovereignty is characterized by a significant degree of dynamism as it 'can have a different meaning in different historical periods', although certain essential features remain.[71] This is an important caveat to bear in mind alongside the perhaps trivial observation that the conclusions to be drawn in relation to the GCM are not necessarily representative of other efforts to strengthening the global governance of transnational issues. Relying on those premises, in the following paragraphs the 'sovereignty test' will be applied to the GCM in order to determine to which extent the claim brought forward by the withdrawing states is ill-founded and, more broadly, to reflect on the pact's interplay with the principle of sovereignty.

3.1 The actors

The first aspect identified by Schrijver as an essential component of sovereignty pertains to the actors participating in the law-making process. The main questions to be asked in relation to this aspect concern whether or not states are preserving the prerogative of international action for themselves and who are the other participants in the international legal process.[72] The GCM was prepared under the auspices of the UN system, therefore the category 'other participants' does not include international organizations, but it rather encompasses a wide array of entities identified as relevant to cover all dimensions of international migration in a holistic and comprehensive manner.

As is well-known the elaboration of the GCM took place through three distinct phases, i.e., a consultation phase, a stocktaking phase, and a negotiation phase.[73] With regard to the first phase, various stakeholders, including civil society organizations, scientific and knowledge-based institutions, parliaments, local authorities, the private sector, diaspora communities, and migrant organizations had the opportunity to contribute their views, opinions, and expertise over the course of a series of six informal thematic sessions and five UN regional consultations which served the purpose of discussing the thematic migration topics at the regional level.[74] The participation of such a wide range of different stakeholders has certainly broadened the circle of subjects involved; however, states irrefutably remained the dominant and decisive actors throughout the whole consultation phase. This emerges quite strongly from the configuration of the thematic sessions. In more detail, each session was co-chaired by the co-facilitators,[75] i.e., the Permanent Representatives of Mexico and Switzerland to the United Nations in New York, each expert panel was moderated by a member state appointed by the President of the General Assembly,[76] and the two co-facilitators were in charge of preparing summaries of the informal

[69]*Island of Palmas Case (or Miangas), United States v Netherlands*, Award, (1928) II RIAA 829, at 838,

[70]H. Steinberger, 'Sovereignty', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. IV (1987), 397. See also E. Lauterpacht, 'Sovereignty - Myth or Reality?', (1997) 73 *International Affairs* 137, at 141; T. Zarmanian, 'Carl Schmitt and the Problem of Legal Order: From Domestic to International', (2006) 19 LJIL 41, at 47; S. D. Krasner, *Sovereignty: Organized Hypocrisy* (1999), 43.

[71]Schrijver, *supra* note 22, at 70.

[72]Ibid., at 83.

[73]New York Declaration for Refugees and Migrants, *supra* note 10, at 24, paras. 14–15.

[74]Modalities for the Intergovernmental Negotiations of the Global Compact for Safe, Orderly and Regular Migration, UN Doc. A/RES/71/280 (2017), at 4, para. 15. An overview of the sessions and consultations is available at www.iom.int/gcm-development-process.

[75]Ibid.

[76]Ibid., para. 17.

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thematic sessions 'on the basis of the views expressed by Member States and, *as appropriate*, other relevant stakeholders'.[77]

In relation to the stocktaking phase – which began with the preparatory stocktaking meeting held in Puerto Vallarta, Mexico, from 4 to 6 December 2017 – its main goal was to review and distil the wealth of information, data and views expressed as well as to engage in a constructive analysis to lay the groundwork for the following steps of the process.[78] Based on the inputs stemming from the consultation phase, the outcomes of the stocktaking phase, i.e., the chair's summary,[79] prepared by the two co-facilitators, and the Secretary-General's report,[80] informed the co-facilitators' zero draft of the GCM. The chair's summary is particularly relevant to ascertain the contribution of non-state actors to the stocktaking phase. According to the summary, non-governmental stakeholder constituencies, namely civil society, private sector, trade unions, parliaments and National Human Rights Institutions, participated both in the retrospection session and in the subsequent ones, i.e., the reporting session and the follow-up and implementation session. Concerning the latter session, it is worth underscoring that the suggestions presented for consideration, and largely embedded in the final text at a later stage, included both the affirmation of states' primary responsibility in implementing and monitoring the GCM and the designation of IOM as the lead organization in co-ordinating the UN system's support to GCM.[81]

Finally, with reference to the negotiation phase, the process was clearly state-led, although the co-facilitators continued to hold informal dialogues – which member states were encouraged to attend – with non-governmental partners in each round of negotiations.[82] The final phase of the process, which is represented by the Marrakesh Intergovernmental Conference, was convened under the UN aegis, with Ms Louise Arbour, UN Special Representative for International Migration, acting as the Secretary-General of the Conference.[83] Nonetheless, states retained their pivotal role by leading the discussion through the speeches of Government ministers, senior officials and representatives of the countries in attendance.[84] As emerges from this overview of the process from which the adoption of the GCM sprung, whereas it is undeniable that the Compact's significance lies, *inter alia*, in its recognition that effective migration policies require the support of many actors, it is also true that their engagement in the various phases could not represent a challenge to state sovereignty. On the contrary, the ancillary role of the *other* stakeholders has been carefully outlined in respect to every phase in order to place increasing emphasis on the centrality of states.

3.2 Definition of sovereignty

This aspect of the 'sovereignty test' deals with how sovereignty has been defined in the GCM and whether new qualifications have been added to it. Already in the preamble, the GCM upholds the sovereignty of states and their obligations under international law.[85] National sovereignty, as a guiding principle of the GCM, is subsequently unfolded as:

[77]Ibid., para. 21 (emphasis added).

[78]Ibid., para. 23.

[79]Chair's summary, Preparatory (stocktaking) meeting, 4–6 December 2017, Puerto Vallarta, Mexico, available at refugeesmigrants.un.org/sites/default/files/171222_final_pv_summary_0.pdf.

[80]Making migration work for all, Report of the Secretary-General, UN Doc. A/72/643 (2017).

[81]Chair's summary, *supra* note 79, at 17–18.

[82]Letter from the co-facilitators, International negotiations, first round, 5 February 2018, available at www.un.org/pga/72/wp-content/uploads/sites/51/2018/02/180205_GCM-zero-draft_final.pdf.

[83]The letter of appointment of Ms. Arbour, which unfortunately did not specify the tasks of her role, is available at www.un.org/pga/71/wp-content/uploads/sites/40/2015/08/letter-for-SG-appointment-of-Arbour-as-SG-of-migration-conference.pdf.

[84]A summary of all the interventions, mostly made by states, that took place during the plenary meetings is available at www.un.org/press/en/2018/dev3378.doc.htm.

[85]Global Compact for Migration, *supra* note 12, at 2, para. 7.

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> the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, *in conformity with international law*. Within their sovereign jurisdiction, States may distinguish between regular and irregular migration status, including as they determine their legislative and policy measures for the implementation of the Global Compact, taking into account different national realities, policies, priorities and requirements for entry, residence and work, in accordance with international law.[86]

In the text, a last explicit mention of national sovereignty appears in connection with objective 11, which deals with the management of borders in an integrated, secure and co-ordinated manner.[87] To fulfil this objective states commit themselves to implement border management policies that 'respect national sovereignty, the rule of law, obligations under international law, human rights of all migrants, regardless of their migration status, and are non-discriminatory, gender-responsive and child-sensitive'.[88] The reference to national sovereignty, which did not appear in the zero draft with respect to this objective,[89] was included only later on.[90] According to some commentators, by restoring the idea of looking at the border also through the lens of national sovereignty, the amendment renders the protection of human rights standards in the context of border controls toothless, especially when national security is at stake.[91] If on the one hand this reading of the objective underscores the existence of a well-known risk,[92] on the other hand it is worth stressing that in the GCM the principle of national sovereignty is explicitly reaffirmed 'in conformity with international law',[93] thereby asserting that states no longer have absolute discretion over movement of people across their borders.[94] This means that while states still have the right to control and regulate admission and expulsion of non-citizens, the GCM overtly recognizes that this prerogative must be exercised respecting the rule of law, international legal obligations derived from customary and treaty law, as well as universally accepted human rights and fundamental freedoms.[95]

The above said recognition represents an important achievement because, even though the limitations imposed by international law on a state's prerogative to control entry into its territory are relatively well established, they are scattered throughout different fields and instruments.[96] Therefore, the additional qualifications of state sovereignty provided in the GCM, rather than weakening or challenging this concept, help delineating its contours and the interplay with international obligations already undertaken by states.

[86]Ibid., at 4, para. 15 (emphasis added).

[87]Ibid., at 18, para. 27.

[88]Ibid.

[89]Zero Draft of the Global Compact for Safe, Orderly and regular Migration, 5 February 2018, at 14, para. 25, available at www.un.org/pga/72/wp-content/uploads/sites/51/2018/02/180205_GCM-zero-draft_final.pdf.

[90]E. Mendos Kuşkonmaz, 'Objective 11: Manage Borders in an Integrated, Secure and Coordinated Manner', in Guild and Basaran, *supra* note 39, at 33.

[91]Ibid.

[92]M. Arden, *Human Rights and European Law: Building New Legal Orders* (2015), 145; S. Trevisanut, 'The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea', (2014) 27 LJIL 661, at 664–7.

[93]Global Compact for Migration, *supra* note 12, at 4, para. 15.

[94]R. Perruchoud, 'State Sovereignty and Freedom of Movement', in Opeskin, Perruchoud and Redpath-Cross (eds.), *supra* note 21, 125, at 126. See also A. Kesby, 'The Shifting and Multiple Border and International Law', (2007) 27 *Oxford Journal of Legal Studies* 101.

[95]Global Compact for Migration, *supra* note 12, at 18, para. 27. On the limitations imposed by international human rights law on a state's prerogative to control entry into its territory see, for example, V. Chetail, 'Freedom of Movement and Transnational Migrations: A Human Rights Perspective', in A. Aleinkoff and V. Chetail (eds.), *Migration and International Legal Norms* (2003), 47; M. Paz, 'The Law of Walls', (2017) 28 EJIL 601, at 603–5.

[96]F. Pizzuttelli, 'The Human Rights of Migrants as Limitations on States' Control Over Entry and Stay in Their Territory', *EJIL:Talk!*, 21 May 2015, available at www.ejiltalk.org/the-human-rights-of-migrants-as-limitations-on-states-control-over-entry-and-stay-in-their-territory/; E. Guild, 'The UN's Search for a Global Compact on Safe, Orderly and Regular Migration', (2017)18 *German Law Journal* 1779, at 1780–1.

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3.3 The scope of sovereignty

This part of the 'sovereignty test' is concerned with whether the exercise of sovereignty is confined to territory within the national boundaries.[97] As is well known the GCM is the expression of states' collective commitment to improving co-operation on international migration, therefore the main goal of the pact is to produce effects that transcend states' borders. The extraterritorial reach of the GCM is especially evident in relation to those objectives that place particular emphasis on migrants' countries of origin. For example, objective 2, which aims at minimizing the adverse drivers and structural factors that compel people to leave their state of origin, specifies 12 actions that states are to draw from to realise their commitment and whose scope is to create conducive political, economic, social and environmental conditions for people to lead peaceful, productive and sustainable lives *in their own country*.[98] All the actions envisaged – divided in two sets focusing respectively on the importance of sustainable development and on natural disasters, the adverse effects of climate change, and environmental degradation[99] rest upon already existing commitments undertaken under the 2030 Agenda for Sustainable Development, the Paris Agreement, and the Sendai Framework for Disaster Risk Reduction 2015–2030.[100]

Objective 21 – which aims at strengthening co-operation in facilitating safe and dignified return and readmission, as well as sustainable reintegration – is another commitment that gives prominence to the tasks pertaining to the countries of origin.[101] Also, in this case the relevant obligations – e.g., the prohibition of collective expulsion and 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, respect for the human right to return to one's own country, and the state's duty to readmit its own nationals – do not stem from the GCM, but are already embedded in the current international legal framework.[102] Thus, expulsion of non-nationals remains a prerogative of the states of destination, to be exercised, like the readmission and reintegration duties of the countries of origin, in accordance with human rights law and other international law norms. Furthermore, none of the objectives listed in the GCM leads to third parties intervening in the territory and/or jurisdiction of another state without its consent, as all the actions foreseen to have effect in the countries of origin – e.g., investing in sustainable development at local and national levels, promoting entrepreneurship, education, vocational training and skills development programmes and partnerships, and developing adaptation and resilience strategies to sudden-onset and slow-onset natural disasters – have already been agreed on in other settings explicitly recalled by the GCM.

3.4 Influence of universal values

This part of Schrijvers' 'sovereignty test' assesses the reasons given for subjecting sovereignty to international law and examines the influence in this regard of 'universal values'.[103] In Schrijver's article the analysis led to the conclusion that the development of international law is being

[97]Schrijver, *supra* note 22, at 85.

[98]Global Compact for Migration, *supra* note 12, at 8, para. 18.

[99]E. Fornale and A. Yildiz, 'Objective 2: Minimize the Adverse Drivers and Structural Factors that Compel People to Leave their Country of Origin', in Guild and Basaran, *supra* note 39, at 10.

[100]Global Compact for Migration, *supra* note 12, at 8, para. 18(a).

[101]I. Majcher, 'Objective 21: Cooperate in Facilitating Safe and Dignified Return and Readmission, as well as Sustainable Reintegration', in Guild and Basaran, *supra* note 39, at 60.

[102]Global Compact for Migration, *supra* note 12, at 29, para. 37.

[103]Schrijver, *supra* note 22, at 88; P. M. Dupuy, 'L'Unité de l'Ordre Juridique International', Cours général de droit international, (2002) 297 *RdC* 9, at 28–33; A. Paulus, 'Whether Universal Values can Prevail over Bilateralism and Reciprocity', in A. Cassese (ed.), *Realizing Utopia. The Future of International Law* (2012) 89, at 97–100; C. Tomuschat and J. M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order* (2006); G. Abi-Saab, 'Whither the International Community?', (1998) 9 EJIL 248.

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increasingly shaped not only by considerations of peace, but also by 'other universal values such as a sense of humanity, respect for human rights, sustainable development of all countries, alleviation of poverty and environmental conservation'.[104] Notably, in the cases selected by Schrijver this task of the exercise required a closer look at the instruments under scrutiny because references to universal values were not explicit, but deducible from the intrinsic components of global governance.[105]

Instead, in relation to the GCM the key values underpinned are showcased in the first part of the document.[106] Particularly blatant is the recurring reference to human rights and sustainable development, whose undisputable relevance resonates across the document. Both human rights and sustainable development are used as sources of global legitimacy and as such they are presented with a universalizing tone that seeks to detach them from any particular point of view, moment in time, or place of origin.[107] For each of the objectives, in fact, human rights, sustainable development, or both, represent the primary value(s) to be upheld in order to shape the phenomenon of global migration. As both values are already at the heart of the relations among states,[108] the GCM could only contribute to further strengthening their universality. Therefore, it is certainly not possible to claim that the pact has anyhow restricted or hampered state sovereignty in order to further promote universal values; on the contrary, it seems that the approach undertaken is coherent with the current trend in global governance, according to which legitimacy is generally sought after through a rhetoric of universal aspirations.[109]

3.5 Duties of states

The aspect concerning the legal duties imposed on states by treaty law, customary law, or other sources of international law is central to assess the extent to which obligations outlined under new legal frameworks impact on the principle of state sovereignty.[110]

In the case under scrutiny, as vigorously stressed by states themselves during the process that led to the adoption of the GCM, the legal duties have been replaced by 'collective commitments' and the binding sources of international law by a pact unequivocally dubbed as a 'non-legally binding and cooperative framework'.[111] Moreover, as already underscored above the fact that the principle of state sovereignty is presented as a one of the key tenets of the GCM, carries important consequences since it excludes that the commitments delineated could ever interfere with states' prerogative to determine their national migration policy and govern migration within their jurisdiction.[112] Nonetheless, it is worth stressing that, by endorsing the GCM, states have agreed not only to identify and uphold crucial political commitments to deal with migration through a global approach, but also to determine for each of them a set of concrete actions from which states can draw. Therefore, states have the possibility to cherry-pick which actions they are willing to undertake in relation to a given commitment. On the one hand this approach clearly undermines

[104]Schrijver, *supra* note 22, at 89.

[105]Ibid.; W. D. Coleman, 'Governance and Global Public Policy', in D. Levi-Faur (ed.), *The Oxford Handbook of Governance* (2012), 673; I. Goldin, *Divided Nations: Why Global Governance is Failing, and What We Can Do About It* (2013), 20–35; A. Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (2007), 287–315.

[106]See Section 2.1, *infra*.

[107]V. Pouliot and J. P. Thérien, 'Global Governance: A Struggle over Universal Values', (2018) 20 *International Studies Review* 55, at 60.

[108]G. Frankenberg, 'Human Rights and the Belief in a just World', (2014) 12 *International Journal of Constitutional Law* 35; A. Saith, 'From Universal Values to Millennium Development Goals: Lost in Translation', (2006) 37 *Development and Change* 1167; L. Olsson, J. C. Hourcade and J. Kohler, 'Sustainable Development in a Globalized World', (2014) 23 *Journal of Environment and Development* 3, at 6–7.

[109]Pouliot and Thérien, *supra* note 107, at 59.

[110]Schrijver, *supra* note 22, at 91.

[111]Global Compact for Migration, *supra* note 12, at 2, para. 7.

[112]Ibid., at 4, para. 15.

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the achievement of a more uniform and coherent strategy, but on the other hand it promotes flexibility, which in the long term can increase states' compliance and even enable non-compliance as a renegotiation strategy to pave the way for a formal treaty.[113] Without ruling out that the GCM could eventually become a forerunner of hard law, for the time being it is not possible to frame the pact's commitments as legal duties that can impinge on state sovereignty.

3.6 The role of international institutions

With regard to the crucial role played by international institutions in the implementation and supervision of the commitments laid down in the GCM, the underlying question is whether this entails a transfer of some aspects of state jurisdiction to supranational entities.[114] The answer to this question requires a closer look at the GCM and in particular at the sections dealing with implementation, follow-up, and review.

As already mentioned, this part of the pact has been subjected to strong criticism and has left many supporters of the GCM dissatisfied.[115] The main reason for the widespread unhappiness triggered by the sections of the GCM that address its operational aspects has to do with the emphasis placed on states.[116] More in detail, even though the GCM clearly outlines the essential role of IOM in relation to capacity building as well as its involvement in the follow up and review mechanisms, the centrality of states remains undisputable. Whereas in the zero draft of the GCM the first article of the follow up and review section read '[w]e commit to track and monitor the progress made in implementing the Global Compact for Migration in the framework of the United Nations. For follow-up and review, we agree on intergovernmental measures that will assist us in fulfilling our actionable commitments',[117] and the revised draft from 26 March 2018 spoke of a 'multi-stakeholder approach in the framework of the United Nations',[118] the final version eloquently affirms that the review process will take place 'in the framework of the United Nations *through a State-led approach* and with the participation of all relevant stakeholders'.[119]

This is consistent also with the implementation of the GCM, which is based on the premise that states will take into account different national realities, capacities, and levels of development, while respecting '*national policies and priorities*'.[120] Furthermore, as already explained above,[121] states are encouraged to resort to national implementation plans to be reviewed at the national level with the contribution of all relevant stakeholders,[122] the national reviews will later serve to inform the participation of states in the IMRF, described as 'the primary intergovernmental global platform for Member States to discuss and share progress',[123] and other relevant fora. As noted also by other commentators,[124] the national pledges recall the so-called 'nationally determined contributions' (NDCs) introduced by the Paris Agreement in order to depart from the Kyoto Protocol top-down approach and allow states to unilaterally determine how much they wish to contribute to the

[113]Meyer, *supra* note 29, at 163.

[114]Schrijver, *supra* note 22, at 92.

[115]See Section 2.2, *infra*.

[116]Lavenex, *supra* note 55, at 6.

[117]Zero Draft of the Global Compact for Safe, Orderly and regular Migration, *supra* note 89, at 25, para. 43.

[118]Revised draft of the Global Compact for Safe, Orderly and Regular Migration, 26 March 2018, at 26, para. 45, available at refugeesmigrants.un.org/intergovernmental-negotiations.

[119]Global Compact for Migration, *supra* note 12, at 33, para. 48 (emphasis added).

[120]Ibid., at 32, para. 41.

[121]See Section 2.2, *infra*. See E. Guild and T. Basaran, 'The UN's Global Compact for Safe, Orderly and Regular Migration: Analysis of the Final Draft and Monitoring Implementation', August 2019, available at rli.blogs.sas.ac.uk/themed-content/global-compact-for-migration/.

[122]Global Compact for Migration, *supra* note 12, at 34, para. 53.

[123]Ibid., at 33, para. 49(b).

[124]Lavenex, *supra* note 55, at 7.

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collective mitigation effort.[125] A comparison between the Paris Agreement, a binding international treaty, and the GCM, a co-operative and non-binding framework, would be pointless; however, the national pledges envisaged under the two regimes deserve to be further analysed since the NDCs are merely one-sided declarations of states, made 'without the intention of being bound by their terms'.[126] Under the Paris Agreement the NDCs are subjected to a system of mandatory national reporting; thus making transparency a key regulatory instrument aimed at building trust between the parties and enabling them to review the implementation of national pledges on a regular basis.[127] Furthermore, the Paris Agreement's reliance on transparency – rather than on legal enforcement – to promote accountability and effectiveness ultimately resulted in the adoption of an interim public registry in accordance with Article 4(12) of the agreement.[128] The registry serves the purpose of guarantying a peer-to-peer supervision of the NDCs as well as promoting public scrutiny. In addition, the registry is not maintained by states, but by the UNFCCC secretariat,[129] and the progress reports on the implementation of the NDCs are scrutinized by a group of technical experts.[130]

It could be argued that the Paris Agreement's enhanced transparency framework does not necessarily represent the best possible option to strengthen states' compliance with national pledges,[131] nor the most suitable for the GCM. However, in order to bolster the implementation of the GCM it would be important to place more emphasis on peer pressure and envisage an impartial and centralized international review mechanism to monitor states' abidance by the commitments undertaken.[132] Lacking such a mechanism, the degree to which international institutions – including IOM that ultimately acts 'in response to the needs of member states'[133] – are involved in the implementation and review of the GCM is not at all able to curb the dominant role assigned to states, which are only restrained, once again, by the obligations already assumed under international law.[134]

3.7 International dispute settlement

The final question of the 'sovereignty test' involves the issue of international dispute settlement and the relationship of international procedures with national ones.[135] The core aspect to analyse is whether states rely exclusively on their national sovereignty in matters of dispute settlement or, and under which circumstances, they surrender it to an extra-national body. As is well known, if states decide to include in an international instrument a dispute resolution clause there are some gradations on the spectrum of possibilities.[136] For example, states can opt for compulsory adjudication in case of dispute, i.e., a breached-against party can bring the breaching party before

[125]2015 Paris Agreement in UNFCCC, COP Report No. 21, Addendum, at 21, Art. 3, 1771 UNTS 107.

[126]On the more ambiguous nature of the NDCs see S. Tahura Zaman, 'Exploring the Legal Nature of Nationally Determined Contributions (NDCs) under International Law', (2015) 26 *Yearbook of International Environmental Law* 98, at 124.

[127]Paris Agreement, *supra* note 125, Art. 13. See R. Falkner, 'The Paris Agreement and the New Logic of International Climate Politics', (2016) 92 *International Affairs* 1107, at 1114–15; D. Bodansky, 'The Paris Climate Change Agreement: A New Hope?', (2016) 110 AJIL 288, at 304–6.

[128]Modalities and Procedures for the Operation and Use of a Public Registry Referred to in Art. 4, para. 12, of the Paris Agreement, Decision 5/CMA.1, FCCC/PA/CMA/2018/3/Add.1.

[129]Ibid., at para. 4.

[130]Paris Agreement, *supra* note 125, Art. 13(11).

[131]See Falkner, *supra* note 127, at 1121.

[132]Global Compact for Migration, *supra* note 12, at 34, para. 54.

[133]Ibid., at 33, para. 45(a).

[134]Ibid., at 32, para. 41, where states emphasize that the Global Compact is to be implemented in a manner that is consistent with their rights and obligations under the exiting legal framework.

[135]Schrijver, *supra* note 22, at 94.

[136]A. E. Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', (1999) 48 ICLQ 901, at 902–3.

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a neutral tribunal with the authority to declare that the state is in violation of the agreement,[137] or for a non-binding conciliation or a non-binding compliance procedure, like in the case of the Montreal Protocol to the Convention on the Ozone Layer.[138]

Another option, typical of soft law agreements – and the GCM is no exception – is dispute avoidance, meaning that states fail to provide for any dispute resolution procedures.[139] Soft law, then, is once again 'a naked norm, whereas hard law is a norm clothed in a penalty'.[140] However, a violator of a norm of soft law may still suffer a reputational loss and a poor reputation risks endangering co-operation in the future or in other issue areas.[141] Furthermore, even though the GCM does not establish international dispute settlement procedures, nor it is enforceable before domestic courts, its potential role in interpreting the compliance of the national policies with national and international law shall not be overlooked.[142] Particularly relevant could be the role of the GCM in decisions taken by domestic courts in the sphere of discretional clauses or indeterminate legal concepts,[143] thus helping to define the meaning of principles and rules laid down in municipal law in compliance with states' international obligations, which the GCM ultimately brings together and consolidates.

4. Conclusion

It has been stressed on a number of occasions – also before and during the various phases of the drafting process – that the GCM bundles agreed norms and principles into a global framework agreement and that it cannot create any new rule of international law related to the management of migration flows.[144] Whereas the soft law nature of the GCM does not exclude some normative significance,[145] it is evident that the GCM 'does not encourage migration, nor does it aim to stop it ... It does not dictate. It will not impose, and it fully respects the sovereignty of States'.[146] Yet, in some instances states have brought forward vague claims that the GCM aims to intrude into their internal spheres and that the adoption of the document, regardless of its legal nature, is capable of undermining state sovereignty. This is not unusual since government leaders and politicians often invoke the term 'sovereignty' to forestall and/or hinder debates and actions – regardless of how much they are necessary – to deal with phenomena that undoubtedly requires the adoption of a concerted global strategy.

Precisely because international legal governance appears to have stalled at a time when international law urgently needs to regain its ability to co-ordinate state action to address global

[137]J. Merrills, 'The Means of Dispute Settlement', in M. Evans (ed.), *International Law* (2014), 563; A. T. Guzman, 'The Design of International Agreements', (2005) 16 EJIL 579, at 587.

[138]Boyle, *supra* note 136, at 902.

[139]A. D'Amato, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d'Aspremont', (2009) 20 EJIL 897, at 899.

[140]Ibid., at 902.

[141]D. M. Gibler, 'The Cost of Reneging: Reputation and Alliance Formation', (2008) 52 *Journal of Conflict Resolution* 426, at 430–2; J. H. Park and K. Hirose, 'Domestic Politics, Reputational Sanctions, and International Compliance', (2013) 5 *International Theory* 300; R. Brewster, 'Unpacking the State's Reputation', (2009) 50 *Harvard International Law Journal* 231, at 234–6.

[142]Allinson et al., *supra* note 38; Peters, *supra* note 26.

[143]D. Thürer, 'Soft Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009), 8.

[144]General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants, Meeting Coverage, 19 December 2018, available at www.un.org/press/en/2018/ga12113.doc.htm; see Peters, *supra* note 26, at 4–5.

[145]Boyle, *supra* note 136, at 902. Speaking of the normative significance of soft law in general, Boyle stresses that 'there is at least an element of good faith commitment, and in many cases, a desire to influence state practice and an element of law-making intention and progressive development'.

[146]Statement by H.E. Mr. Miroslav Lajčák, President of the 72nd Session of the UN General Assembly, at Final Intergovernmental Negotiations on the Global Compact for Safe, Orderly and Regular Migration, 13 July 2018, available at www.peacebuildingdata.org/liberia/results/war-peace-transition-addressing-needs-survivors/measures-victims.

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problems,[147] claims that hinder crucial efforts should not be quickly dismissed or underestimated. The scholarly literature has drawn attention to important factors to explain 'why global governance is failing',[148] and it was beyond the scope of the present article to delve into this issue and contribute to the current debate. Nonetheless, the analysis carried out has shown how alleged normative conflicts are resorted to in order to hide the political dynamics of global governance and in particular the undisputable, but still hurtful, truth that 'not everyone on the world stage aspires to the same thing'.[149]

In order to shed light on the lack of validity of the 'sovereignty claim' made by the states that have withdrawn their support from the GCM, the present article sought to deconstruct the concept of sovereignty and analyse the GCM's impact on each of its core elements by applying the 'sovereignty test'. The 'sovereignty test' was originally used by Schrijver to determine to which extent the challenges allegedly posed to national sovereignty by new developments in international law compel a change of paradigm and ultimately try to 'pull the rug out' from under one of the most well established international legal principles. As it emerges from the application of the 'sovereignty test' to the GCM, none of the key aspects of sovereignty identified by Schrijver actually risks being undermined or restrained by the GCM. Rather, the only limitation to state's sovereignty in the field of migration stems from the plethora of international norms and principles, also belonging to human rights law, that states have willingly decided to uphold. It is precisely because of the obligations assumed by states, and reiterated in the GCM, that it is no longer an:

> accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[150]

[147]Meyer, *supra* note 29, at 161.

[148]Goldin, *supra* note 105, at 47–55; M. Koskenniemi, 'Global Governance and Public International Law', (2004) 37 *Kritische Justiz* 241, 245–54; D. Held and M. Koenig-Archibugi, 'Introduction', in D. Held and M. Koenig-Archibugi (eds.), *Global Governance and Public Accountability* (2005); T. Hale, D. Held and K. Young, *Gridlock: Why Global Cooperation is Failing When We Need It Most* (2013).

[149]Pouliot and Thérien, *supra* note 107, at 58.

[150]*Nishimura Ekiu v. United States*, 142 US 659 (Sup.Ct. 1892).

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