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Rule of Law and Human Mobility in the Age of the Global Compacts

Edited by
Marion Panizzon, Daniela Vitiello and Tamas Molnar

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Preface to "Rule of Law and Human Mobility in the Age of the Global Compacts"

The pros outweigh the cons that glow
from Beckett's bleak reductio -
and who would trade self-knowledge for
a prelapsarian metaphor,
love-play of the ironic conscience
for a prescriptive innocence?

Beyond Howth Head, by Derek Mahon 1970

Almost five years after the two Global Compacts on migration and refugees were adopted, legal scholars are still pondering their effects for migrants, refugees, the sending, transit, and receiving countries, and, above all, their implications for international law. Starting out with the elephant in the room means to circle around this 'unidentifiable' international cooperation framework and to assess its law-like quality. This is especially true for the Global Compact for Safe, Orderly and Regular Migration (GCM), for which many open questions remain: What kind of (legal) sources, what normative values, which aspirations were embedded in its 23 objectives, as well as its guiding principles and common understandings cementing its pieces together? What functions should practitioners and academics ascribe to the Compacts' soft legal quality: can these be—using the conceptual frame developed by Peters (2011)—gap-filling as '*para*-law', soft norms as forerunner to hard law ('*pre*-law') or, finally, a consolidation of regional and bilateral best practices, which pre-empt the emergence of prescriptive rules or else expand and diversify the scope and content of general principles of law or customary norms ('law-*plus*')? This list goes on for both Global Compacts: according to which criteria were the composites assembled, and do they provide international migration and refugee law with a coherent and actionable global institutional architecture?

In this book, which reprints the Special Issue The Rule of Law and Human Mobility in the Age of the Global Compacts: Relativising the Risks and Gains of Soft Normativity?, nine contributions dive into the pandemonium of the Global Compacts buzzing in our analytical universe, and the verses of Derek Mahon come to our minds. 'Self-knowledge', for us legal scholars, reveals our own projections about our legal traditions interacting with different epistemic communities and their visions over the Global Compacts. As a result, their legal characteristics are filtered through the perception of an academic community that clusters around pre-fixed normative conceptions, methodologies, approaches, and legal theories. As in Mahon's metaphor, the 'prescriptive innocence' of this methodological approach trades ironic conscience for familiar epistemic keys to decrypt and describe complexity. By this turn, it renounces to unlock that bulk of rules with a different key, one which is similar to a pen drawing the ink from evolving patterns in public international law.

Likewise, the ambition and intention of this edited volume are to relinquish for a while our pre-determined self-knowledge as legal scholars and envisage new epistemic keys switching from innocent 'relative normativity' (Weil 1983) to interdisciplinary analytical platforms, which could feed substance into the goal of 'making migration work [better] for all' (UN Secretary General 2017).

In line with the vision of a 'comprehensive approach to the Global Compacts', which is guiding this Special Issue, we decided to arrange the articles in a deductive order, starting out with those

pieces of work discussing the Global Compacts on an international legal scale and from a global governance perspective, followed by those articles that analyze the impact of the Compacts on the external dimension of EU migration and asylum policies, with a third set of articles investigating specific issues of national migration law and policy for which the Compacts are setting standards for.

As co-editors of this Special Issue based in Bern, Rome, and Vienna, overcoming pandemic-induced physical distance through a shared vision and a steady common endeavor, we were not alone. Indeed, with the firm resolve to ascribe real meaning to the array of projects, practices, principles, and programs revolving around the Global Compacts, we reached out to authors from the United Kingdom, Bangladesh, the Netherlands, Italy, Switzerland, and Sweden, directly and through an open call for papers, to lend us their ear and offer their enriching insights.

The result is this edited volume that hosts a collection of articles embracing and proposing new epistemic legal keys and cross-comparative perspectives, ranging from those of the European Union, selected EU and UN Member States, the Global South, NGOs, and legal theory. Within this collection, finding its center of gravity in the Global Compact for Migration, multiple insights, loopholes, and long-held beliefs are identified and challenged, with a view to delivering a thought-through map and a guidepost toward new multilateral (legal) solutions. Common to all articles is the contribution to rooting the rule of law, human rights, and due process more firmly into the regimes governing cross-border movement of persons, such that a precondition is laid for the human rights of all the people on the move to be enjoyed and protected, also at borders, during dangerous journeys, in transit and once admitted to a foreign soil.

We, as editors, strongly believe that the approach adopted challenges conventional knowledge on the two Global Compacts and conveys thought-provoking key messages to policy makers, reflective practitioners, and academics alike on the potential of the Global Compacts for rethinking the law and policy underpinning international migration and refugee governance. We do hope this edited volume will be of inspiration for everyone interested in unpacking the Global Compacts and the plethora of salient public international law issues—and beyond—that they raise.

Marion Panizzon, Daniela Vitiello, and Tamas Molnar
Editors

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Editorial

The Rule of Law and Human Mobility in the Age of Global Compacts: Relativizing the Risks and Gains of Soft Normativity?

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1. Global Compacts: Between Legal Aspirations and Political Achievements

The 2016 New York Declaration,[1] for the first time in United Nations (UN) history, coalesced a diverging palette of regional and a few multilateral efforts before the UN General Assembly. The uniqueness of this global cooperation effort is still felt today, despite the fact that only 155 out of the voting 164 UN Member States endorsed the subsequent Global Compact for Safe, Orderly and Regular Migration (GCM).[2] However, from the legal perspective adopted in this *Special Issue*, the GCM's compilation of standards and practices stopped mid-way before settling on a source of law-like quality or on standard-setting for the national, regional, and multilateral norms as well as on practices that it had identified, collected, and arranged globally. Hence, the predominance of the "soft" and "opaque" in international migration law is nowhere as tangible than in case of the GCM (Chétail 2020, pp. 254, 265).

The GCM commits (at least) 155 UN Member States to align to its 23 objectives and 10 guiding principles, the majority of which focus on the proclaimed aspiration to turn dangerous migratory routes and unsafe journeys into regular pathways by "strengthening international cooperation" for effective migration management (objective 23 of the GCM). Though this call for cooperation does not challenge the traditional premise of the international ius migrandi, since the mainstay of migration trajectories remains governed by the sovereign right of states to decide over whom to admit, the GCM acts as a launchpad for states to experiment with creative solutions to other phases throughout the "migration cycle" (paragraph 16 of the GCM). Since many of these inroads to sovereignty start out, understandably, as experiments, their legal formats resemble nonbinding partnerships, common dialogues, joint guidelines, action plans, and pilot projects. Consequently, the diverse carve-outs that states hold each other actionable for remain "blurry" in comparison to the clear and precise language of binding obligations (Vitiello 2022 in this *Special Issue*). In addition, the GCM's boundaries towards the formal sources of law-making remain "fuzzy", which is one of the reason the GCM has been labelled a "concept without a settled meaning in international law".[3] In consequence, it makes sense for legal scholars to contextualize the law-making of the GCM within concepts such as soft law, governance, and

[1] UN General Assembly, New York Declaration for Refugees and Migrants. Resolution adopted by the General Assembly on 19 September 2016, UNGA Res 71/1 (2016) UN Doc A/RES/71/1.
[2] UN General Assembly, Global Compact for Safe, Orderly and Regular Migration. Resolution adopted by the General Assembly on 19 December 2018, UNGA Res 73/195 (2018) UN Doc A/RES/73/195.
[3] Statement by the Representative of the Philippines, UN General Assembly, Plenary, 73rd session, 60th and 61st meetings, 19 December 2018, General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants, UN Meetings and Press Coverage. Available online: https://www.un.org/press/en/2018/ga12113.doc.htm (accessed on 9 December 2022).

treaty interpretation, which all are categories of legal inquiry uniting the authors of this *Special Issue*.

If this research has been premised on the paradigm of the "quasi-legal system" which is often associated with soft law as the GCM embodies, there is evidence that the GCM nonetheless encourages states to achieve a certain coherence towards other fields of law (Guild et al. 2019). In result, states tread a thin line between politically benefitting from joining this cooperation framework while, at the same time, being called upon to normatively affirm the actions, to which they committed to politically, through adopting implementing national legislation (Molnár 2021). At the same time, the voluntary nature of reporting before the GCM review bodies can entice states to "cherry-pick" over which action out of the 23 objectives they wish to report on and over which ones to abstain, as Farahat and Bast (2022) point out in a recent collection of articles on the GCM. Hence, in come the 10 guiding principles of the GCM, some of which promote coherence while others exacerbate the risk of fragmentation. In particular, the GCM's third guiding principle, national sovereignty, stands diametrically opposed to some of the others, including international cooperation and the whole-of-government/society approach, and thus undermines the vision of the "first intergovernmental agreement prepared under the auspices of the United Nations [. . .] to cover all dimensions of international migration in a holistic and comprehensive manner"—borrowing the words of the Office of the UN High Commissioner for Human Rights.[4]

Instead of remaining entrapped in the closed-circuit of "sovereignty" being pitted against "international cooperation", this *Special Issue* selects the rule of law and due process as two out of the 10 guiding principles. Our choice is justified by the fact that these figure as the only two principles, which the GCM drafters extracted from national legal systems (also being general principles of international law), and which carry a normative value that can be judicially reviewed. In this *Special Issue*, all eight contributions address these two general principles of law, either because they "consolidate practices", in view of creating an inventory, or because, more ambitiously, due process and rule of law are co-responsible for "expanding" national, local, bilateral, regional, and multilateral norms (Chétail 2020).

Already within the legal aspiration to "make migration work for all"[5] lies an assumption that global cooperation should not work in silos—as Aleinikoff has suggested (Aleinikoff 2007, p. 267). The guiding principles connect states to their obligations under international law, and thus contribute to achieve "comprehensive" commitments when states are called to implement the GCM in a manner that is "consistent with [their] rights and obligations under international law" and to attain "policy coherence".[6]

At the same time, as the 2015 Global Commission for International Migration (GCIM) Report (p. 7) flagged, the narrative of "comprehensiveness" risks producing outcomes which are worlds apart from being desirable for migrants and responsive to fulfilling their human rights.[7] Only if comprehensiveness means acknowledging the complexity of each migrant's situation can human rights be sufficiently guaranteed. Hence, extensive recourse to border procedures, including mass screening at the borders, often coupled with comprehensive data mining on migrant routes and destinations, occurring at the expense of due process rights and access to justice, are several such contentious modes. This explains why a more comprehensive and integrated approach to human mobility should be informed by due process and the rule of law, especially if one goal of global cooperation is to resonate with a human-rights-driven approach (see Section 1.1, below).

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[4] Office of the UN High Commissioner for Human Rights, *Global Compact for Safe, Orderly and Regular Migration (GCM)*. Available online: https://www.ohchr.org/en/migration/global-compact-safe-orderly-and-regular-migration-gcm (accessed on 9 December 2022).

[5] Ibid.

[6] Ibid., para 41: "emphasize that the Global Compact is to be implemented in a manner that is consistent with our rights and obligations under international law".

[7] Global Commission on International Migration (GCIM), "Migration in an Inter- connected World: New Directions for Action", Report 2015. Available online: https://www.iom.int/global-commission-international-migration (accessed on 13 December 2022).

In addition, the GCM upholds a rigorous dichotomous approach to the migration–refugee nexus, as also confirmed by the parallel existence of the Global Compact on Refugees (GCR).[8] As a result, the legal aspiration of revitalizing global partnerships for the sustainable management of cross-border human mobility, a programmatic element in objective 23 of the GCM and already found in the 2016 New York Declaration,[9] falls short of enabling effective interconnections between the respective commitments, actions, and guiding principles of the two Global Compacts. The result is a "kaleidoscopic" melting pot of action plans, commitments, and objectives (Chétail 2020). Yet, some general principles are steeped so deeply in the narrative behind the Global Compacts that they are more likely to penetrate domestic implementation than others, despite the Compacts' unascertained acceptance by certain national policymakers. Such basic tenets are the rule of law, due process, and good governance, which assume a pivotal role among these principles because they stand out in their "legal-like" quality from the other eight principles (Cholewinski 2020, p. 311). In particular because of the GCM's soft law frame, this triad transmits a cornerstone of a (hard) legal agenda by encapsulating the noyeau dûr of the right to an effective remedy as a limitation against arbitrary and discriminatory action by public authorities. On the one hand, getting rid of them through this cherry-picking approach (Farahat and Bast 2022), which characterized the first International Migration Review Forum (IMRF)'s monitoring of states' practices, would mean renouncing to the very same legal-like aspirations leading to this first, comprehensive framework on international migration at the global level. On the other hand, the ten "guiding principles" could then stand as the bright-line rule to be complied with by all UN Member States, which guarantee against states watering down their human rights obligations when implementing the Global Compact on Migration. Among those, the duo of due process and the rule of law potentially could sharpen the contours of an otherwise invisible judiciary and of judicial review.[10] The close-to absent role of the judiciary, is just one of the hicks in the GCM's 360-degree vision of comprehensiveness. Another is the dual sides of the concept of "global": firstly "global" implies that "comprehensive" complies with a whole-of-society approach, in the sense of involving all stakeholders, especially in the Global North, for actions, policies, and commitments that may render human mobility safe, regular, orderly, and dignified (Gombeer et al. 2019; Baxi 2016). Secondly, "global" refers to UN-leadership in managing international migrations. Yet, both notions of "global" derive from an "institutions"-driven orientation, which covers up a severe lacunae within comprehensiveness, which is the absence of concretizing universally binding norms. Whereas the GCM is imagined and narrated as "comprehensive" (Pécoud 2021), the vague quality of formulation when it comes to its alignment to UN conventions and public international law, accounts for its close-to absent universality. In result, a relativist ontology whitewashes the GCM just as its "global" aspiration pays only a lip service to the complexity of levels and actors involved in contemporary migration governance, from the local to the multilateral levels.

In this *Special Issue*, international and EU legal scholars and practitioners have filtered out key doctrinal, judicial, institutional, and political challenges which shape the ongoing implementation phases of both Global Compacts, with a specific focus on the GCM. Whereas some articles focus on systemic flaws and potential opportunities cutting across both Global Compacts, other authors focus in on how to legally analyse and contextualize a specific GCM objective. A third set of articles have opted for a comparative legal analysis of the Global Compacts by identifying gaps and loopholes, or, inversely, scoping for benchmarks and minimum standards evolving. Cutting across all articles is

[8] UN General Assembly, Global Compact on Refugees. Resolution adopted by the General Assembly on 17 December 2018, UNGA Res 73/151 (2018) UN Doc A/RES/73/151.

[9] UN General Assembly, 'In safety and dignity: addressing large movements of refugees and migrants,' UN Doc A/70/59, 21 April 2016.

[10] Committee on Migrant Workers Discusses Draft General Comment on the Convergence of the Convention and the Global Compact for Safe, Orderly and Regular Migration, 28 September 2022: https://www.ohchr.org/en/press-releases/2022/09/committee-migrant-workers-discusses-draft-general-comment-convergence (accessed on 9 December 2022).

a critical appraisal of the imprimatur provided by the global commitments to firming up innovative cooperation strategies and migration governance modes in national and regional legal frameworks, alongside a scholarly analysis of the interdependence and separation of migrant and refugee statuses, as affected and mediated by the triangular relationship between host, transit, and sending countries (see objective 2 of the GCM).

1.1. The Interplay between Human Rights Anchorage and Good Governance in the Global Compacts

A particular focus of scholars and practitioners alike has been the human rights anchorage in the Global Compacts (Gammeltoft-Hansen et al. 2017; Guild 2018; Hilpold 2020). Whereas the duty to respect, protect, and fulfil the human rights of all migrants figures as a guiding principle of the GCM, which self-proclaims being grounded in the 1948 Universal Declaration of Human Rights (as well as the nine core UN conventions of international human rights law (IHRL)[11], this human rights anchorage lies at the heart of the debate about the repercussions that soft law status has on individual migrants and their families. At a second glance, however, the alignment to human rights and international legal obligations (para. 42 of the GCM) fails to motivate a type of legislative activity that might serve to supersede the asymmetric relation between national sovereignty and human mobility across international borders.

At the same time, the principle of good governance—forming a stronghold of the GCR, defended in earlier drafts of the GCM—appears quite diluted in the GCM's final text (Pécoud 2021), where it figures as both a guiding principle, and under objectives 2 and 23 of the GCM, while failing to appear in the first IMRF Progress Declaration, adopted in May 2022.[12] Nonetheless, good governance commits states to respect a degree of procedural legitimacy over decisions to admit and orders to expel migrants and their families (Höflinger 2020; Cholewinski 2020). In this sense, the due process/rule of law guarantees of paragraph 13 of the GCM open the door for judicial review, which in turn associates the GCM with a legally much deeper alignment among the different levels of international migration law than what mere "policy coherence" under objective 23 of the GCM implies. Yet, if objective 23 aspires to an interpretation "consistent" with bilateral and multilateral treaties, the soft law quality of the Compact renders it uncertain whether a "convergence and complementarity" can also be requested from the GCM when read in relation to the nine core UN human rights conventions, the WTO/GATS agreements, the UN Framework Convention for Climate Chance, and the UN Convention to Combat Desertification can be reached, as Desmond (2022) developed for a *Special Issue* on the GCM. How arts. 31 and 32 of the Vienna Convention on the Law of Treaties, VCLT apply to a soft law framework is one issue is one question (Yildiz in this *Special Issue*), another relates to how the respective membership within a given convention and the GCM overlap or fail to match (art. 31:2(a) of the VCLT; see also Ammann 2019; Desmond 2020).

The GCR, in turn, raises further human rights issues, especially in light of the potential role of the surrogacy principle in expanding the definition of refugee (Burson and Cantor 2016) and the Compact's "States plus" approach to multilateralism (Triggs and Wall 2020), mounting expectations for a more equitable and predictable system of burden and responsibility sharing for the world's refugees in the aftermath of the 2019 Global Refugee Forum.

A starting point for concretizing the GCM's 23 objectives might be departing from the guiding principles, some of which embody general principles of law. For instance, both Global Compacts acknowledge and uphold the principle of non-discrimination and call for "child-, gender-, age-, linguistically, culturally, faith and health-responsive policies" (Guild et al. 2019).

[11] Office of the UN High Commissioner for Human Rights, The Core International Human Rights Instruments and their Monitoring Bodies. Available online: https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies (accessed on 9 December 2022.

[12] Progress Declaration of the International Migration Review Forum. Resolution adopted by the General Assembly on 7 June 2022, UNGA Res 76/266 (2022) UN Doc A/RES/76/266.

In addition, the GCM is construed on a strong stand-still premise, featuring the principle of non-retrogression as a benchmark for future developments.

Nonetheless, this terminology betrays the full endorsement of conservative solutions, and has rather exacerbated than mitigated existing antinomies and inconsistencies in the normative structure of the Global Compacts (see, e.g., Panizzon and Daniela 2019), implying that some people on the move are still "left behind", either because of their legal status or the route chosen (Pijnenburg and Rijken 2021). By the same token, neither the quest for safe, orderly, and regular migration via global partnerships (in objective 23 GCM), nor that for more equitable and predictable systems of refugee responsibility sharing (under the GCR), seem to affect the existing balance between human mobility and state sovereignty (Guild 2018).

In this sense, as Guild et al. (2019) critically observed, the GCM is propagating a para-human rights vernacular of "-sensitive, -responsive, -relevant policies"—labeled in paragraph 13 of the GCM as "principles"—that, for the most part, fall short in advancing respect, protection, and the fulfilment of human rights obligations. Overcoming these flaws would call for alternative and creative solutions, which might lie (inter alia) in reading the GCM and GCR "together" to improve international protection—as Garlick and Inder (2021) suggest.

1.2. A Constructive Role for a "Principled Approach"?

Already in 2015, the Global Commission for International Migration suggested that "principled" approaches to laws, norms, and human rights should be taken to ensure the efficiency and predictability of the law's application to migrants, in particular because migrants are exposed to norms and laws from such varied and different sources: regional, national, and bilateral (GCIM Report 2015, p. 53). From this perspective, the adoption of a principled approach in the GCM cannot be underestimated. Although the "guiding principles" enshrined in the GCM represent a platform of mutual soft law commitments, which cannot be equated to the "general principles of law",[13] in a field as divisive as international migration law (IML) the mere fact of listing them at the outset of a global cooperation framework seems to already be an important achievement. Indeed, these principles capture a legal essence and, thus, they may "constitute both the backbone of the body of law [concerned] and the potent cement that binds together the various and often disparate cogs and wheels of the normative framework" (Cassese 2005).

Furthermore, the GCM adopts "cross-cutting and interconnected" principles (para. 13 of the GCM), which pivot around two "axes": "the first matching national sovereignty and good global governance and the second running along the *continuum* between human-centricity and the rule of law" (Vitiello 2022, p. 19, in this *Special Issue*). These axes—the centrality of which has been acknowledged in the 2022 IMRF Progress Declaration—cut across the migration-specific topics under the heading "Objectives" (as listed in para. 16 of the GCM) and the restatement of well-established principles of international law (such as the best interests of the child and the principle of non-refoulement, which are key to the GCR as well). Yet, the potential implications which this "cross-cutting and interconnected" approach might have on judicial review at the implementation level remain unchartered.

One of the explanations is linked to the rawness of the relation established among the axes. The principles guiding the implementation of the 23 objectives and the actions subordinated to these are not "logically differentiated" (Elias and Lim 1997), in the sense that states failed to reach a political consensus on a relative ranking among these, for example, by attributing pre-eminence to the rule of law (Panizzon 2022). During the IMRF 2022, Ecuador—speaking on behalf of 28 "champion countries"[14]—responded to the

[13] See Art. 38(1)(c) of the Statute of the International Court of Justice.

[14] GCM Champion countries are: Azerbaijan, Bangladesh, Cambodia, Canada, Chad, Colombia, Costa Rica, Ecuador, Egypt, El Salvador, Ethiopia, Ghana, Guinea-Bissau, Honduras, Indonesia, Iraq, Kenya, Luxembourg, Malawi, Mali, Mexico, Morocco, Nepal, Niger, Nigeria, Philippines, Portugal, Senegal, and Thailand.

UN Secretary General's biennial report[15] by positioning the GCM in the line of UN-led international cooperation tools:

> "[w]hen migration is safe, orderly, and regular, it represents a sustainable development opportunity. We have the 'what' in the 2030 Agenda. We have the 'how' in the GCM. And we must make sure that the IMRF constitutes the 'where' for the benefit of migrants and their communities of origin, transit, and destination".[16]

This plea underscores the urgency to come up with stronger language with which to identify priorities and give meaning to migration-related goals within the remit of both indicator 10.7.2 of the UN 2030 Agenda for Sustainable Development[17] and the GCM's 23 objectives. Nevertheless, the close-to-absent numerical targets in the GCM deflate any appearance of precision from the GCM's plain meaning. Clarity of formulation is—unlike in the GCM—more present in the 2030 Agenda, and thus in SDG 10.7 on migration (Denaro and Giuffré 2022; Desmond 2020). In addition, the choice of formulation in "making migration work for all", a term chosen by the UN Secretary General during the drafting of the GCM,[18] is less advanced in terms of equity and justice than "to leave no one behind" of the Agenda 2030. For that reason, the champion countries for the IMRF 2022 were adamant to call for a tighter amalgam between the GCM and SDG 10.7, under the assumption that a closer convergence between the two UN-led cooperation frameworks could secure the "dignified" and "responsible" migration policies that were missing out from the GCM final text. The different ambiguities featured in the Global Compacts' principled, yet permeable, approach to migration and refugee issues is explored in this *Special Issue*, inter alia, by using the EU legal order as a comparator and a testbed for implementation.

1.3. Moving from Guiding Principles to Implementation: Anything but a "Soft Landing"?

Legal scholars have commonly attributed a "gap-filling" mission to the soft law embodied in the Global Compacts (Peters 2018; Allinson and Croce 2021; Petrig 2021). Their observations depart from the hypothesis that the soft law in the GCM deploys a legal effect which, while not identical to the bindings of hard law (Hilpold 2020), nonetheless offers a "prescriptiveness" that elevates soft law to a normative quality beyond producing factual or political effects (Peters 2011). This idea has been shared by international relations scholars, who link the gap-filling idea attributed to the soft law in the GCM with its ambition to incentivize non-state actors to contribute to law and policymaking—an effort which could not be achieved through recourse to formal lawmaking (Appleby 2020; Höflinger 2020; van Riemsdijk et al. 2020).

Indeed, non-legally binding instruments enable states to rapidly clarify their positions and expectations on heated topics while avoiding the time-consuming process of concluding a treaty and undergoing domestic ratification (Bufalini 2019), two aspects which may make a difference in those fields of international cooperation that are most affected by national sovereignty constraints. In addition, there is another structural feature of soft law which should be weighed against its possible disadvantages. Soft law may perform—in the "penumbra of law" (Peters 2011)—important social functions, including the "whole-of-government" approach, and thus pave the way for inclusive multistakeholder involvement during negotiations and in the monitoring as well as reviewing of national implementation projects. Yet, the "corrective" potential of soft law by gap-filling or re-interpretation through e.g., nonstate actors reaches a limit, once the principles of non-retrogression, due process and rule of law deploy their full meaning. Just as "open-ended" negotiating outcomes have

[15] UN, "Global Compact on Safe, Orderly and Regular Migration", Report by the UN-Secretary General, UN Doc. A/76/647, 21 December 2021, available online https://migrationnetwork.un.org/resources/secretary-general-report (accessed on 13 December 2022).

[16] Statement of the GCM Champion countries at the Briefing on the Report of the Secretary-General on the implementation of the GCM, 16 February 2022: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/ecuador_on_behalf_of_the_champion_countries.pdf (accessed on 9 December 2022).

[17] Transforming our world: the 2030 Agenda for Sustainable Development. Resolution adopted by the General Assembly on 25 September 2015, UNGA Res 70/1 (2015) UN Doc A/RES/70/1.

[18] UN, "Making Migration Work for All", Report of the Secretary-General, UN Doc. A/72/643, 12 December 2017, available online https://refugeesmigrants.un.org/SGReport (accessed on 13 December 2022).

added complexity, the "degrees of normativity" (Peters 2011) seems in full display in the GCM, rendering its endorsement and implementation challenging for those states, which see their democratic ratification process (Petrig 2021) challenged by soft law's relative normativity (Weil 1983).

Concomitantly, a format such as a spectrum of "nascent obligations" (Elias and Lim 1997, p. 7) lacks—by design—the hierarchical structure and procedural legitimacy associated with formal sources of international law. Within the GCM, this architectural void explains the lingering divide between the axis of "sovereignty" and "international cooperation", as well as "whole-of-society/governance". A solution might be to resort to the two good governance guideposts of the rule of law and due process informing the GCM, which are mirrored in the "axiology" sketched out, if vaguely, by these "guiding principles" Hilpold (2020). Yet, the guidance to be expected in the principles is only half-way developed: it is difficult to detect clear priorities attributed to social or normative values, apart from the inter-relations shaped around IML and IHRL or IML and international environmental law (Yildiz in this *Special Issue*). Yet, even these inter-relations are not unidirectional and fully articulated, which means that there are different kinds of normative inferences determined by one and the same objective.

These stances raise the issue of balancing the risks and gains of soft normativity as an elective means to reach the intended goal of "making migration work for all" (see, e.g., Gammeltoft-Hansen et al. 2017; Gavouneli 2019).[19] The prime element to assess is, therefore, the relation between the soft commitments in the Compacts and the corresponding hard law obligations under international law. In particular, for cooperation frameworks such as the Global Compacts, which ingest both customary human rights rules (see, e.g., the principle of non-refoulement and the prohibition of torture as well as other forms of ill-treatment) and conventional IHRL, while incorporating general principles of law (such as the rule of law), the soft/hard law synchronicity appears to be key to delivering global outcomes in terms of enhancing good governance. Unlike in the fields of corporate social responsibility (Choudhury 2018) or climate change and environmental law (Pickering et al. 2019; Eckersley 2004)—where it has been suggested that a non-dichotomous concept of soft law could produce effective governance of sustainable development—if human mobility has to be taken seriously, as in the GCM, then decoupling soft law from its specular hard legal obligations may entail a serious risk of retrogression (e.g., Baxi 2016).

Can we derive from these premises that states' executive powers obtain a carte blanche to opt out of a commitment or to choose at their own discretion which type of normative inference to implement (Allinson and Croce 2021)? Relatedly, what could be the implications for democratic oversight and the role of domestic constituencies (Petrig 2021)? Additionally, what types of consequences can be foreseen—if any—for the progressive development of IML in the sense of art. 1(1) of the Statute of the UN International Law Commission (ILC) (Chétail 2019)? How does "compacting"—defined as the exercise of mapping practices and programs, in order to level out the playing field for stakeholders' inclusion in decision-making processes (van Riemsdijk and Panizzon 2022)—impact protection standards? Is the informal element implied in the "compacting" exercise—i.e., the establishment of soft partnerships and arrangements at the global and regional levels—capable of "firming up" obligations at the implementing level (see mutatis mutandis, Merry 2015)? Or is their legal effect altogether a different, alternative one (Hilpold 2020)?

Additionally, further zooming in, what has been (and could be) the contribution of a key regional actor—the European Union—to a systemic and contextual interpretation of the Global Compacts, inspired by art. 31(1) of the 1969 Vienna Convention on the Law of Treaties read in conjunction with art. 1(1) of the ILC Statute (Molnár 2020)? Could it stretch

[19] This ambition is embedded, for instance, in the "soft landing" that the 'EU MATCH' programme intends to deliver to Senegalese and Nigerian talents recruited for internships in Europe and upon their returns. For further info, see https://eea.iom.int/sites/g/files/tmzbdl666/files/documents/MATCH%20report%20-Looking%20at%20Labour%20Mobility%20Initiatives%20from%20the%20Private%20Sector%20Perspectives%20.pdf (accessed on 9 December 2022).

the asymmetry between the two axes—of sovereignty and human centricity—around which soft commitments are built? Or could a formal incorporation of the Global Compacts within the EU legal order underscore the prominent role of fundamental rights and the rule of law characterizing the process of European integration?

2. A Special Issue of *Laws*, Offering Fresh Insights into the Classics

Against the above backdrop, this *Special Issue* for 'Laws' puts under scrutiny the relations arising in the forcefield of the two Global Compacts between the rule of law and the governance of human mobility. In a collection of eight articles, this relationship is investigated from the classical standpoint of identifying the legal effects which such international soft law instruments might produce, but adding a dynamic investigation to the classics by adopting a multilayered approach to soft normativity. The latter draws on the prescriptive quality of soft law as a catalyst for generating some autonomous legal effects that move beyond factual or political impacts to evaluate the governance quality of the GCM and GCR for human mobility and its relationship to the rule of law.

By focusing on the transformative power of the interaction itself, much more than on the hegemonic or hierarchical relations between the sources that interact, such a relational approach to regime interaction raises several questions.

First, which are the gaps that the GCM failed to close, and what rights were white-washed in the final text, or curtailed? Examples of "firewalling" access to essential services, a patchy access to justice in border procedures, and the questionable detention of vulnerable persons are just a few such erasures.

Second and inversely, what are the achievements of the GCM in terms of gap-filling, in the sense of raising awareness of the legal challenges facing migrants that, so far, no international cooperation framework had addressed and which guide, for example, the EU's external dimension of migration law?

Third, what is the role of due process and the rule of law in approximating the acquis of the GCM with the nine UN core human rights conventions while sketching an accessible and adequate judicial response for migrants?

Tackling these questions can contribute to a better understanding of how (national and regional) legal systems could "embed" the global soft law instruments normatively. In addition, it would advance knowledge on how the predominantly political nature of the commitments in the Global Compacts excludes or triggers legally binding effects out of the normative inferences that they produce.

The above questions have guided the authors of the pieces in this *Special Issue*, which are summarized hereunder. A first strand of articles employs the EU legal order as a "principled" comparator to test the "relative normativity" of the Compacts (Section 2.1), while a second line of investigation relates to EU migration, asylum, and border policies as a testbed for their implementation (Section 2.2). The cross-fertilization between regional (supranational) law and practice is then explored prospectively, considering the first IMRF, by a third tranche of contributions dealing with selected issues concerning the ownership and implementation of the Global Compacts (Section 2.3). Finally, the challenges, gaps, and inconsistencies in national migration and asylum laws, as well as how they can they be fixed, with reference to the Global Compacts is the thread accounting for the final contributions (Section 2.4).

2.1. The Guiding Principles of the Global Compacts: Proxies for Legal Obligations or Transformative Agendas?

Guiding principles serve to create a common narrative: the same holds true for those of the GCM. Guild et al. (2019) posit that the Global Compacts incorporate guiding principles (see the GCR) and crosscutting as well as interdependent legally binding obligations (see the GCM), at the forefront being the duty to respect, protect, and fulfil human rights. This article discusses how the GCM and GCR, despite being non-legally binding, can constitute an interpretative tool that prompts adherence to three legal principles: the rule of law and due process,

non-retrogression from IHRL, and the principle of non-discrimination (Molnár 2020). Whereas Guild et al. (2022 in this *Special Issue*) argue that the EU asylum acquis—as interpreted by the Court of Justice of the EU (CJEU)—cannot disregard the principle of non-retrogression as enshrined in the Global Compacts when interpreting the EU Charter of Fundamental Rights, they lend some support to the idea of the "relative normativity" (Weil 1983) of the Compacts. In their view, non-retrogression counterweighs the traditional concept of state sovereignty in the production of normative inferences out of "non-consensual legal phenomena"—as described in the seminal analysis by Elias and Lim (1997).

Set against the background of the CJEU jurisprudence emerging in response to the "rule of law crisis" in some EU Member States, the contribution by Favi (2022 in this *Special Issue*) investigates the CJEU's case law through the lens of the Global Compacts. Her analysis of the CJEU concludes that the rule of law can enhance the protection of third-country nationals, at least within the EU, and that by the judiciary's activity the EU's compliance with some of the commitments laid down in the Global Compacts has increased, regardless of the position taken by some individual, recalcitrant EU Member States with respect to these universal instruments. In particular, several hallmark CJEU judgments handed down in preliminary ruling procedures are compared to EU infringement procedure cases as to their relative efficacy, seen from the perspective of upholding the rule of law and access to justice in certain EU Member States infamous for their border injustice.

2.2. The Global Compacts and Their Impact on EU Asylum and Border Policies: Puzzling Realities

In this *Special Issue*, a specific focus is devoted to the EU, considering the prominent role played by its cooperative models and highly integrated legal architecture in shaping concepts and governance mechanisms envisaged by the Global Compacts.

Cornelisse and Reneman (2022 in this *Special Issue*) analyze the (potential) role of the Global Compacts in the development of EU law concerning asylum seekers who arrive at the EU's external borders. Despite widespread violations of their fundamental rights at the EU's external borders, the new EU Pact on Migration and Asylum[20] proposes integrated border procedures as important instruments with which to "deal with mixed flows" and make the Common European Asylum System (CEAS) under art. 78 of the TFEU work. The authors underscore the fact that the EU legislature has not substantiated the claim that border procedures will contribute to achieving the aims of the CEAS, such as the creation of a uniform, fair, and efficient asylum procedure, preventing abuses. Neither does the Pact provide a solution for pushbacks and the systematic use of immigration detention, nor does it guarantee the quality of the asylum procedure. The article thus concludes that these new legislative proposals ignore the standards of the Global Compacts, and asks the following question: What role can the Global Compacts still play in the ongoing negotiations over the legislative proposals present under the EU Pact?

A second article in this strand by Vitiello (in this *Special Issue*) takes the European policy as well as practice of border "securitisation" and the governance of large movements of refugees and migrants at the EU level as a case study with which to investigate the interplay between the quest for safe, orderly, and regular migration (objective 23 of the GCM) and states' commitments to managing borders in an integrated and coordinated manner (objective 11 of the GCM). The key conceptual framework around which the analysis revolves is the dyad of "comprehensiveness-fragmentation", which frames the entire structure of the GCM and inspires its implementing actions. With a view to contributing to the debate stimulated by the first IMRF, this article elucidates the conditions under which the ambivalent interaction between the legal aspiration to regularize migration and the reality of border controls may lead to the enhancement—or (vice versa) to a further dilution—of the legal entitlements of migrants and refugees.

[20] European Commission, New Pact on Migration and Asylum, COM (2020) 609 final, 23 September 2020. Available (along with the legislative proposals presented thereunder): https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en (accessed on 2 December 2022).

2.3. Implementation and Review of the Global Compacts' Commitments: Selected Issues

Prospectively, in light of the recently held first IMRF, a pressing challenge is to ensure the effective implementation and oversight of the undertaken obligations in the Global Compacts. Unlike for the UN Agenda 2030 for Sustainable Development, where the attainment of the 17 SDGs is timed by 2030 and tracked by numerical indicators and targets, both benchmarks are absent from the GCM. Two articles of this *Special Issue* deal with the issue of monitoring the implementation of the GCM's objectives, from different perspectives.

Yildiz (2022 in this *Special Issue*) stresses that the international community failed to converge on a mechanism for benchmarking, just as the GCM's monitoring and review mechanisms fail to build sufficient peer pressure to nudge states towards facilitating human mobility triggered by disasters and climate change. A review of relevant other international legal sources, including the UN Framework Convention for Climate Chance (and the UN Convention to Combat Desertification, as well as the work of different UN Special Rapporteurs and the Human Rights Council), permits the determination of which gaps in the GCR/GCM frameworks persist. The author points to several gaps, contributing to a better understanding of the limited translation into action of states' commitments related to human mobility induced by disasters and climate change.

Another illustrative case in point for a gap in the GCM concerns immigration-detention-related commitments, representing a controversial—and very intrusive—immigration law enforcement measure. As Majcher (2022 in this *Special Issue*) argues, states have committed to using administrative detention in immigration matters only as a measure of last resort and to work towards alternatives in light of objective 13 of the GCM, drawing from eight sets of actions to attain this commitment. She uses immigration detention as a case study to suggest that the synergies between the GCM's commitments and existing IHRL regimes can boost the mechanisms for monitoring states' implementation. For instance, given the similarities between the IMRF and the Universal Periodic Review[21] under the auspices of the UN Human Rights Council, the latter could inspire legal and policy innovations working to improve the GCM's review and oversight mechanisms. She concludes that, through such avenues, objective 13 of the GCM could be used to also strengthen, more generally, its guiding principles, specifically the rule of law in global migration governance.

2.4. National and Comparative Perspectives of Implementing the Global Compacts

One paradigmatic shift in international migration policy has been ascribed to the GCM's comprehensive, "360-degree vision and its impact on host countries' migrant welfare policies. When operationalized at the national level through the "whole-of-society/government approaches", the GCM—and this is a primer in international migration policy—commits host states to subject their entire integration and inclusion policies to scrutiny by the IMRF and the International Organization for Migration (IOM). Hence, from access to essential services, the recognition of foreign credentials, remittances transfers, to diaspora relations, every covert or overt policies thus becomes subject of reviewing by the IMRF and is in full international spotlight. Through this invasive inroad to sovereignty, also the external dimension of migration policies is inextricably tied up with domestic law and policy, and by this token (finally) can be adjudicated before courts. The final two articles hosted by this *Special Issue* inquire into these different domestic ramifications, including by investigating selected instances of "unconventional" implementation of the GCR at the national level.

The article by Vankova (2022 in this *Special Issue*) explores the quest for safe pathways from the perspective of the collective responsibility of the international community for offering durable solutions to refugees—as expressly recognized by the 2016 New York Declaration and the GCR—and as an opportunity for refugee access to labor opportunities—as envisaged by the GCM. The analysis focuses on how these soft law commitments

[21] United Nations Human Rights Council, Universal Periodic Review. Available online: https://www.ohchr.org/en/hr-bodies/upr/upr-main (accessed on 9 December 2022).

contained in the Global Compacts can be embedded into national legal systems by exploring the legal and political feasibility of establishing such complementary legal pathways in two selected EU Member States: Germany and Sweden. Drawing (inter alia) on semi-structured interviews with stakeholders at the national level in Germany and Sweden, this article contends that politicians' and policymakers' traditional thinking of migration and asylum as separate domains remains the key challenge to opening work-based complementary pathways for refugees. It concludes by emphasizing that the launch of the Global Task Force and the interest in complementary pathways shown by international organizations strengthen the political feasibility of work-based complementary pathways, not least because public awareness increases jointly with more expertise becoming available.

Alexander and Singh (2022 in this *Special Issue*) analyze the impact of the GCR on Indian statutory and judicial practice over access to asylum for Afghan refugees. They caution against over-rating the benefits of the Global Compacts and of elevating the virtues of soft law therein. In the case of India, non-refoulement and access to asylum as well as to essential services for migrants and refugees only exist by virtue of India's High Courts. Without court-adjudicated acquis, migrants' and refugees' access to justice would be even more fragmented, if not factitious, underlying once more the key value of due process and the rule of law as guiding principles of the GCM. Similarly, the intake of the GCR by the Indian government has exacerbated an upfront confrontation of what happens when no domestic legislation is in place to absorb the objectives and political commitments assumed at the international level.

3. Charting the Way Ahead for the Global Compacts: What Role for the Rule of Law in Global Migration Governance?

The Global Compacts for Migration and on Refugees promise more than a compilation (and, according to Chétail 2020, a consolidation) of the existing international legal standards governing migration and refugees, even if the levels of ambition, as the IMRF 2022 revealed, differ from one group of states to others. Whereas some insist on keeping up with the soft law quality of the GCM, including Australia, stating that "the activities listed under . . . the Compact are merely illustrative of possible State practice",[22] others, notably in the Global South,[23] expect a higher level of ambition from the UN community, demanding to see more decisiveness over the direction that the commitments are taking, including a possible agreement over the stewardship of the IOM, but also expanding on certain previously undetected or underestimated thematic areas, including gender-based violence, bilateral labor mobility agreements, one-stop shops, harmonizing criteria for skills testing and recognition, and other integration measures. A third group of countries, including Egypt, Spain, and another 18 UN Member States,[24] as well as Ecuador as the champion for the 29 champion countries of the IMRF 2022, define progress as reaching coherence with other international norms, including, as discussed in this *Special Issue*, the UN Framework Convention for Climate Chance, the UN Agenda 2030, and the International Convention on Migrant Workers, over issues of validating climate-induced displacement, but also reaching

[22] Statement by H.E. Dr Fiona Webster, Chargé d'affaires Australian Mission to the United Nations United Nations Briefing on the Global Compact for Migration: Report of the Secretary General 16 February 2022. Available online: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/australia.pdf (accessed on 9 December 2022).

[23] See Remarks from the Launch of the UN Secretary General's Report, 16 February 2022. Available online: https://migrationnetwork.un.org/sg-report-2022 (accessed on 9 Deceember 2022).

[24] Statement of the GCM Champion countries at the Briefing on the Report of the Secretary-General on the implementation of the Global Compact for Safe, Orderly and Regular Migration, 16 February 2022. Available online: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/ecuador_on_behalf_of_the_champion_countries.pdf (accessed on 9 December 2022): "When migration is safe, orderly, and regular, it represents a sustainable development opportunity. We have the 'what' in the 2030 Agenda. We have the 'how' in the GCM".

consensus over fair and ethical migrant labor recruitment, including for persons in need of protection, and drafting standards over sustainable returns.[25]

When the UN Secretary General in his Second Report on the GCM (21 December 2021) described the "[GCM]'s value as a guide and touchstone", the ambition had lowered from the original GCM acting as a tramplin for reaching a "multilateral" treaties, which the 2017 Sutherland Report ("making migration work for all") had suggested for a future GCM.

The 2022 IMRF Progress Declaration—which monitors the implementation of the GCM's first four years—has shed more light on where the under-developed concepts of the rule of law and due process might lie, hindering the overall improvement of the situation and well-being of migrants, "regardless of their status and the phase during the migration cycle". Notwithstanding, states have been given credit for "making migration work for all" as per the 2017 report of the UN Secretary General, even if much of their voluntary reporting dwells deliberately on contingent motivations, including on pandemic preparedness and relief, often to distract from more contentious and highly debatable policies and practices. Hence, the recently adopted 2022 IMRF Progress Declaration demonstrated which political commitments states are most willing to cooperate on, while shedding more light on where gaps persist. Ideally, the IMRF nudges states towards agreeing on prioritizing certain commitments and values, which would dynamically move the GCM beyond its current of "re-affirming" national and regional best practices, as critics observed during the IMRF.[26] If states were to rearrange certain commitments along a scale of "relative normativity" (Weil 1983), including by elevating human rights to a status further challenging state sovereignty (Crépeau and Atak 2016), such progress would mark a first step towards "firming up" (Merry 2015) the legal fabric of the Global Compacts. At the same time, several UN Member States took first steps to soften the narrative of "safe, orderly and regular" by calling for more "humane" and "coherent" migration policy (Morocco)[27], or to "include actionable and measurable recommendations" in view of addressing the GCM's "critical challenges".[28]

This *Special Issue* undertook a legal analysis into this juncture between the legal-like and political formats, recast and enhanced by the two Global Compacts. Drawing on the negotiating history and outcome documents from the first International Migration Review Forum (IMRF), we reason that, in many ways, the line-up and mapping of practices, in addition to the recasting of legal obligations as "guiding principles", pay tribute to the different speeds and capacities of states as well as other actors for implementing the Global Compacts. In a best-case scenario, this reframing of existing obligations achieves a fuller commitment to non-refoulement, the prohibition of collective expulsion or the right to return, and enhances existing best practices, including "firewalls"; in other cases de-legalization dilutes the protection of the human rights of migrants. Finally, the key risks involved in softening the human rights standards are linked to the absence of the ranking of priorities, both for the global and other levels. Remedial actions to mitigate these risks are also identified: first, to rely on the bridging function of the guiding principles enshrined in the Global Compacts to concretize rights and obligations; second, to interlock the Compacts'

[25] Statement by Egypt at the occasion of the United Nations Briefing on the Global Compact for Migration: Report of the Secretary General, 16 February 2022. Available online: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/egypt.pdf (accessed on 9 December 2022); and consider also the Statement by Spain. Available online: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/spain_on_behalf_of_18_countries.pdf (accessed on 9 December 2022).

[26] Champions letter to the President of the UN General Assembly, 31 January 2022: "We believe the Progress Declaration should go beyond a mere reaffirmation of the Compact, and we are willing to test the idea of including some concrete commitments in specific areas, in line with national priorities, to accelerate progress in attaining the GCM's objectives". Available online: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/champions_letter_to_pga.pdf (accessed on 9 December 2022).

[27] Statement by Morocco at the occasion of the United Nations Briefing on the Global Compact for Migration: Report of the Secretary General, 16 February 2022. Available online: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/morocco.pdf (accessed on 9 December 2022).

[28] Statement of the GCM Champion countries at the Briefing on the Report of the Secretary-General on the implementation of the Global Compact for Safe, Orderly and Regular Migration, 9 February 2022. Available online: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/ecuador_on_behalf_of_the_champion_countries.pdf (accessed on 9 December 2022).

commitments more tightly with international legal obligations and the United Nations Agenda 2030 for Sustainable Development.

In sum, the Global Compact for Migration, read in conjunction with the Global Compact on Refugees, has the potential to transform the grip and the profile of international soft law and thereby to rearrange the cartography of IML. Yet, more research by scholars in addition to multiplied efforts by practitioners and civil society alike are necessary to bring about the kind of meaning-making from the Global Compacts, which might serve to unearth new priorities and foster a more effective dialogue among their goals for more efficient global migration governance.

In the Guest Editors' earnest hope, this *Special Issue* will help to generate further discussions—and also shared understanding—around the multiple issues outlined above. The Guest Editors wish you all happy reading!

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The UN Global Compacts and the Common European Asylum System: Coherence or Friction?

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Abstract: This paper examines the "protective potential" of the Global Compacts on Refugees and Migrants vis à vis existing commitments to fundamental rights within the European Union (EU). The relationship between the two normative frameworks is scrutinised to establish the extent to which the two might be mutually supportive or contradictory, since this determines the Compacts' capacity to inform the interpretation of EU fundamental rights within the Common European Asylum System (CEAS). This paper explores this protective potential through three of the Compacts' key guiding principles: respect for human rights and the rule of law, the principle of non-regression, and the principle of non-discrimination. The Compacts' commitments to the first two are presented as sites of coherence where the Compacts concretely express pre-existing protections within EU law and provide a blueprint for implementation in the migration sphere. However, the Compacts' principle of non-discrimination reveals an area of friction with EU primary law. It is argued that the implementation of this principle can address the inherently discriminatory system underpinning EU law. Within the EU, rather than undermining international and national human rights obligations, the Compacts present an opportunity to refine the implementation of existing EU fundamental rights obligations applicable to migrants and refugees.

Keywords: Global Compacts; non-regression; non-discrimination; rule of law; human rights; Common European Asylum System (CEAS)

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1. Introduction

The Global Compact on Refugees (GCR) and the Global Compact for Safe, Orderly and Regular Migration (GCM) were adopted in December 2018 by the United Nations (UN) General Assembly.[1] This article proposes a reading of the two Compacts as instruments that operationalise and contextualise existing State obligations in the migration context. In so doing, it examines the Compacts' potential to effect improved rights protection for migrants and refugees within the European Union (EU), given the European Union's own legal framework that includes the Common European Asylum System (CEAS). This is not a question of conceiving the Compacts as a binding Treaty or not; there is agreement that the Compacts' commitments are not about creating new obligations (Guild and Weiland 2019; Chetail 2020; Gammeltoft-Hansen et al. 2017). Instead, our research focusses on the complementarity of the Compacts with pre-existing legal frameworks in refugee and human rights law, and their role in improving respect for the rights of refugees and migrants (Guild 2019; Guild et al. 2017, 2019). They can be used by the EU both as an internationally endorsed aid to the interpretation and implementation of existing international human rights and as a new tool in EU development law. The EU's submission to the first regional

[1] Global Compact on Refugees, UN Doc A/73/12 (Part II) (2 August 2018); Global Compact for Safe, Orderly and Regular Migration, UN Doc A/RES/73/195 (19 December 2018).

review of the GCM in the European region specifies that the European Union, through the work of the European External Action Service and the European Commission, "has been contributing to the implementation of the [GCM] objectives" including through "support for actions in and outside Europe to [. . .] protect the human rights of all migrants with particular attention to children and the most vulnerable groups" (EEAS 2020). In exercising its functions in the field of development cooperation, the European Union is already bound to comply "with the commitments and take account of the objectives they have approved in the [UN] context".[2]

Indeed, the Compacts are founded upon the refugee protection regime and human rights law obligations.[3] The fact that the Compacts are embedded in these two international legal frameworks means that they have the potential to operationalise these pre-existing legally binding obligations at the national and regional levels, including through the migration and asylum law of the EU. Coming from this understanding of the Compacts, this article examines how these instruments align with what already exists in the EU to establish the potential for the Compacts to inform the interpretation of EU law and the implementation of policy and practice. Since its creation, the EU legal order has existed as an autonomous legal framework.[4] However, this framework is nonetheless shaped by the European Union and its twenty-seven Member States' commitments to, and obligations under, international law, including refugee and human rights law. The expression of these obligations, as seen in the development of the asylum and migration *acquis*, means that ever since the European Union exercised its competence to enact legislation in the area, Member States' action towards migrants and refugees must conform with their EU law obligations. As such, an assessment of the EU legal order's receptiveness to the Global Compacts' commitments can illustrate the extent to which these instruments complement pre-existing legal sources and can result in improved rights protection for migrants and refugees, particularly by fleshing out the content of these obligations in a migration-specific context.

The Compacts have been negotiated and adopted under the UN's Sustainable Development Goals (SDGs)—Goal 10(7). As the Commission's Legal Service has explained, Article 210 Treaty on the Functioning of the European Union (TFEU) requires the European Union and the Member States to coordinate their actions on development policy (Commission Legal Service 2019).[5] In the New European Consensus on Development,[6] the multiple aspects of migration and forced displacement are agreed as development policy with specific reference to the Global Compacts. As the Legal Service argues, there is extensive case law requiring the European Union to consider the objectives of development policy when implementing measures affecting developing countries. As a result, it concludes that the GCM has legal effects for European Union development policy.[7] This means that, according to the Legal Service, the GCM is an integral part of European Union positions in development cooperation as the GCM participates in the European Union's legal framework. Our argument regarding the impact of the GCM on EU law goes in a slightly different direction, aligning it with that of EU migration and asylum law. As the Legal Service proposed regarding development policy, we claim that in respect of EU law in migration and asylum, EU law and policy must be compatible with the GCM objectives,

[2] *Consolidated version of the Treaty on the Functioning of the European Union* (TFEU), 13 December 2007, OJ 2008/C 115/01 Article 208(2). On the role of the EU in the Compacts' negotiation see, (Molnár 2020).

[3] See GCR (n1) para. 5; GCM (n1) para. 15. https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/contribution_by_the_eeas_european_commission_services_to_the_regional_review_of_the_global_compact_for_safe_orderly_and_regular_migration_in_the_unece_region.pdf (accessed on 24 August 2021)

[4] Case 26/62 *NV Algemene Transport—en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1.

[5] This document was leaked by an independent MEP to *La Voce del Patriota*, an Italian news outlet connected with the Fratelli d'Italia, a national conservative political party in Italy.

[6] Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission "*The New European Consensus on Development: Our World, Our Dignity, Our Future*" OJC 210, 30.6.2017, pp. 1–24.

[7] See Commission Legal Service, (n8), para. 46.

not only based on the principle of loyal cooperation (Article 4(3) Treaty on European Union (TEU)) as proposed by the Legal Service regarding development cooperation), but also as the most recent definitive clarification of the meaning of existing human rights conventions as they apply to migrants. Human rights standards are an inherent part of EU development policy which is an integral part of EU law. The impact of the GCM on one field of EU law is directly relevant to its legal effect in other areas, including migration and asylum.

EU competence was extended to migration and asylum in 1999, when a revision of the treaties took place. A specific commitment was written into the Treaty requiring compliance with the principle of *non-refoulement*, the Refugee Convention, and other relevant treaties (now contained in TFEU Article 78(1)).[8] The EU legislator implemented the competence regarding asylum in the Common European Asylum System (CEAS)—a set of secondary EU legislation adopted from 2003 onwards, revised in the early 2010s and currently under revision again.[9] This secondary legislation currently establishes minimum standards but with the objective of achieving common standards. In 2000, the EU adopted the EU Charter of Fundamental Rights (EUCFR), which was given full legal effect and equivalence to the EU Treaties in 2009 on the last revision of the treaties.[10] The Charter includes a right to asylum with due respect for the rules of the Refugee Convention (Article 18 EUCFR) and an explicit prohibition of refoulement (Article 19 EUCFR). Furthermore, regarding migration, the TEU states that the European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (Article 2 TEU).[11] This is augmented by Article 6(3) TEU, which confirms that fundamental rights, as enshrined in the European Convention on Human Rights (ECHR), are general principles of EU law. It is reflected in the Charter where Article 1 commences with the entitlement to human dignity. The full impact of the Charter in the Area of Freedom, Security and Justice, of which the CEAS and migration form a part, has been well examined elsewhere (Sánchez and Pascual 2021). Thus, the application of the guiding principles of the Compacts—human rights including the rule of law, non-discrimination and non-regression—fit easily into the EU treaty framework The Compacts, as instruments adopted after the relevant treaty changes and endorsed by the EU and most EU Member States, need to be taken into account in the interpretation and implementation of the CEAS and EU migration law in order to ensure the coherence of EU fundamental rights law with its international counterpart.

This contribution examines three key elements of the Compacts: human rights and the rule of law, the principle of non-regression, and the principle of non-discrimination. These elements are presented among the "cross-cutting and interdependent guiding principles", which the international community has agreed should form the foundation of the Compact's aims and objectives.[12] This article argues that in the EU's fundamental rights framework, the emphasis on the rule of law (Art. 2 TFEU) and the principle of non-regression[13] are already embedded within the EU constitutional setup as obligations under EU law. As such, these points of coherence between the two frameworks result in a considerable protective potential for the Compacts within EU law. This coherence can ensure that these overarching principles are applied, in the context of migration, in line with international commitments.

At the same time, the prohibition of discrimination on the basis of migration status which is espoused in the Compacts, primarily the GCM, emerges as a site of friction between the Compacts and the EU legal order. Despite a commitment to non-discrimination on

[8] *TFEU* (n5).

[9] It consists of the Asylum Procedures Directive (2013/32/EU), the Reception Conditions Directive (2013/33/EU), the Qualification Directive (2011/95/EU), the Dublin Regulation (No. 603/2013), the EURODAC Regulation (No. 604/2013) and the Regulation establishing the European Asylum Support Office (No. 439/2010).

[10] *Charter of Fundamental Rights of the European Union (EUCFR)*, 26 October 2012, OJ 2012/C 326/02.

[11] *Consolidated version of the Treaty on European Union (TEU)*, 13 December 2007, OJ 2008/C 115/01.

[12] GCM, (n1) para. 15.

[13] Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311 building on C-824/18 *A.B. and Others (Appointment of judges to the Supreme Court–Actions)*, EU:C:2021:153, para. 108.

enumerated grounds in primary law, the EU migration and asylum *acquis* is constituted along a structural principle that permits and creates the differential treatment of third-country nationals in their access to rights, based on their migration status. Although non-discrimination based on nationality in EU law is limited in scope to EU nationals (and their family members), the Compacts take a wider approach, calling for application regardless of migration status. As discussed below, this approach has been at least partially adopted by the European Court of Human Rights (ECtHR). Here, extant EU law stands out as fundamentally inconsistent with the Compacts' commitments. At the same time, despite this apparent irreconcilability, the Compacts' status as instruments that express the contemporary commitment to the rights of migrants and refugees can act to prompt a reconsideration of this stance. They call into question the continued legitimacy of the failure to apply the principle of non-discrimination on the basis of migratory status across the different categories of third-country nationals, in respect of which the EU legislator has exercised competence.

This paper proceeds as follows. Following these introductory remarks, Section 2 identifies the areas of coherence between the Global Compacts and the EU legal order and focuses on the role played by respect for human rights and the rule of law, together with the principle of non-regression, in shaping the EU legal order. In so doing, it examines how the expression of these principles within EU law facilitates the possibility that the Compacts' detail informs the interpretation and implementation of the relevant obligation at the EU level and enhances existing levels of protection. In contrast, Section 3 engages with the Compacts' presentation of non-discrimination on the basis of migration status as impermissible and how this runs counter to the understanding of the principle embedded in the structure of the EU legal order. It explores how the differential treatment of third-country nationals (as aliens are called in EU law) appears inbuilt in the EU's structural framework, which limits the possibility of the Compacts imparting a protective effect. Nonetheless, it argues that the Compacts can provide a principled basis for re-evaluating the exclusion of third-country nationals from basic rights within the EU, in particular, through a wide interpretation of equal treatment provisions in secondary legislation. A concluding section integrates these strands of analysis.

2. Coherence between the Global Compacts and the EU: Respect for Human Rights, the Rule of Law, and Non-Regression

As noted above, the Compacts do not impose binding legal obligations on the EU but are well-placed to provide additional interpretative value to migration-specific contexts. This role is facilitated in areas where EU law and the Compacts overlap in their understanding of the key principles guiding their implementation (with specific impact on development policy). This section reflects how the Compacts' commitments to respect for human rights, the rule of law, and the principle of non-regression are already present within the EU legal order at the level of primary law, thereby providing fertile ground for the Compacts to enhance the meaning of obligations in the migration and asylum obligations expressed through the CEAS.

2.1. Respect for Human Rights and the Rule of Law

The two Global Compacts are both founded in the UN body of international human rights instruments, commencing with the Universal Declaration of Human Rights (UDHR), notwithstanding their incorporation into the Sustainable Development Goals 2030. The GCR commences with reference to the UN Charter and the commitment to cooperation among states in the context of their faithful implementation of the Refugee Convention (paras. 2 and 5). It also refers to regional instruments which complement the Refugee Convention, including through more general human rights duties (para. 5). The GCM is even clearer about its relationship with human rights. Its first paragraph confirms that it rests on the UDHR and references the full range of UN human rights conventions adopted to give the UDHR commitments convention status. It states that it is based on a set of

cross-cutting and interdependent guiding principles which include respect for human rights and rule of law (para. 15). As part of the GCM's commitment to human rights, it confirms that it upholds the principles of non-discrimination and non-regression (which will be dealt with later in this paper) and aims to ensure effective respect, protection, and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle (para. 15, indent 6).

As noted earlier, the EU is no stranger to human rights, with human and fundamental rights being central to the EU's legal structure.[14] The long history of the EU's gradual incorporation of human rights into its legal order has been well described elsewhere (Peers et al. 2021; Guild and Lesieur 1998). The EU's language of rights includes both human rights (the UN and Council of Europe's terminology) and fundamental rights (EU formulation), in part to accommodate more rights in the Charter than those which appear in many human rights conventions (De Búrca 2013, pp. 168–84). Its constituting treaties now include references to fundamental rights and an express reference to the Refugee Convention. More recently, the EU has signed UN human rights treaties, commencing with the Disability Convention.[15]

The protection of human rights is a key component of a system founded upon the rule of law. Rule of law features in the GCR (para. 9), where States undertake to uphold the UN Charter as well as rule of law at the national and international levels (thereafter, there are no further references to rule of law). In the GCM, rule of law and due process are part of the cross-cutting principles (para. 15, indent 4). It recognises that rule of law and due process as well as access to justice are fundamental to all aspects of migration governance. States commit to ensuring that not only their authorities, but all public and private entities and natural persons, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated. This is quite a developed definition of the essential elements of rule of law for an instrument such as the GCM to contain.[16] It is perhaps a response to the widely existing problem of inadequate legal protection for migrants and limited or non-existent access to justice. For two Compacts which expressly state that they are non-legally binding (para. 4 GCR, para. 7 GCM), this is quite an ambitious legal framework within which the political commitment of the Compacts is defined.

As an organisation, the EU is a structure based on the rule of law. Unlike states which adopt constitutions to crystallise the relationship of the people and the state and confirm the existence of the state (Von Bogdandy 2008, p. 397), the EU was conjured into existence exclusively by treaties in the 1950s. The Treaty on European Union states in Article 2 that it is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. There has been substantial academic work on the meaning of rule of law in the EU, as well as interpretation by the Court of Justice of the European Union (CJEU) (Pech 2009; Konstadinides 2017; Bárd and Ballegooij 2018, pp. 353–65). Much like the Compacts' reference to the rule of law as requiring the public promulgation of laws, their equal enforcement and independent adjudication, the EU's institutional set up, legislative process, and judicial oversight illustrate a similar understanding of the principle. As the European Commission's assessment of the upholding of the rule of law in the EU and its Member States makes clear, despite the diverse legal systems and traditions, "the core meaning of the rule of law is the same across the EU" (European Commission 2021, p. 1). It includes respect for the key principles of "legality, legal certainty, prohibition of the arbitrary exercise of executive power, effective judicial protection by independent and

[14] *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, OJ 2007/C 306/01.

[15] UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I; Council Decision of 26 November 2009 Concerning the Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L 23/35.

[16] See for discussion: (Bingham 2011).

impartial courts respecting fundamental rights in full, the separation of powers, permanent subjection of all public authorities to established laws and procedures, and equality before the law" (European Commission 2021, pp. 1, 7). In upholding the rule of law, Member States must comply with EU law and the principle of the primacy of EU law, upon which the European Union is founded.[17]

For the EU's asylum and migration framework, respect for human rights and the rule of law are indispensable. Just as the Compacts are embedded in pre-existing human rights obligations, the CEAS does not exist in abstraction; its implementation must be in line with the broader fundamental rights obligations that accrue within EU law. This includes the Charter, which largely mirrors the principles of the Compacts in that it obliges the CEAS to be in line with the Refugee Convention, embraces the commitment to the rule of law, and respect for human rights. There is also room for the role of non-regression, particularly with the more recent CJEU rulings and for promoting the principle of non-discrimination in the migration space.

2.2. Non-Regression, the Compacts, the EU and the CEAS

The GCM's rootedness in international human rights and refugee law obligations and the rule of law is supplemented by its explicit commitment to upholding the principles of non-regression and non-discrimination.[18] The principle of non-regression, also referred to as non-retrogression within international human rights law,[19] acts to ensure that existing levels of protection are maintained once an instrument comes into force. As such, the GCM's basis in non-regression "resembles a standstill provision where the law at the time of the entry into force of the commitment must be maintained or changed only in the direction of the political commitment which has been undertaken".[20] It follows that, in cases where States have pre-established higher levels of protection than that prescribed by an instrument, they cannot reduce those protections without expressly contradicting their commitment to non-regression. Moreover, once committed to non-regression, States should not undermine these higher levels of protection. Accordingly, States' commitment to uphold the principle of non-regression in the migration context operates as a prohibition on the adoption of retrogressive actions. States with higher standards in place than the relevant instrument, in this case the GCM, undertake not to lower extant standards of protection. This principle also applies to the EU, for instance, when revisiting the CEAS.

Prior to its inclusion in the GCM, the non-regression principle had already been recognised within international environmental law (Alegre 2018), and in the context of the protection of socio-economic rights, a place where it is expressed as the prohibition of retrogressive measures.[21] In environmental law, this may be viewed as "a negative obligation inherent in all positive obligations associated with fundamental rights" (Collins 2020). In the context of socio-economic rights, backwards steps are impermissible with respect to core obligations, which include, for example, the provision of primary and emergency healthcare.[22] The possibility of States taking retrogressive steps with respect to other non-core obligations is contemplated only in specific circumstances which must be justified by the State Party.[23]

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17 See, for example, the Court of Justice's ruling in *Repubblika v Il-Prim Ministru* (n 18).

18 GCM (n1) para. 15(f) specifies that the GCM 'is based on international human rights law and upholds the principles of non-regression and non-discrimination'.

19 This is especially the case for economic, social and cultural rights: see UN Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education*, 8 December 1999, para. 45.

20 Guild and Wieland (n 2) p. 197.

21 See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No.3: The Nature of States Parties Obligations*, Art. 2, Para. 1 of the Covenant, 14 December 1990, E/1991/23, on the prohibition of "any deliberately retrogressive measures" (para. 9). The idea that once a human right is recognised it cannot be restrained, destroyed or repealed is shared by all major international instruments on human rights.

22 See CESCR '*General Comment No. 14: The Right to the Highest Attainable Standard of Health*' (2000) UN Doc E/C.12/2000/4 para. 48.

23 CESCR, (n34), para. 32; CESCR (n32) para. 9.

The principle of non-regression is not novel to the EU law framework either. Within the EU framework, the CJEU has explored standstill provisions in relation to the EEC–Turkey Association Agreement (Gutmann 2016), where it has highlighted how they act to freeze existing restrictions (if any) in time and ban the introduction of new, more restrictive restrictions.[24] Moreover, non-regression clauses have long been articulated within employment-law-related secondary EU law instruments, which specify that the directive in question must not be used to justify reducing "the general level of protection afforded to workers" within the instrument's scope.[25] Granted, the clauses in EU social legislation and the CJEU's restrictive interpretation thereof focused on establishing a limited rule that does not encompass a comprehensive "standstill" clause which rules out lowering standards in connection with the Directive's implementation.[26] This led Peers to brand them as "entirely, or very nearly entirely, ineffective" (Peers 2010, pp. 436, 439). However, the same cannot be said of the importance accorded to non-regression in the fundamental rights context at the level of EU primary law.

The EU's fundamental rights architecture can already be said to incorporate a principle of non-regression, by pegging the substantive scope of EU fundamental rights against those of the ECHR. Article 52(3) EUCFR provides that Charter rights corresponding to rights protected by the ECHR must have the same scope and meaning, as interpreted by the ECtHR, and provide for an equivalent level of protection.[27] This standard is a minimum floor of protection that does not prevent EU law from "providing more extensive protection".[28] In addition, Article 53 EUCFR presents the Charter as a source of "better protection of fundamental rights within the scope of operation of the [EU] (. . .) [which] does not seek to displace existing protection of fundamental rights"; at a minimum, these must meet ECHR standards and those international agreements to which the EU is a party (de Witte 2019, p. 74). This is accompanied by the qualification that nothing in the Charter must restrict or adversely affect existing levels of fundamental rights protection provided by EU law, international law, and international agreements upon its entry into force. The provision establishes a minimum level of protection that incorporates human rights obligations originally conceived outside of EU law. Although in *Melloni*, this was interpreted to mean that higher levels of *national* fundamental rights protection than those established by the Charter are only permissible provided they do not affect the primacy, unity and effectiveness of EU law, the same restriction may not be as easily imposed on ECHR rights which are explicitly linked to the determination of the level of Charter rights protection.[29] In their opinion in *FMS*, Advocate General Pikamäe argues that the absence of the ECHR's formal incorporation in the EU legal order means that the consistency sought by Article 52(3) EUCFR "cannot adversely affect the autonomy of EU law and that of the [CJEU]" and the CJEU interprets Charter provisions "autonomously". However, they acknowledge that even if the CJEU were to side-line ECtHR caselaw, this remains subject to the caveat that "its interpretation leads to a higher level of protection than that guaranteed by the ECHR".[30] To that end, it appears possible to speak of the EUCFR as providing an example of a principle of non-regression within EU primary law. Arguably, although not

[24] See for example, the EU–Turkey Association Article 41(1) of the Additional Protocol and Article 13 of Decision 1/80 of the EU–Turkey Association Council. Case law includes C-12/86 *Demirel* ECLI:EU:C:1987:400; C-182/91 *Sevince* ECLI:EU:C:1990:322; C-138/13 *Doğan*, ECLI:EU:C:2014:2066; *C-225/12 Demir* ECLI:EU:C:2013:725 and C-561/14 *Genc* ECLI:EU:C:2016:247.

[25] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (1999) OJ L 175/43 1999 70 clause 8(3).

[26] As in *AG Opinion in Mangold* para. 61; (Peers 2010, p. 438).

[27] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C-303/17; Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 para. 20; Case C-400/10 PPU, *J McB v L E* [2010] ECR I-08965, para. 53.

[28] Case 400/10 PPU, *J McB v LE* EU:C:2010:582 para. 53.

[29] Case C-399/11 *Melloni ECLI:EU:C:2013:107*.

[30] See Advocate General's Opinion in Joined Cases C-924/19 PPU and C-925/19 PPU *FMS, FNZ* ECLI:EU:C:2020:294, paras. 148–149.

legally binding, Compact provisions on non-regression in the migration context can inform the interpretation of a non-regression obligation in the migration and asylum field.

This interpretation is enhanced by the CJEU's explicit presentation of the principle of non-regression as a principle of EU law applicable to the EU values in Article 2 TEU, albeit specifically in the rule of law context.[31] The term "rule of law backsliding" has been used to refer to the weakening of democratic institutions by elected authorities and the systemic breaches of judicial independence and other violations that have plagued multiple Member States in recent years,[32] with additional criticism of the EU's own commitment towards the rule of law (Kochenov 2015). It is in this context that recent developments in the CJEU's jurisprudence indicate that the principle of non-regression is an important principle at the level of EU primary law. In *Repubblika v Il-Prim Ministru ta' Malta*, the CJEU was called upon to determine whether the Maltese system for judicial appointments was consistent with the principle of effective judicial independence.[33] Its ruling highlighted the existence of a principle of non-regression which is tied to the values enumerated in Article 2 TEU as EU foundational values; as such, an EU Member State which had freely and voluntarily acceded to the European Union "cannot amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU".[34] In this scenario, the *value* of the rule of law meant Member States must "ensure that (. . .) any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary".[35] As Leloup, Kochenov, and Dimitrovs have pointed out, the assertion of an explicit principle of non-regression "marks a bold new step in the Court's jurisprudence" (Leloup et al. 2021, pp. 700–1). However, it also builds upon earlier rulings in which it had emphasised the importance of adherence to EU values given Member States' free and voluntary commitment thereto in acceding to the European Union.[36]

The recognition of a non-regression principle that is tied to the European Union's values expressed in Article 2 TEU points towards the recognition of the same principle with respect to EU fundamental rights. This argument is foreshadowed by Kostakopoulos, who argues "for the formal recognition of the principle of non-regression in the EU legal order", which is derived inter alia from a cumulative reading of the EU's objectives (Article 3 TEU) and the Charter's references to the preservation and development of common values (including fundamental rights) and its non-regressive clauses (as seen above) (Kostakopoulou 2021, p. 99).[37] In light of the CJEU's ruling in *Repubblika* with its emphasis on the non-regression of laws tied to the values in Article 2 TEU and of which fundamental rights form an explicit part, it would appear that it is justifiable to speak of an EU principle of non-regression with respect to fundamental rights and which forms a key principle of the EU legal order that goes beyond the need to ensure a consistent interpretation of EU law.

2.3. Implications of the Importance of Human Rights, Rule of Law, and Non-Regression for the CEAS

As can be seen from the case law of the CJEU, human rights arising from the Charter have been very important to the interpretation of the CEAS.[38] Member States' applications

[31] Case C-896/19 *Repubblika v Il-Prim Ministru* (n18).

[32] (Pech and Scheppele 2017). 19 *Cambridge Yearbook of European Legal Studies* 3; 'European Commission "Rule of Law Report 2021" COM(2021) 700'. available at: https://ec.europa.eu/info/sites/default/files/communication_2021_rule_of_law_report_en.pdf accessed 15 September 2021.

[33] *Repubblika* (n 18). For detailed commentary, see (Leloup et al. 2021; Pech and Kochenov 2021).

[34] *Repubblika* (n 18) para. 63.

[35] *Repubblika* (n 18) para. 63.

[36] *Repubblika* (n 18) at para. 61; see also C-621/18, *Wightman* ECLI:EU:C:2018:999.

[37] For earlier arguments see (Antpöhler et al. 2012, p. 489; von Bogdandy and Spieker 2019).

[38] *Ex multis*, Joined Cases C-411/10 and C-493/10 *NS and ME* [2011] ECR I-13905; Case C-31/09, *Nawras Bolbol v Hungary* ECLI:EU:C:2010:351; Joined Cases C-175/08 C-176/08 C-178/08 and C-179/08 *Aydin Salahadin*

of the CEAS measures have been found flawed on fundamental rights grounds on numerous occasions. For instance, regarding reception conditions in *Saciri*, the CJEU held that Article 1 of the Charter, under which human dignity must be respected and protected, precludes the asylum seeker from being deprived, even for a temporary period of time, of the protection of the minimum reception standards.[39] A human-rights-compliant interpretation of the CEAS has required considerable modification of Member State practice regarding the treatment of asylum seekers in particular.[40] Regarding rule of law, it was the CJEU which found Hungarian border procedures which resulted in the detention of persons on the basis of their inability to meet their own needs and the absence of an entitlement to effective judicial protection against arbitrary detention unlawful.[41] The need for effective judicial protection in respect of detention is a foundation of the rule of law.

Challenges to the rule of law further arise through the non-implementation of existing legislation, which can give rise to serious breaches of fundamental rights. After all, as Tsourdi argues, the implementation gap of existing EU law obligations towards migrants and refugees and the systemic violation of rights within the EU point towards "asylum (. . .) [as] one of the many faces of "rule of law backsliding" (Tsourdi 2021, pp. 497–97). Here, the acceptance of a principle of non-regression can be key to the CEAS, both in the implementation of existing obligations and in the development of the system. The recognition of non-regression as an obligation governing the CEAS would subordinate the development and implementation of new laws and policies at both EU and Member State level to heightened scrutiny on compliance with pre-existing levels of protection. The principle of non-regression in the GCM can strengthen the existing principle of non-regression of fundamental rights obligations within EU primary law through its explicit link and application to the migration and asylum *acquis*. Accordingly, a GCM-informed reading of the non-regression obligation in the case of fundamental rights law and policy towards migrants and refugees recognises an obligation to refrain from lowering existing standards of protection. This applies through the role of non-regression as an EU foundational value protected through Article 2 TEU and Charter provisions which, in turn, governs the application of the CEAS, as subordinated to the entire corpus of EU fundamental rights obligations.

Recognising this duty as applying to the EU institutions and the EU Member States would be particularly relevant at this moment in time, when the ongoing negotiations on the proposed Pact on Migration and Asylum have generated significant commentary on the extent to which the proposals risk lowering EU law protection standards for migrants and refugees.[42] A commitment to non-regression entails assessing new legislation and policy against existing human rights obligations. This would further illustrate the capacity of the Compacts to augment, rather than undermine, the protection of the rights of migrants and refugees in the European sphere, and lay to rest concerns that they can be exploited by States to roll back on existing protections.

This framework of human rights and rule of law in the EU should provide a strong foundation for the two Compacts to be given legal effect within EU law. However, three EU Member States voted against the GCM at its adoption in the UN General Assembly in December 2018 (Gatti 2018), although no such defection was demonstrated at the adoption of the GCR in the same month (Boucher and Gördemann 2021, pp. 227–49). However, when the European Commission issued its New Pact for Migration and Asylum

Abdulla and others [2010] ECR I-1493; Case C-396/17 *Shajin Ahmed* ECLI:EU:C:2018:713; Joined Cases C-443/14 and C-444/14 *Alo & Osso* ECLI:EU:C:2016:127; Case C-364/11 *El Kott* ECLI:EU:C:2012:826; Case C-573/14 *Lounani* EU:C:2017:71.

39 ECLI:EU:C:2014:103.

40 Case C-199/12 *X, Y & Z* ECLI:EU:C:2013:720; Case C-562/13 *Abdida* ECLI:EU:C:2014:2453 ; Case C-148/13 *A, B & C* ECLI:EU:C:2014:2406 ; Case C-69/10 *Diouf* ECLI:EU:C:2011:524 ; Case C-239/14 *Tall*, EU:C:2015:824 ; Case C-181/16 *Gnandi* ECLI:EU:C:2018:465, to name only a few.

41 Case C-924/19 *PPU* and Case C-925/19 *PPU*, *FMS* ECLI:EU:C:2020:367.

42 See for example, (ECRE 2020; Thym 2021; UNHCR 2020, 2021).

in September 2020,[43] two years later, not a single reference was made to either Compact. Nor is any mention made to them in the numerous documents which accompany the Pact.[44] Why this silence? The Commission itself had sought an exclusive negotiating mandate from the Council regarding the Compacts, of which the efforts were unsuccessful (Guild and Weatherhead 2018). Nonetheless, it was very active in the negotiations and strongly supported the conclusion (Diaz and Escarcena 2019, pp. 273–85). The Legal Service, as noted above, has advised that the GCM in an integral part of the EU positions in development cooperation because the GCM participates in the EU legal framework. However, when the Commission came to revising its migration and asylum law, it did not include any reference to the standards which it had been so keen to support only two years earlier.

3. Friction: Non-Discrimination, the Compacts and the CEAS

The principle of non-discrimination on the basis of migration status is an innovation within the Compacts that has the capacity to augment the protection of migrants seeking international protection and of refugees. It is identified as a key cross-cutting and interdependent guiding principle, and as will be discussed below, it is also expressed throughout the Compact in different objectives. However, this commitment represents a key area of friction with existing EU law and jurisprudence which, through relying on exceptions and restrictive interpretations of non-discrimination obligations, has permitted States to confirm their loyalty to non-discrimination whilst continuing to discriminate both against third-country nationals and amongst categories of third-country nationals.[45]

References to non-discrimination run throughout the Compacts, demonstrating its central position within them and wider human rights law. The GCR in paragraph 5 acknowledges its grounding in international human rights law.[46] Paragraph 9 calls on States to "promote, respect, protect and fulfil human rights and fundamental freedoms for all;" and to end exploitation and abuse, as well as discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or disability. This aligns with the International Covenant on Civil and Political Rights (ICCPR) which has been interpreted to include immigration and nationality status within "other status" (De Schutter 2016, p. 62).[47] Paragraph 84 requires that programmes and projects should be designed in a way that combats "all forms of discrimination and promote peaceful coexistence between refugee and host communities". The GCR acknowledges the importance of non-discrimination for the durability and sustainability of protection in line with human rights law.

Non-discrimination is a guiding principle of the GCM, with paragraph 15(f) specifying that, in its implementation, States "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".[48] Furthermore, objective 17 aims to eradicate all forms of discrimination against migrants. It is underpinned by international legal obligations relating to non-discrimination.[49] It focuses on eliminating discriminatory practises however they may manifest themselves, and condemns expressions and acts of racism and xenophobia. It acknowledges that, for non-discrimination to be eliminated, state policies must also be constructed so as to avoid directly or indirectly discriminating against migrants. Thus,

[43] COM (2020) (n60) p. 609.

[44] See here for the Commission documents on the New Pact on Migration and Asylum. https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en (accessed 29 August 2021).

[45] See for further discussion, (Friðriksdóttir 2017).

[46] See GCR (n1) fn 5.

[47] See also *Ibrahima Gueye et al. v France*, Communication No. 196/1985, UN Doc CCPR/C/35/D/196/1985.

[48] See GCM para. 15(f): 'The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination . . . '.

[49] Article 2 of ICCPR, Article 2 ICERD, Article 2 CEDAW and HRC General Comment No 15 (1986) on the Position of Aliens.

discrimination must be addressed at all levels through a "whole of society" approach. The Compacts' alignment with international human rights law commitments creates a framework that does not permit any exceptions or justifications for discrimination on grounds of nationality or immigration status. Once an individual is within the territory of a State, they must generally have equivalent access to human rights as nationals.[50]

The Compacts commit to end discrimination,[51] and the GCM highlights the need to avoid discrimination on the ground of migratory status in particular.[52] However, non-discrimination on grounds of nationality within the EU is a complex area. Article 18 TFEU prohibits discrimination on grounds of nationality, but that is limited to EU Member State nationality.[53] Article 19 TFEU provides a competence to combat discrimination on the basis of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, which has been exercised and applies to all within the scope of EU law.[54] As already alluded to, the ICCPR[55] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[56] outline fundamental rights available to "all" persons, regardless of their legal status. Thus, arguably, under international human rights law, there is no permissible distinction between nationals and non-nationals due to the general applicability of human rights through the principle of non-discrimination.[57] However, the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD), which sets the international standards regarding the prohibition of discrimination, includes Article 1(2), which permits distinction between citizens and non-citizens so long as it pursues a legitimate aim and is proportionate.[58] This tension within the human rights framework permeates the EU legal order and creates friction with the Compacts' commitment to non-discrimination.

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50 Limitations to human rights by reference to immigration status are tightly circumscribed under international law and are only acceptable in clearly defined circumstances. They primarily relate to those areas considered core to citizenship e.g., the right to vote and the right to hold public office.

51 In para. 9 GCR (n1) all States are called on 'to end exploitation and abuse, as well as discrimination of any kind . . . ' and para. 84 'programmes and projects will be designed in ways that combat all forms of discrimination and promote peaceful coexistence between refugee and host communities...'. The (n1) para. 15(f) and Objective 17 seeks to 'Eliminate all forms of discrimination'

52 Para. 4 GCM: 'Refugees and migrants are entitled to the same universal human rights and fundamental freedoms', Para. 11 holds that there is 'an overarching obligation to respect, protect and fulfil the human rights of all migrants, regardless of their migration status' and in para. 12 states that 'It intends to reduce the risks and vulnerabilities migrants face at different stages of migration by respecting, protecting and fulfilling their human rights . . . '.

53 Case C-22/08 *Vatsouras* ECLI:EU:C:2009:344.

54 See, for instance, Case C-83/14 *Chez* ECLI:EU:C:2015:480 for a particularly bold interpretation of the secondary legislation adopted under this competence.

55 Article 26 of the ICCPR 'prohibits discrimination in law or in fact in any field regulated and protected by public authorities'. The prohibited grounds of discrimination extend to any 'other status', including thus refugee status or nationality. See HRC, 'General Comment No 18: Non-Discrimination', UN doc HRI/GEN/1/Rev.6 (12 May 2003) 148–9, para. 12. See also (Chetail 2021, p. 214).

56 In the ICESCR, the notion of progressive realization implies that any retrogressive measures, such as those targeting asylum seekers or refugees, are incompatible with the Covenant. The principle of non-discrimination under article 2(2) of the ICESCR is 'an immediate and cross-cutting obligation'. Hence, '[t]he Covenant rights apply to everyone including non-nationals, such as refugees, asylum seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation'. Committee on Economic, Social and Cultural Rights (CESCR), '*General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights*,' UN doc E/C.12/GC/20 (2 July 2009) paras. 7 and 30; see also Chetail (n77).

57 See HRC, General Comment 15 on the position of aliens, paras. 2, 5 and 6; (Chetail 2021, p. 26); however, the ILC's draft articles on the expulsion of aliens highlight in the commentary to Art 14(5) that: 'The reference in the draft article to "any other ground impermissible under international law" makes it possible to capture any legal development concerning prohibited grounds for discrimination that might have occurred since the adoption of the Covenant. On the other hand, it also preserves the possible exceptions to the obligation not to discriminate based on national origin. In particular, it preserves the possibility for States to establish among themselves special legal regimes based on the principle of freedom of movement for their citizens such as the regime of the European Union.'

58 CERD, General Comments 30 (2004) para. 4; see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.)*, Preliminary Objections, Judgment (4 February 2021) wherein discrimination on the basis of nationality is deemed admissible (see paras. 109–13).

Although some case law of the CJEU demonstrates the Court is willing to extend specific workers' rights to third-country nationals,[59] and Peers argues that discrimination between third-country nationals on the basis of nationality is also covered by the interaction of Articles 18 and 19 of the TFEU,[60] the fundamental framework of EU primary law is constructed to permit differential treatment of third-country nationals. Friðriksdóttir argues that the "sectoral approach" of the common immigration policy entrenches this discrimination at the secondary law level, despite claims it is intended to promote fair treatment Friðriksdóttir (2017), n 67, pp. 4–5. This approach ensures that differential treatment is permitted through differentiating migratory status (Friðriksdóttir (2017), n 67, p. 328; Cholewinski 2014, p. 25).

Criticisms of the discrimination permitted within EU primary and secondary law are often rebutted through reference to the ECHR non-discrimination protections which are considered general principles of law binding on the European Union and Member States.[61] Although not expressly stated in Article 14 ECHR, discrimination on the basis of nationality has been found to be unlawful by the ECtHR. Examples from this case law include the case of *Gaygusuz v. Austria*, where a nationality limitation on access to some social rights in Austria was found to be prohibited discrimination on the basis of nationality.[62] However, this has only been applied in limited circumstances.[63] This limited application of the prohibition of non-discrimination on grounds of nationality has reinforced a certain reluctance of some EU Member States to grant equal treatment to third-country nationals with their own nationals. However, the Compacts also call discrimination based on migration status between third-country nationals into question. Non-discrimination on the grounds of migration status not only in terms of integration, but also relating to access to a territory or to a labour market, is an innovation of the GCM that runs contrary to the practice of EU Member States and the jurisprudence of regional courts.[64] The EU framework is utilised to enable EU Member States to commit to the right to non-discrimination, whilst utilising restrictive interpretations to continue to treat third-country nationals differently. This is so in three ways.

First, the ECtHR has outlined that "Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention".[65] As such, indirect differential practice is permitted so long as it has a legitimate aim and is deemed proportionate. This is not unusual for non-absolute human rights protections. However, the expansive understanding of a legitimate aim in regard to national security, the welfare of the State, and in the national interest means that discriminatory practice against third-country nationals is often permitted, despite claims by the Court that justifications must be "very weighty".[66]

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59 C-311/13 *Tumer* ECLI:EU:C:2014:2337.

60 See C-311/13 *Tumer* ECLI:EU:C:2014:2337; see also (Guild and Peers 2006, p. 111).

61 See Case C-336/05, *Ameur Echouikh* (2006) para. 65; Case 36/75, *Rutili* (1975) ECR 1219; Case C-55/00, *Gottardo* (2002) para. 34.

62 *Gaygusuz v Austria* (1996) 23 EHRR 364; see also *Koua Poirrex v France* (2003) 40 EHRR 2.

63 Article 14 ECHR outlines the prohibition of discrimination for 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status..' however, Article 5(1)(f) permits 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition . . . '; Article (1) of Protocol 7 outlines the procedural safeguards relating to expulsion of aliens and Article 16 ECHR permits EUMSs placing restrictions on political activity of aliens.

64 See See for example, (ECRE 2020; Thym 2021; UNHCR 2020, 2021); see *MA v Denmark* (2021) Application no. 6697/18 para. 177

65 See *Zarb Adami v Malta* hudoc 2006-VIII; 44 EHRR 49 para. 73

66 See, for example, ECrtHR, *Ponomaryoni v Bulgaria* (Appl No. 5335/05) para. 54; ECrtHR, *Bah v the UK* (Appl No 56328/07); ECrtHR *Moustaquim v Belgium* (1991); *Piermont v France* (1995) ECrtHR, *Biao v Denmark* (appl No. 38590/10) Judgment of 24 May 2016, para. 113.

Second, Article 14 requires that discrimination occurs within the ambit of another provision of the Convention.[67] Thus, it contains no substantive right such that it will only apply in conjunction with another right. Although the other right need not be breached, the applicant need only prove that the practise was discriminatory, which seriously limits its effectiveness (Ellis and Watson, *EU Anti-Discrimination Law* (2012) p. 13). In practise, the Court either fails to discuss the discrimination at all, instead focussing on the breach of the "primary right",[68] or the state argues that there is no primary right breach, and therefore, Article 14 is not applicable to the practice in question.[69]

Third, the ECtHR's interpretation of Article 14 sets out that discrimination occurs whenever there is "a difference in the treatment of persons in analogous, or relevantly similar, situations (. . .) based on an identifiable characteristic".[70] For discrimination to be established, the applicant must first prove that they are in an analogous situation to someone else to whom the discriminatory practise has not applied, and this difference in treatment was due to a prohibited ground.[71] This principle has also been found to require that people in different positions should be treated differently.[72] This has been stretched to untenable lengths by some EU Member States, who argue that, due to the difference in position of refugees, beneficiaries of international protection, asylum seekers or migrants, and EU Member States nationals, their situations are not identical or nearly so, such that discrimination cannot be established.[73] The ECtHR confirmed in the *MA* case that treating people with a different migratory status differently was not discrimination as their situations were not sufficiently similar. This returns to the sectoral approach within EU secondary law concerning immigration status and access to rights See Friðriksdóttir (2017), n 67, pp. 328–40. Through classifying access to rights for different migrant groups and status, the EU creates a system where differential treatment is justified because these groups are not analogous; thus, Article 14 is not applicable Friðriksdóttir (2017), n 67, p. 9. Despite obligations of non-discrimination in human rights and EU primary law throughout their legal frameworks, these protections are caveated on differentiation of nationality and migration status potentially permitting even direct discrimination on the basis of nationality.

The rather bleak picture, however, is tempered by the CJEU's interpretation of some EU secondary migration law, for instance, the Single Permit Directive,[74] where the Court maintained that discrimination against a migrant worker on the basis of the precariousness of her work and residence permit was contrary to the Article 12 right to equal treatment.[75] This interpretation of an equal treatment provision has been extended to two other secondary law instruments,[76] the long-term residents directive[77] and blue card directive.[78]

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67 *Koua Poirrex v France*, (n86) para. 36.

68 *Dudgeon v UK* ECHR 22 October 1981.

69 This weakness is remedied in part by Protocol 12, which contains a general prohibition on discrimination. However, at the time of writing it has been ratified by 20 of the 47 Member States of the Council of Europe.

70 *Zarb Adami v Malta* (n89) para. 71 (citing Willis v UK 2002-IV; 35 EHRR 547 para. 48).

71 ECtHR, *Case Relating to Certain Aspects of the Laws on the use of Language in Education in Belgium v. Belgium* (Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), 23 July 1968, para. 284; see criticism of this approach in (McColgan 2006, p. 656).

72 C-279/93 *Schumacker* (1995) para. 259; ECtHR *Thlimmenos v Greece* (Application no. 34369/97, 2001) para. 44.

73 See, for example: ECtHR, *MA v Denmark* ((Application no. 6697/18) 9 July 2021, para. 177, where the court expressly refused to find that difference of treatment for family reunification for 1951 refugees and Art 3 beneficiaries of international protection constitutes discrimination; see Case C-579, *P&S* (2015), paras. 42–43.

74 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State *OJ L 343, 23.12.2011*, pp. 1–9.

75 C-449/16 *Martinez Silva* ECLI:EU:C:2017:485.

76 C-462/20 *ASGI* ECLI:EU:C:2021:894.

77 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents *OJ L 16, 23.1.2004*, pp. 44–53.

78 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment *OJ L 155, 18.6.2009*, pp. 17–29 (*as was*).

This line of cases is favourable for a positive EU interpretation of the prohibition on discrimination on the basis of migration status, but is currently limited to a number of instruments.

From the European perspective, the Compacts' commitment to end discrimination,[79] together with the GCM-expressed duty to avoid discrimination based on migration status, present an area of considerable friction with both EU law and EU Member State practice. Articles 18 and 19 TFEU are utilised to embed discrimination against third-country nationals, although the sectoral approach to migration status justifies further differential treatment amongst this group. Conversely, the Compacts provide clear guidelines on the equality of treatment which refugees and migrants should receive regardless of migration status.[80] To translate this into rights protection, it is necessary to link the commitments in the Compacts to the relevant existing EU obligations and read them through the lens of the Compacts. The commitment to non-discrimination on grounds of nationality or migratory status in both Compacts requires greater alignment with the commitments to non-discrimination, as discussed under the ICCPR. In line with the case law on discrimination on grounds of nationality, interpretation of Article 14 ECHR[81], Member States need to provide "very weighty" justification for treating people with different migration status differently.[82] In order for EU law to align with the commitments made in the GCM, the material scope of the prohibition on discrimination would need to eradicate all forms of discrimination against migrants with a tightly circumscribed exception for rights attached to citizenship, i.e., voting rights and holding public office. A Compact-compliant application of non-discrimination would ensure that migrants are entitled to the same human rights protections as everyone else.

4. Conclusions

An examination of the two Compacts' guiding principles with the EU's constitutional framework reveals much similarity between the two regimes. The rootedness of the Compacts in human rights obligations mirrors the EU's commitment to fundamental rights protection which is expressed at the primary law level, such as through the Charter, its constitutive Treaties, and its relationship with the ECHR. Similarly, the Compacts' commitment to the rule of law is reflected in EU primary and case law. Despite the issues with rule of law backsliding, the underlying legal framework and interpretation by the CJEU is holding EU Member States accountable to that legal order's commitment to the principle and is robust.

In key respects, the Compacts' guiding principles appear coherent with the EU legal order. The role played by fundamental rights, the rule of law, and the principle of non-regression within EU law enables the Compacts to play a role in the field of migration and asylum, since the latter are in harmony with key obligations within EU primary law. As instruments which articulate in considerable detail the actions States can take to respect, promote, and fulfil the rights of migrants and refugees, the interpretative detail contained therein can be used to flesh out obligations and move towards a more rights-compliant system. In the European context, the Global Compacts present an opportunity to refine the implementation of existing EU fundamental rights obligations as they apply towards migrants and refugees.

It is in the application of the non-discrimination principle that we see greater tension between the Compacts and the EU framework. The Compacts make clear that the human right to non-discrimination should apply irrespective of nationality or migration status, and that these are legitimate grounds for challenging differential treatment. Bringing this

[79] See (n72) and (n73).

[80] See GCR (n1) para. 5, 'The global compact is guided by relevant [IHRL] instruments,' and paragraph 9 commits all States to 'to promote, respect, protect and fulfil human rights and fundamental freedoms for all . . . '.

[81] Protocol 12 ECHR is also relevant here.

[82] All EUMS are parties to the ECHR. Not all EUMS have ratified Protocol 12. For full list see: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=177 (accessed 28 August 2021).

approach into EU law is far from straightforward, because non-discrimination on the basis of nationality is reserved for EU nationals, whereas for migrants, EU primary law calls for fair treatment, a term which is certainly not synonymous with non-discrimination.[83] Only through EU secondary law, where equal treatment provision is expressly included, does there seem to be some progress towards non-discrimination on the basis of migration status. Even the interpretation of non-discrimination on the basis of nationality in the case law of the ECtHR has developed both slowly and very cautiously, starting with prohibitions on nationality exclusions from access to social benefits, it has more recently been applied to different family reunification rules depending on how the principals have acquired citizenship. This state of the law creates friction with the commitments found in the Compacts.

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Article

Protecting Asylum Seekers and Migrants in the Context of the Rule of Law Crisis in EU Member States: The Recent Approach of the Court of Justice of the EU through the Lens of the Global Compacts on Refugees and Migration

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Abstract: In recent times, the CJEU has started to develop its judicial response to the "rule of law crisis" in some Member States. On the one hand, this new trend has emerged also as a reaction to some national reforms concerning asylum and migration law. On the other hand, the CJEU in protecting the EU founding values has deployed its "traditional" competences attributed to it by the EU Treaties, namely the mechanisms of the preliminary ruling procedure and the infringement procedure. Against this background, this contribution aims at investigating this new CJEU's jurisprudence through the lens of the Global Compacts on Refugees and Migration. This will lead us to reflect on how the CJEU's caselaw could be seen as an effective tool to enhance the rule of law and protect third-country nationals, at least within the EU, and indirectly contributes to increasing compliance with some of the commitments laid down in the Global Compacts, regardless of the position taken by some recalcitrant EU Member States with respect to these documents.

Keywords: Global Compacts; EU asylum and migration law; rule of law; Court of Justice of the EU; EU Member States

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1. Introduction

The adoption of the Global Compact for Safe, Orderly and Regular Migration (GCM) and of the Global Compact on Refugees (GCR) in December 2018 within the framework laid down by the United Nations (UN) General Assembly in the New York Declaration for Refugees and Migrants of 19 September 2016 (New York Declaration), has been considered as the first attempt of the world's governments to give a comprehensive response to the question of large movements of refugees and migrants, "who move for different reasons but who may use similar routes" (New York Declaration 2016, para. 6).

The two Global Compacts (GCs or Compacts) set forth a series of political commitments, which touch upon different aspects of this growing global phenomenon of international migration. In particular, while the GCR focuses on providing "a basis for predictable and equitable burden and responsibility-sharing among the UN Member States" (GCR 2018, para. 3) together with other relevant stakeholders, the GCM "offers a 360-degree vision of international migration", fostering international cooperation among all relevant actors on migration, "acknowledging that no State can address migration alone" (GCM 2018, para. 11). The general purposes foreseen in the Compacts are then detailed in more specific objectives and actions. Against this background, the protection of the crosscutting and guiding principle of the rule of law by the parties should be considered as an objective but also as a *pre*-condition to the achievement of the goals laid down in the Compacts. Only a State with strong checks and balances, which ensures the separation of powers and the protection of civil liberties and rights, is able to respond to the commitments laid down in the Compacts (GCM 2018, para. 14; Carrera et al. 2018).

However, both the GCM and the GCR do not provide anything different from what has already emerged at the international level regarding the protection of the rule of law. In fact,

the GCR expressly refers to upholding of the rule of law "at the national and international levels" as part of the commitment of States to "tackle the root causes of large refugees situations" (GCR 2018, para. 9) and the GCM recognises in a general manner that the respect of the rule of law, "due process and access to justice are fundamental to all aspects of migration governance" (GCM 2018, para. 15). In the 2012 UN High-level Meeting on the Rule of Law at the National and International Levels, which culminated in the adoption of the Declaration on the Rule of Law at the National and International Levels (Declaration on the Rule of Law), heads of state and government had already recognized "that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions" (Declaration on the Rule of Law 2012, para. 2). They also recognized that "all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law" (Declaration on the Rule of Law 2012, para 2.) and reaffirmed "that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations" (Declaration on the Rule of Law 2012, para. 5).

While the two Compacts do not seem to add anything new under the sun, in recent times the European Union (EU or Union) has paid special attention to the protection and enforcement of the rule of law, as a value enshrined in Article 2 of the Treaty on European Union (TEU), *within* the territory of EU Member States. The innovative aspect of this new course concerns not only the role played by the Court of Justice of the EU (CJEU) in the context of the so-called "rule of law backsliding" in some EU Member States (Pech and Sheppele 2017), but also the progressive shaping of the notion of the rule of law under EU law.

These two aspects are closely linked. In fact, while the CJEU initially developed its judicial response to the "rule of law crisis" assessing the compatibility with EU law of Member States' legislation that undermined the independence of the judiciary, it then extended its action with respect to national reforms concerning other aspects of EU law, including that of migration and asylum law (Tsourdi 2021). The most recent CJEU's jurisprudence shows in particular how the need to uphold the rule of law value coexists with the exigence of protecting migrants' and asylum seekers' rights.

These new developments could thus be considered as particularly relevant as they can indirectly contribute to increasing compliance with some of the commitments laid down in the GCs, in particular in the GCM, regardless of the position taken by EU Member States in respect to these documents.

For that purpose, this contribution will first briefly describe the GCs, paying special attention to some of the objectives foreseen in the GCM (Section 2). Second, the focus will be on the pioneering role of the CJEU in protecting the EU founding values through the "traditional" competences attributed to it by the EU Treaties, namely the mechanisms of the preliminary ruling procedure and the infringement procedure (Section 3). Third, the recent developments of this line of jurisprudence will be dealt with, where the CJEU has acted in defence of the rule of law value, also protecting migrants' and asylum seekers' rights (Sections 4 and 5). Some conclusions can then be drawn, stressing how these recent developments could be seen as a tool to enhance the protection of migrants and asylum seekers in context of "rule of law crisis", regardless of the position taken by some recalcitrant EU Member States with respect to the Compacts (Section 6).

2. Ambitious Objectives and Uncertain Nature of the Global Compacts

As already mentioned, the GCM and GCR represent the political will and ambitions of the parties in addressing the question of large movements of refugees and migrants (Micinski 2021; Guild and Grant 2017). Both Compacts introduced some broad commitments

regarding the treatment of migrants and refugees with the general purpose of the global governance of people on the move.

The GCR aims in particular to facilitate the application of a comprehensive response in support of refugees and countries particularly affected by a large refugee movement, through more equitable and predictable burden and responsibility-sharing with host countries. It further promotes the support of States, the international community and of other relevant stakeholders to host country or country of origin, in sectors identified as in need of support, such as reception and readmission.

By contrast, the GCM represents a "milestone in the history of the global dialogue and international cooperation on migration" (GCM 2018, para. 6), as it is the first ever UN comprehensive agreement on migration in all its dimensions. In particular, the GCM comprises 23 objectives, which are intended to achieve safe, orderly and regular migration along the entire migration cycle. Among these objectives is the commitment of the parties to develop and strengthen effective mechanisms for an adequate screening and individual assessment of all migrants "for the purpose of identifying and facilitating access to the appropriate referral procedures" (GCM 2018, para. 18). In particular, the actions envisaged in this regard include, inter alia, to ensure that, in the context of mixed flows of refugees or migrants "relevant information on rights and obligations under national laws and procedures, including on entry and stay requirements, available forms of protection, as well as options for return and reintegration, is appropriately, timely and effectively communicated, and accessible" (GCM 2018, para. 28, lett. *e*). Furthermore, in order to address and reduce vulnerabilities in migration, the GCM provides that parties should ensure that migrants "have access to public or affordable independent legal assistance and representation in legal proceedings that affect them [. . .] in order to safeguard that all migrants, everywhere, are recognized as persons before the law and that the delivery of justice is impartial and non-discriminatory" (GCM 2018, para. 23, lett. *g*). The GCM also affirms the commitment of parties to ensure that any detention, irrespective of the moment it occurs, "follows due process, is non-arbitrary, based on law, necessity, proportionality and individual assessments" (GCM 2018, para. 29). This means providing access to justice for all migrants that are or may be subject of detention, including by facilitating access to free or affordable legal advice and assistance and ensuring the exercise of rights of all migrants in detention, including to have access to legal orientation and assistance (GCM 2018, lett. *d*). Parties should also ensure that all migrants, regardless of their migration status, can have access to basic services without discriminations (GCM 2018, para. 31). Finally, parties have also undertaken the commitment to ensure that the return of migrants "who do not have the legal right to stay on another State's territory is safe and dignified, follows an individual assessment [. . .] and allows all applicable legal remedies to be exhausted, in compliance with due process guarantees" (GCM 2018, para. 37, lett. e).

States parties are therefore called to enact measures intended to fulfil the objectives expressed in the GCs. In this respect, difficulties may thus arise with regard to two linked aspects.

In the first place, these instruments expressly specify that they are non-legally binding instruments (McAdam 2019). Non-binding status does not mean that the Compacts are legally irrelevant (Hilpold 2021; Ferris and Donato 2019; Gammeltoft-Hansen et al. 2017; Panizzon and Vitiello 2019; Peters 2018). However, while the Compacts appears to acknowledge the need for an international coordination to address the question of large movements of refugees and migrants, these documents do not create any new legal obligations for States, nor rights for individuals (Höflinger 2020).

In the second place, some States have decided to quit the adoption process of the Global Compacts. In this regard, the GCR was adopted by a vote of 181 in favour to 2 against (Hungary and United States of America) and 3 abstentions (Eritrea, Liberia, Libya), while the GCM was adopted with 152 votes in favour, 12 abstentions, and 5 votes against (namely by the Czech Republic, Hungary, Israel, Poland and the United States of America). An additional 24 UN Member States were not present to take part in the vote. It

is relevant to note that both Hungary and Poland decided to disengage from the GCM's adoption process, respectively in July 2018 and November 2018, affirming in essence that the objectives laid down in these documents were in contrast with their national interests (Molnár 2020; Gatti 2018; Meline 2018). In particular, the Polish Government found that the GCM failed to meet its demands regarding strong guarantees for Countries to have the right to independently decide who they choose to accept (Reuters 2018). The Hungarian Foreign Minister as well affirmed that the GCM expanded the opportunities to "lodge complaints with relation to procedures conducted by national authorities" and it "calls for countries to afford every single migrant all of the services that they otherwise afford their own citizens during the whole period of the migrating process, and at an equal level of quality" (Website of the Hungarian Government 2018a). Moreover, the Hungarian Government voted against the GCR since, as stated by its Foreign Minister, such a document "opens the back door to those that cannot come in through the main entrance" (Website of the Hungarian Government 2018b).

These two Member States are indeed the same ones having introduced laws and policies that the EU has deemed to have serious, negative implications for human rights and the rule of law as protected by EU law, in particular, in respect of the independence of the judiciary and the protection of migrants and asylum seekers' rights (Bánkuti et al. 2012; Kovács and Tóth 2011; Wiącek 2021). In fact, despite the decision to leave the Global Compact's adoption process, these Member States are already under an obligation deriving from EU law to safeguard the rule of law as a founding value of the Union.

In this regard, the mechanisms provided for by Article 7 TEU are specifically meant to address the violation by the Member States of the EU values enshrined in Article 2 TEU. However, the political difficulties surrounding the activation of such mechanisms, led the CJEU to develop further "tools" in order to protect the common values of the Union (Editorial Comments 2015). The recent developments of this jurisprudence, where the "new" tools are deployed to cope with EU Member States' reforms concerning migration and asylum law, could thus indirectly contribute to ensuring compliance with the commitments laid down in the Compacts, regardless of the position taken by the two Member States in question on these documents.

3. The Protection of the EU Founding Values within the Member States and the "New" Role of the CJEU

Article 7 TEU is the provision meant to ensure, through mechanisms of political nature, the protection and enforcement of the EU founding values as enshrined in Article 2 TEU in the event of their (potential or actual) violation by a EU Member State (Sadurski 2010). The scope of application of Article 2 TEU covers all areas of action of EU Member States, as the procedures laid down in Article 7 TEU, which are horizontal and general in scope (Kochenov 2021). However, the wide scope of application of this latter provision corresponds to a limited competence of the CJEU. According to Article 269 of the Treaty on the Functioning of the European Union (TFEU), the CJEU shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 TEU "in respect solely of the procedural stipulations contained in that Article".

However, since the very beginning such mechanisms have not proved effective in addressing "crises" of the EU founding values in Member States (Besselik 2017). Indeed, the reasoned proposals adopted by the Commission in 2017 and the European Parliament in 2018, respectively against Poland and Hungary calling the Council to determine "a clear risk of a serious breach" of the rule of law value by the two EU Member States, did not lead to any outcome so far. The political nature of the choices underlying the activation of the procedures laid down in Article 7 TEU, as well as the high voting thresholds, have made these mechanisms hardly practicable. This situation has been labelled as the "rule of law crisis" by several authors in EU studies (Müller 2015; Von Bogdandy and Ioannidis 2014).

Against this background, the CJEU has then been progressively involved in the protection of the EU values, through the "traditional" competences attributed to it by the EU

Treaties, namely the preliminary ruling procedure and the infringement procedure (Scheppele 2016; Blokker 2013). In this sense, the *Associação Sindical dos Juízes Portugueses* (*ASJP*) judgment of 27 February 2018 represents a turning point, thanks to the link established by the CJEU between the right to an effective judicial protection and the rule of law value, to which Article 19 TEU gives concrete expression. Indeed, the *ASJP* judgment represents the starting point of a line of cases through which the CJEU has progressively shaped its role as regards the violation by EU Member States of the founding values enshrined in Article 2 TEU (Bonelli and Claes 2018; Pech and Platon 2018). In this judgment, the CJEU held for the very first time that Article 19 TEU, which entrusts the responsibility for ensuring judicial review in the EU legal order not only to the CJEU but also to national courts, should be considered as giving "concrete expression to the value of the rule of law stated in Article 2 TEU" (*ASJP* 2018, para. 32). In this regard, the CJEU held that "[t]he very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law" (*ASJP* 2018, para. 36). Therefore, EU Member State must ensure that their national courts or tribunals, within the meaning of EU law, meet the requirements of effective judicial protection, in particular the requirement of independence, in accordance with Article 19 TEU.

Such an interpretation paved the way for several questions for preliminary ruling raised in particular by Polish courts, leading the CJEU to assess the compatibility with EU law of national judicial reforms undertaken by the Polish legislator. At the same time, the Commission, taking into account this new legal framework, started several infringement procedures leading the CJEU to rule on the violation of the obligations stemming from Article 19 TEU by Poland on account of its national reforms concerning both its Supreme Court and ordinary courts.

These developments in the CJEU's role have then interested other areas of EU law, notably migration and asylum law. In particular, the reforms undertaken by Hungary in these fields had already been the subject, amongst others, of the reasoned proposal (European Parliament 2018) pursuant to Article 7(1) TEU, in which concerns were raised by the European Parliament with respect to the treatment of migrants and asylum seekers in Hungary and to the protection of their fundamental rights. In this regard, since 2015, the Hungarian Government has narrowed asylum seekers' procedural rights in "ordinary" procedures, notably eliminating the possibility of presenting new facts in certain circumstances during the judicial phase and taking away the power of the courts to change the decision of administrative authorities. At the same time, the Hungarian Government strengthened the use of accelerated and border procedures, which entailed detention of asylum seekers and third-country nationals in "transit zones" where access to advice and representation was not always guaranteed. A fully informal removal mechanism was introduced, depriving asylum seekers crossing the Hungarian borders of the possibility to claim for asylum. Furthermore, all integration measures for persons recognised as in need of international protection were abolished (Nagy 2018).

Due to the difficulties surrounding the application of the procedures laid down in Article 7 TEU, both mechanisms of the preliminary ruling procedure and the infringement procedure have then been deployed by the CJEU to respond to the progressive deterioration of the rule of law in this respect, determining different effects as regard the protection of migrants and asylum seekers in such a context.

As the next section will show, the *ASJP* judgment laid the basis for subsequent developments, where the role of the CJEU as the "guardian" of the rule of law within the EU was strengthened, while at the same time ensuring an effective protection of migrants' and asylum seekers' rights in such contexts.

4. Strengthening Migrants' and Asylum Seekers' Rights through the Preliminary Ruling Procedure

As recently recalled by the CJEU in its *Łowicz* judgment of 26 March 2020 (Platon 2020), the procedure provided for in Article 267 TFEU is an instrument of cooperation between

the CJEU and national courts, by means of which the CJEU provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them. Therefore, the CJEU's function in proceedings for a preliminary ruling is to help the referring courts to resolve the specific dispute pending before them.

In recent times, references for preliminary rulings have been submitted by Hungarian courts concerning, in essence, the compatibility with EU law of the reforms undertaken by the Hungarian Government, which touched many aspects of national asylum and migration law. Particularly relevant in this regard are the *FMS* and *Torubarov* judgments issued by the CJEU following several preliminary references initiated by Hungarian courts, called upon to rule on appeals brought by third-country nationals claiming before them the protection of their rights deriving from EU law.

The *FMS* judgment of 10 May 2020 (Dumas 2020) allowed the CJEU to scrutinise various aspects of the Hungarian legislation relating, inter alia, to conditions of third-country nationals placed by national authorities in transit zones. In fact, the questions referred to the CJEU concerned, firstly, the absence in national law of any effective remedy to challenge a return decision issued by national administrative authorities against third-country nationals placed in a transit zone between Hungary and Serbia. Indeed, the Hungarian authority designated as having jurisdiction to rule on such appeals under national law, did not meet the requirements of independence stemming from EU law, namely from Article 47 which enshrines the right to an effective remedy and to a fair trial. The CJEU not only held that the Hungarian legislation was incompatible with Article 13 of Directive 2008/115 (the Return Directive) providing the right to an effective remedy against return decisions, but it also linked this situation to the broader context of the rule of law. Indeed, the CJEU expressly reminded that "in accordance with the principle of the separation of powers which characterizes the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive" (*FMS* 2020, para. 136). Therefore, the national legislation at issue also failed "to comply with the essential content of the right provided for in Article 47 of the Charter" (*FMS* 2020, para. 137). Moreover, the Hungarian legislation did not guarantee any judicial review of national decisions ordering the placement of asylum seekers and other third-country nationals in a transit zone, which according to the CJEU in the case at stake amounted to illegal detention. Nor did the national legislation provide for a remedy to ensure the protection of the right to material reception conditions of asylum seekers, after being unlawfully detained. The CJEU observed that Article 15 of Return Directive and Article 9 Directive 2013/33 (the Reception Directive) have direct effects and give concrete form to the right to an effective remedy enshrined in Article 47 of the Charter, both in the context of return procedures and against decisions concerning accommodation. Therefore, national legislation, which does not guarantee any judicial review of an administrative decision ordering the detention of an asylum seeker or an "illegally staying third-country national", not only constitutes an infringement of Articles 15 of the Return Directive and Article 9 of the Reception Directive, "but also undermines the essential content of the right to effective judicial protection, guaranteed in Article 47 of the Charter" (*FMS* 2020, para. 255).

Against this background, the principle of primacy of EU law and the right to an effective judicial protection, guaranteed by Article 47 of the Charter, require the referring court to disapply any national provision in contrast with EU law and to substitute its own decision for that of the national administrative authority.

In the specific context of the rule of law crisis concerning migration and asylum law, the CJEU, through the preliminary reference procedure, has thus paid special attention to strengthening the protection of the rights conferred by EU secondary legislation to migrants and asylum seekers, in particular the right to an effective remedy against return decisions and decisions ordering detention and the right to material accommodation. For this purpose, the CJEU has recognised to national courts broad powers and competences, which they directly derive from EU law.

The same approach had already been applied by the CJEU in the *Torubarov* judgment of 20 July 2019, concerning Hungarian legislation not providing national courts of any means to enforce their decisions relating to the recognition of a form of international protection against reluctant national administrative authorities (Caiola 2019). A national case could then be repeatedly shuttled back and forth between courts and administrative authorities. As already mentioned above, in 2015, the Hungarian legislator had changed the competence that courts had when reviewing administrative asylum decisions from having the possibility to directly alter a decision, to the power to merely annul and remit (Hungarian Law on Asylum 2007). As a result, national courts could not replace such decisions when they found them to be unlawful. They could merely annul them and refer the case back to the administrative authority for a new decision. The referring court then decided to stay the proceedings and refer a question for preliminary ruling to the CJEU, doubting the compatibility of such national legislation with Article 46 of Directive 2013/32 (the Procedures Directive), providing the right to an effective remedy in the context of asylum procedures, read in the light of Article 47 of the Charter.

The CJEU found in particular that "the right to an effective remedy would be illusory if a Member State's legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party" (*Torubarov* 2019, para. 57). Therefore, a national legislation that results in such a situation deprives in practice the applicant for international protection of an effective remedy, within the meaning of Article 46 of Directive 2013/32, and "fails to comply with the essential content of the right to an effective remedy enshrined in Article 47 of the Charter" (*Torubarov* 2019, para. 72). Both provisions having direct effect, a national court seized of an appeal in such a context is required to set aside a decision of the administrative body that does not comply with its previous judgment and to substitute its own decision on the asylum seeker's application by disapplying the national law that prohibits it from proceeding in that way.

In both judgments, national courts hold competences and powers directly deriving from EU law, namely from the right to an effective judicial protection and from the principle of primacy of EU law. In particular, such powers lead national courts to disapply the political choices made by the national legislator not complying with EU law, ensuring in this way the effectiveness of migrants and asylum seekers' rights, which they derive from EU secondary legislation also in contexts where the national legislative will is to dismantle the procedural and substantial guarantees recognized to third-country nationals by EU law.

5. Addressing Multiple Violation of EU Migration and Asylum Law through the Infringement Procedure Mechanism

As previously mentioned, the CJEU has deployed another instrument to face rule of law crisis in Member States, namely its judgments issued following an infringement procedure under Article 258 TFEU. Indeed, where a situation of deterioration of the rule of law also implies a violation of EU law obligations by the Member States, the CJEU has considered the infringement procedure as an effective instrument to address such a situation (Bàrd and Śledzińska-Simon 2019; Kochenov 2015). In the area of migration and asylum law, this is evident in two recent rulings where the CJEU found that Hungary failed to comply with its obligations under EU law.

Firstly, in the *Commission v. Hungary* judgment of 17 December 2020 (*Commission v. Hungary* 2020), the CJEU found that, as a consequence of recent national reforms concerning asylum and migration law, Hungary failed to ensure effective access to the procedure for granting international protection under the Procedures Directive, as far as third-country nationals wishing to gain access to the EU from the Serbian-Hungarian border, were de facto barred from accessing asylum procedure. Moreover, the CJEU confirmed, as already held in the *FMS* judgment, that the obligation on applicants for international protection to remain in one of the transit zones for the duration of the procedure for examination of their application constitutes detention, within the meaning of the Reception Directive. The CJEU also held that Hungary failed to fulfil its obligations under the Return

Directive, as far as the Hungarian legislation allowed for the removal of third-country nationals who are staying illegally in the territory without prior compliance with the procedures and safeguards provided for in that directive, inter alia, to have their personal situation examined before their removal. Finally, the CJEU considered that Hungary did not respect the right, conferred by the Procedures Directive on any applicant for international protection, to remain in the territory of the EU Member States after the rejection of his application, until the time limit within which to bring an appeal against that rejection or, if an appeal has been brought, until a decision has been taken on it.

Secondly, in the *Commission v. Hungary* judgment of 16 November 2021 (*Commission v. Hungary* 2021), the CJEU similarly found that Hungary was in breach of its obligations under the Procedures and Reception Directives. In particular, the CJEU held that the legislative reforms undertaken by Hungary in 2018 had not only added a further ground of inadmissibility of an application for international protection but also criminalised organising activities facilitating the lodging of asylum applications by persons who were not entitled to refugee status under Hungarian law. In particular, the CJEU held that the national provisions criminalising persons who, in connection with an organising activity, provide assistance in order to make or lodge an application for asylum when it can be proved that that person was aware that that application could not succeed under Hungarian law, amounts to a restriction on the rights enshrined in the above-mentioned Directives. More specifically, the additions made to the Hungarian legislation restricted the right of access to applicants for international protection and the right to communicate with those persons, and the effectiveness of the right afforded to asylum seekers to be able to consult, at their own expense, a legal adviser or other counsellor.

It is apparent from these two judgments that the infringement procedure has been used by the CJEU to address multiple violations of EU obligations, which taken as a whole constitute a manifestation of the CJEU attempting to resolve a "rule of law crisis" in a EU Member State (Bogdanowicz and Schmidt 2018). In fact, the caselaw analysed shows how the infringement procedure can address violations of EU obligations, which derive from the political choices made at the national level aimed at depriving in a general and systemic manner third-country nationals of the procedural and substantial guarantees recognized to them by EU law.

The two mechanisms of the preliminary ruling procedure and the infringement procedure have thus proven to be effective instruments to address rule of law violations in EU Member States, which can also affect migration and asylum legislation.

However, the different nature of such mechanisms entails different effects as regards the protection of migrant and asylum seekers. While the mechanism of the preliminary ruling procedure can result in strengthening the protection of individuals' rights also in context of deterioration of EU common values, the infringement procedure addresses such crisis in a more general and comprehensive manner. In fact, whereas in a preliminary ruling procedure the function of the CJEU is to help the referring courts to resolve the specific dispute pending before them, in an action for failure to fulfil obligations, the Court is called to ascertain whether the national measures challenged by the Commission or another EU Member State, contravenes EU law in general. Moreover, under Article 279 TFEU the CJEU has the power to prescribe an interim measure, which it considers necessary in a case brought before it. While this provision does not provide any limitation concerning the nature and type of case where interim measure could be prescribed by the CJEU, it appears to be particularly useful when it comes with an infringement action under Article 258 TFEU (Prete 2021). This is evident in the recent order of 27 October 2021, issued by the Vice-President of the CJEU (Order of the Vice-President of the CJEU 2021) in the context of an infringement action brought by the Commission against Poland and which ordered to the Member State in question to pay to the Commission a periodic penalty payment of 1,000,000 euros per day.

Against this background, the infringement procedure seems to be a more effective tool to address not only specific, but also multiple violations of EU law obligations as a

manifestation of the rule of law crisis in a Member State, which can also affect the area of migration and asylum law.

6. Conclusions

As emerged from the previous Sections, the recent developments in caselaw show the increasingly essential function of the CJEU in protecting the rule of law within the Union, which now also extends to national migration and asylum law. In particular, through the two mechanisms of the preliminary ruling procedure and of the infringement procedure, the CJEU assessed the compatibility of the Hungarian legislative reforms with EU law, notably with the procedural and substantial guarantees which Member States are called to provide to third-country nationals in case of detention in transit zones and in case of return decisions.

In respect to these obligations, it is possible to find a convergence with the commitments expressed, in a broader manner, in the GCs, in particular in the GCM. In fact, the GCM requires States parties to ensure that any detention, irrespective of the moment it occurs, follows due process, is non-arbitrary, based on law, necessity, proportionality and individual assessments. This includes notably having access to basic rights, such as access to food, basic healthcare, legal orientation and assistance, information and communication, as well as adequate accommodation. Moreover, States parties are committed to enact measures aimed at ensuring that the return of migrants who do not have the legal right to stay on another State's territory is safe and dignified, follows an individual assessment, is carried out by competent authorities and allows all applicable legal remedies to be exhausted.

Taking into account the existent link between these different sources of protection, if one looks at the two mechanisms employed by the CJEU in its caselaw through the lens of the GCs, the infringement procedure appears to be the most appropriate to indirectly contribute to increasing compliance with the commitments provided for by the GCM. In fact, the infringement procedure allows the CJEU to scrutinize in a more comprehensive manner national measures violating EU asylum and migration legislation, notably thanks to the Commission's monitoring role as "guardian of the Treaties".

In this way, the CJEU has thus required the fulfilment of the obligations, which are also reflected in a broader manner in the GCM, by EU Member States regardless of the existence of a specific dispute pending before a national court. This also appears to be in line with the general purpose of the GCs, which are not intended to ensure the protection of migrants and refugees, in their "individual" dimension, but rather to provide a "global" protection of people on the move. Furthermore, in these cases, the infringement procedure seems to be used as an instrument of political pressure on EU Member States to fulfil their obligations under EU law, as the Commission "may" bring the matter before the CJEU and therefore exercise its discretion in this respect where, as the cases analysed show, the political institutions fail to initiate the procedures under Article 7 TEU.

The risk of jeopardizing the principle of institutional balance provided for by the EU Treaties does not seem to affect the need for protecting the rule of law value and migrants' rights which are inseparably combined, allowing (and requiring) that all the available legal and judicial tools and procedures are deployed.

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Article

Border Procedures in the European Union: How the Pact Ignored the Compacts

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Abstract: This article analyses the (potential) role of the Global Compact for Migration and the Global Compact for Refugees in the development of EU law concerning asylum seekers who arrive at the external borders of the European Union (EU). Under the current rules, many asylum seekers are refused entry to the territory of the EU and detained while their asylum claim is examined in a border procedure. Some EU Member States even push back asylum seekers without a proper assessment of their needs for international protection. Despite widespread violations of the fundamental rights of asylum seekers at the external borders of the EU, the New Pact on Migration and Asylum presents the new integrated border procedure as an important instrument to 'deal with mixed flows' and make the Common European Asylum System (CEAS) work. However, the EU legislator has not substantiated the claim that border procedures will contribute to achieving the aims of the CEAS, such as the creation of a uniform, fair and efficient asylum procedure and prevention of abuse. Neither does the Pact provide a solution for pushbacks and systematic use of detention, nor does it guarantee the quality of the asylum procedure, including the identification of persons with special needs. The Pact therefore not only fails to comply with the EU's own Better Regulation guidelines and protect the fundamental rights of asylum seekers, but it also ignores the standards of the Global Compacts. What role can the Global Compacts still play in the ongoing negotiations over the Pact?

Keywords: border procedures; Global Compacts; New Pact on Migration and Asylum

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1. Introduction

The situation of asylum seekers and other migrants arriving at the external borders of the European Union has been of great concern to European institutions, Member States and human rights organisations for many years. According to Frontex, in the first nine months of 2021, 133,900 migrants crossed the EU's external borders in an illegal manner.[1] Many of these migrants, including children, have been subjected to (sometimes violent) pushbacks, detention measures and accelerated asylum procedures at the border, implying systematic violations of their fundamental rights.[2]

In September 2020, the European Commission (henceforth: the Commission) proposed a New Pact on Migration and Asylum (henceforth: the Pact), which aims to provide a 'durable European framework' offering 'a proper response' to the challenges faced by the Member States in the area of external border control and immigration.[3] An important pillar

[1] Frontex, News Release, 'Migratory situation at EU's borders in September: Increase on the Central Mediterranean and Western Balkan routes' (15 October 2021).
[2] See, for example, Fundamental Rights Agency, Migration: Key Fundamental Rights Concerns, Bulletin 2-2021 (24 September 2021), UN Special Rapporteur on the human rights of migrants, Report on means to address the human rights impact of pushbacks of migrants on land and at sea (12 May 2021), (EPRS 2020).
[3] Communication from the Commission on a New Pact on Migration and Asylum, COM(2020) 609 final, p. 1.

of the Pact is the introduction of an integrated border procedure: 'a seamless procedure at the border applicable to all non-EU citizens crossing without authorisation, comprising pre-entry screening, an asylum procedure and where applicable a swift return procedure'.[4]

The proposals for the New Pact were issued only a few years after the adoption of the United Nations Global Compact for Safe, Orderly and Regular Migration[5] (henceforth: GCM) and Global Compact on Refugees (henceforth: GCR)[6]. These Compacts are not legally binding. However, they express the political commitment of the participating UN Member States to comply with specific principles and objectives (Carrera and Cortinovis 2019, p. 1; Costello 2018) that are rooted in international human rights law.[7] As we will argue in this article, the New Pact as a whole not only fails to engage explicitly with the Global Compacts,[8] but the proposed integrated border procedure even violates some of the principles and objectives they promote.

After briefly setting out the proposed measures establishing the integrated border procedure (Section 2), this article identifies four areas in which the proposals for the integrated border procedure in the Pact ignore the Global Compacts. First, it shows that the proposals are not evidence-based, as is required by both Compacts.[9] Negating its own Better Regulation Guidelines, the Commission failed to properly evaluate existing legislation on border procedures, monitor Member State practices and carry out an impact assessment of the proposed legislation (Section 3).

Second, the proposed legislation does not provide solutions for current problems at external borders experienced by migrants and even risks exacerbating those problems. This includes difficulties and delays in accessing the asylum procedure and practices of pushbacks (Section 4) and inadequate examination of international protection needs (Section 5)[10]. This is incompatible with the GCR, which provides that States should have mechanisms in place for the registration, documentation and status determination of migrants, enabling all those in need of international protection to find and enjoy it.[11] Finally, the proposals, if adopted and implemented, will result in the continuation of practices whereby Member States systematically detain migrants at external borders (Section 6), while the Compacts require that immigration detention be a measure of last resort and promote the development of alternatives for such detention.[12] In our conclusions (Section 7), we highlight the role that the Global Compacts could still play in the current negotiations over the proposed legislation.

2. The Integrated Border Procedure in the Pact

In short, the proposed integrated border procedure comprises the following measures. First, all migrants arriving at external borders, including those who apply for international protection and those who do not satisfy the conditions for entry in the EU, will be screened to establish their identity and to carry out health and security checks.[13] During

[4] COM(2020)609 final, p. 4.

[5] United Nations General Assembly, Global Compact for Safe, Orderly and Regular Migration, Resolution 73/195, Adopted by the General Assembly on 19 December 2018 (henceforth referred to as GCM).

[6] Report of the United Nationals High Commissioner for Refugees. Part II. Global Compact on Refugees, UN Doc. A/73/12 (Part II), New York: United Nations (henceforth referred to as GCR).

[7] See GCM, paras. 1 and 2 and GCR, para. 5.

[8] The Communication of the Commission about the New Pact (COM(2020) 609 final), the Proposal for a Screening Regulation (COM(2020) 612 final) and the Proposal for an amended Asylum Procedures Regulation (COM(2020) 611 final) do not refer to the Global Compacts.

[9] GCM para. 17, GCR paras. 45–48.

[10] See also 'Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum' (Carrera 2020, p. 5) and 'Admissibility, Border Procedures and Safe Country Notions'(Vedsted-Hansen 2020, p. 174), both in: (Carrera and Geddes 2021).

[11] GCR, paras. 58 and 61.

[12] GCM, para. 29 and GCR, para. 60.

[13] Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612 final, Art 1 under a and b.

the screening, migrants are not authorised to enter the territory of the Member State.[14] The screening may take up to five days, which may be extended in exceptional circumstances by another five days.[15] After the screening, migrants will be refused entry and/or referred to the suitable procedure, which, amongst others, can be an asylum procedure or a return procedure.[16]

Second, if asylum seekers are channelled into the asylum procedure, their applications will be examined either in a normal asylum procedure or in an asylum border procedure. Just as during the screening, those subject to the asylum border procedure are not allowed to enter the territory of the Member States.[17] The Pact *obliges* Member States to use a border procedure in three cases: (1) if the asylum seeker poses a risk to national security or public order; (2) if the asylum seeker has misled the authorities by presenting false information or documents or by withholding relevant information or documents; or (3) if the asylum seeker is from a third country for which the share of positive asylum decisions in the total number of asylum decisions is below 20 per cent.[18] The asylum border procedure should be as short as possible but may take up to 12 weeks. After that period, asylum seekers have a right to enter the territory of the Member States.

Third, if an asylum border procedure is used and the application is rejected, a return border procedure will follow.[19] Just as in the asylum border procedure, persons in a return border procedure are not authorised to enter the Member State's territory.[20] They should be kept at the external borders, or in their proximity, or in transit zones.[21] The return border procedure has a maximum duration of 12 weeks.[22]

Lastly, the Pact introduces a Crisis Instrument which allows Member States to derogate from the normal border procedures in 'exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State.'[23] In such situations, Member States may extend the use and duration of border procedures. Hence, in situations of crisis, they may apply the asylum border procedure to applicants coming from a country with an EU-wide recognition rate of 75% or lower.[24] This means that this border procedure could affect people who have a large likelihood of being refugees. Moreover, in situations of crisis, it is possible to extend the duration of the asylum border procedure and the return border procedure each with another eight weeks.[25] As a consequence, the proposed seamless asylum and return border procedure could last for a total period of 40 weeks plus ten days of screening.

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14 Ibid., Art 4.

15 Ibid., Art 6(3).

16 Ibid., Art 13.

17 Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final, Art 41(6). In this particular respect, the proposed border procedure is similar to the current border procedure in Art 43 Asylum Procedures Directive (2013/32/EU).

18 COM(2020) 611 final, Art 41(3) linking it to the Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final, Art 40(1), which provides for cases in which *accelerated* procedures may be used to decide on the merits of an asylum applications.

19 COM(2020) 611 final, Art 41a (1) and (2).

20 Ibid., Art 41a(2).

21 However, if capacity becomes stretched, Member States may resort to the use of other locations within their territory. See COM(2020) 611 final, Art 41a(2).

22 COM(2020) 611 final, Art 41a (2).

23 Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613 final, Art 1. The crisis shall be of such a scale and nature that it would render a Member State's asylum, reception or return system non-functional and would risk having serious consequences for the functioning of, or result in the impossibility of applying, the Common European Asylum System and the migration management system of the Union.

24 COM(2020) 619 final, Art 4(1) (a).

25 Ibid., Artt 4 and 5.

3. European Legislation on Border Procedure: Led by Facts or Myths?

Reading the Pact, one gets the impression that the Commission considers the integrated border procedure as a panacea for some of the migratory problems that Member States and the EU face. It aims to quickly filter out 'abusive asylum requests or asylum requests made at the external border by applicants coming from third countries with a low recognition rate in order to swiftly return those without a right to stay in the Union'. The Commission claims that 'the use of the border procedure would be beneficial to the system of asylum generally, as a better management of abusive and inadmissible asylum requests at the border, would benefit the efficient treatment of genuine cases inland'.[26] As we will set out in this section, these statements are not supported by adequate data.

The idea of evidence-based policy making entails that policy decisions are 'better informed by available evidence and should include rational analysis' (Baldwin-Edwards et al. 2019). It is assumed that rational policy making should produce better outcomes.[27] Both Global Compacts endorse the idea of evidence-based policy making. Louise Arbour, Special Representative of the Secretary-General for International Migration, stated that with the GCM, 'Governments committed to a global migration framework based on facts not myths' (Statement by Louise Arbour 2018). In this context, it is worth highlighting that the very process of preparation of both compacts was characterised by an extensive process of consultation of States and stakeholders and information gathering (Kraly and Hovy 2020; United Nations 2018, p. III).[28]

The GCM states in its first objective that States 'commit to strengthen the global evidence base on international migration by improving and investing in the collection, analysis and dissemination of accurate, reliable and comparable data'. These data should foster 'evidence-based policymaking' and allow 'for effective monitoring and evaluation of the implementation of commitments over time'.[29] The GCR posits that 'reliable, comparable, and timely data is critical for evidence-based measures to [. . .] assess and address the impact of large refugee populations on host countries in emergency and protracted situations; and identify and plan appropriate solutions'.[30]

In this light, it is striking that the proposals concerning the integrated border procedure in the Pact are far from evidence based. This shortcoming comes most prominently to the fore with regard to the *mandatory character* of the border procedure and the rationale underlying policies of *non-entry*. For both of these characteristics, the Commission fails to provide any justification in the Pact (EPRS 2021). Moreover, the Commission failed to evaluate the existing border procedure,[31] which lies at the basis of the new integrated border procedure, and to monitor its application in the EU Member States. See also (Di Salvo and Barslund 2020). As a result, information regarding, amongst others, the effectiveness and efficiency of the current border procedure was lacking when the Commission proposed the new instruments. Moreover, there was no clear picture as to the extent of the fundamental rights violations taking place at borders and in transit zones.[32] The Commission also omitted carrying out a proper impact assessment of the proposed legislation, which would have identified the problems to be solved, the reasons for and aims of the integrated border procedure and its potential impact on migrants' fundamental rights (See Cornelisse and Reneman 2021). The lack of evaluation, monitoring and impact assessment is incompatible with the Commission's own Better Regulation Guidelines (European Commission 2017).

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[26] COM(2020) 611 final.

[27] Ibid.

[28] (Kraly and Hovy 2020). (United Nations 2018) United Nations. 2018. Globle Compact on Refugees. New York. Available online: https://www.unhcr.org/5c658aed4 (accessed on 11 April 2022).

[29] GCM, para. 17.

[30] GCR, para. 45.

[31] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, Art 43.

[32] See *EU: Independent Monitoring Mechanism on EU borders must ensure fundamental rights and accountability* (Amnesty International 2020)

These guidelines aim to ensure rational policy making and are supposed to form a coherent system of checks and balances underpinning the legitimacy of EU action. (See Cornelisse and Reneman 2021, p. 183).

It was the European Parliament which in 2020 took up the task of drafting an implementation report, focusing specifically on border procedures.[33] This report noted that the assessment of the transposition and application of border procedures was hindered by a lack of comprehensive data, for example with regard to (the grounds, length and location of) detention and the use of alternatives to detention (EPRS 2020). In 2021, the European Parliament requested a Horizontal Substitute Impact Assessment of the New Pact. This impact assessment concluded that under the Pact, lack of data concerning the implementation and application of the CEAS is likely to persist, seeing that the Pact does not propose adequate mechanisms to force Member States to comply with their reporting obligations (EPRS 2021, p. 171).

We have argued elsewhere that the Commission's failure to back up its legislative proposal with evidence is a symptom of the 'broken balance' between politicisation and rationality in the policy field of asylum, resulting in a more political role of the Commission. See (Cornelisse and Reneman 2021). Two factors have facilitated the increased politicisation of the Commission. First, the Commission has been engaged in a continuous struggle over competence with the Member States in this policy field. Member States have tried to avoid the adoption of EU law which would require substantial changes to restrictive national asylum systems. Consequently, EU asylum legislation is often complex and leaves wide discretion to Member States, resulting in widely diverging State practices. This renders monitoring and evaluation of EU law highly problematic and at the same time very important. Second, the shift towards a politicised Commission was caused by an increasing sense of crisis and emergency in the field of EU asylum policy, in particular after the situation of a high influx of migrants in 2015. The Commission wished to counter the image of uncontrolled migration and a failing European asylum system (Costello 2018) by proposing new legislation and ad hoc measures (European Parliament 2016, p. 6). In this process, the Commission did not take time to evaluate and monitor existing EU legislation and policy.[34]

In the next sections, we will demonstrate that the proposals for the integrated border procedure fail to address major shortcomings in the current EU border procedure. We focus on problems relating to access to the asylum procedure and pushbacks, the examination of asylum applications and detention.

4. Access to the Procedure and Pushbacks at External Borders

The GCR 'is grounded in the international refugee protection regime, centred on the cardinal principle of non-refoulement' with the Refugee Convention at its core.[35] Both the GCM and the GCR recognise the importance of border control, respectively recommending pre-screening of migrants and the registration and identification of refugees.[36] The GCR recognises that 'registration and identification of refugees is key for people concerned, as well as for States to know who has arrived'.[37] It specifies that it 'facilitates access to basic assistance and protection, including for those with specific needs'.[38]

[33] European Parliament, Report on the implementation of Article 43 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (2020/2047 (INI)), LIBE Committee, Erik Marquardt as rapporteur.

[34] Note that the Commission has proposed to enhance monitoring in the New Pact on Migration and Asylum. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final.

[35] GCR, para. 5.

[36] GCM, para. 27, GCR, para. 58.

[37] GCR, para. 58.

[38] See notes 27 above.

The principle of non-refoulement is protected by EU law,[39] which goes a step further than international refugee law by also protecting the right to asylum.[40] However, the Proposal for a Screening Regulation does not explicitly accord persons who wish to apply for asylum a right to remain, nor does it provide for material reception conditions during the period of screening, leaving compliance with fundamental rights during this period to the Member States.[41] The Proposal thus seems to primarily serve security interests, leaving it to individual Member States to ensure 'access to basic assistance and protection, including for those with specific needs'[42] during this phase. This conclusion is supported by the fact that the provisions in the Proposal for a Screening Regulation on the outcome and the debriefing of the screening do not in any way refer to findings on special needs that may have emerged during the screening.[43] The choice to tailor EU legislation in such a way that it responds to (legitimate) security concerns while leaving it up to the Member States to ensure conformity with the human rights of migrants sits uneasily with the GCR, which holds that 'security considerations and international protection are complementary'.[44] This is especially true in view of widespread problems that have been reported with regard to adequate material reception conditions at external borders in Europe, for example illustrated by (but by no means limited to) past experiences with the Greek refugee camps.[45]

When it comes to timely access to the asylum procedure, some of the adaptations, which are foreseen by the Crisis Instrument, are equally in tension with the GCR's insistence on conformity with international protection and applicable international law standards, also in 'emergency and protracted situations'. The Crisis Instrument allows Member States to delay the registration of applications for international protection up to four weeks (instead of the usual three working days).[46] This derogation aims to ensure the 'enforcement of procedures in situations of crisis, when specific adjustments are needed to allow the competent authorities under strain to exercise their tasks diligently and cope with significant workload'.[47] Such delays in registration would result in an extended duration of a stay at the external border, thus exacerbating some of the problems discussed above. Indeed, the Court of Justice of the EU has held that 'effective, easy and rapid access to the procedure guarantees the protection of the fundamental rights of applicants'.[48]

In the context of registration of protection claims, the GCR also calls attention to the need to 'avoid protection gaps' and the importance of '[enabling] all those in need of international protection to find and enjoy it'.[49] The GCR's insistence on minimising protection gaps is relevant in the face of the numerous pushbacks which have been reported across a majority of EU Member States (EPRS 2021, pp. 28–29). However, when it comes to addressing these flagrant violations of international refugee law, the Pact provides remarkably little answers. Thus, the proposal for a Screening Regulation proposes that Member States set up a monitoring mechanism, which should cover 'the respect of fundamental rights in relation to the screening, as well as the respect of the applicable national rules in the case of detention and compliance with the principle of non-refoulement'.[50]

[39] Art 19 Charter of Fundamental Rights of the European Union (the Charter). See also Art 21 of Directive 2011/95/EU (Qualification Directive).

[40] Art 78 TFEU and 18 of the Charter.

[41] COM(2020) 612 final.

[42] See notes 37 above.

[43] COM(2020) 612 final, Art 13 and 14.

[44] GCR, para. 56.

[45] (EPRS 2020, pp 93–94, 206). See also 'Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy' (Fundamental Rights Agency 2019).

[46] COM(2020) 619 final, Article 6, by derogation from the four working days in Article 27 of the proposal for an amended Asylum Procedures Regulation (COM(2016) 467 final).

[47] COM(2020) 619 final, p. 3.

[48] CJEU Case C-808/18 *Commission v Hungary* [2020] paras. 102–6.

[49] GCR, para. 51.

[50] COM(2020) 612 final, p. 3.

It is unlikely that this monitoring mechanism would actually provide an adequate answer to pushbacks, seeing that it would not extend beyond the screening procedure, thus leaving out the effective monitoring of pushbacks that occur outside the context of any legal procedure. In addition, the mechanism which the Commission proposes is a *national* mechanism, while it has been argued that only an independent mechanism for ensuring compliance with non-refoulement would be effective (Dumbrava 2020; Stefan and Cortinovis 2020).

5. Quality of the Asylum Procedure including Identification of Persons with Special Needs

In order to implement the provisions of the Refugee Convention and guarantee the principle of non-refoulement, States should identify refugees in a status determination procedure (asylum procedure). International law leaves it to States to 'establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure'.[51] Nevertheless, UNHCR (UN High Commissioner for Refugees (UNHCR) (2020)) and international human rights treaty bodies have developed standards for national asylum procedures (Cantor 2015, pp. 79–106). As will be further explained below, on the EU level, the Procedures Directive has established a detailed set of standards for asylum procedures.[52]

The GCR does not provide States with much guidance regarding asylum procedures. It just mentions that States have status determination mechanisms in place to avoid protection gaps and enable all those in need of international protection to find and enjoy it.[53] It makes clear that asylum procedures should be fair, efficient, adaptable and integer.[54]

Border procedures have two distinctive characteristics which directly affect the asylum seeker's ability to effectively participate in this procedure and the quality of decision-making: time limits are short, and the applicant remains in detention throughout the procedure. Short time limits may prevent asylum seekers from properly preparing and substantiating their asylum application and making use of their procedural rights. The fact that asylum seekers are detained limits their access to legal assistance and information and their ability to gather evidence in support of their case. There is an important tension between the factors time and detention in border procedures. Longer time limits may enhance the applicant's ability to substantiate their case and make use of procedural rights, but they also prolong the applicant's detention, which may have negative effects on their well-being.

It may therefore be argued that border procedures should only be applied to less complex cases or cases in which the asylum seeker is not cooperating with the authorities or poses a risk to public order or national security (EPRS 2020, p. 128). The current Procedures Directive allows Member States 'in well-defined circumstances' to examine the admissibility and/or substance of asylum applications in a border procedure, prior to a decision on an applicant's entry to its territory.[55] Nevertheless, it provides 10 different grounds for application of the border procedure.[56] In practice, Member States do not limit the application of the border procedure to less complex cases. Some Member States automatically channel all asylum applications made at the border into the border procedure, irrespective of their merits or complexity (EPRS 2020, p. 71).

The Proposal for an amended Asylum Procedures Regulation extends rather than limits the application of border procedures. As was mentioned before, it even makes the

[51] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para. 189. See also (Cantor 2015).

[52] Directive 2013/32/EU.

[53] GCR, para. 61.

[54] GCR, paras. 61–62.

[55] Directive 2013/32/EU, Preamble Recital 38, affirmed by CJEU in Joined Cases C-924/19 PPU and C-925/19 PPU *FMS* [2020] para. 236.

[56] Directive 2013/32/EU, Art 31(8).

application of the border procedure mandatory in specific types of cases, such as cases of asylum applicants from countries of origin with a low recognition rate (less than 20%).[57] Vedsted-Hansen notes that 'the totality of the procedural proposals seems to have the rather clear cognitive implication that many asylum seekers neither deserve nor need to undergo substantive examination in normal asylum procedures with the full scope of guarantees' (Carrera and Geddes 2021, p. 177)[58].

Time limits for decision making in European border procedures (in the administrative and appeal phase) are often extremely short, sometimes no longer than a few days (EPRS 2020, p. 99). Due to these short time limits and the fact that they are detained, asylum seekers experience substantial problems accessing information and (free) legal assistance and contacting the outside world in order to collect evidence in support of their case (EPRS 2020, pp. 105 and 112). Sometimes, personal interviews are short or very long and/or take place remotely or in spaces where confidentiality is not guaranteed. It is likely that all these factors negatively affect the quality of the decisions taken in the border procedure.

The Commission has not substantiated how the Proposal for an amended Asylum Procedures Regulation contributes to the aim of establishing fair and efficient asylum procedures (Carrera and Geddes 2021, p. 172)[59]. The proposal introduces a right to free legal assistance during both the administrative and appeal phase of the border procedure.[60] However, the Commission does not mention in its proposal how the existing practical hurdles for making use of this and other procedural rights will be overcome. Moreover, the proposal retains the wide discretion afforded to the Member States with regard to the applicable timeframe in border procedures, as no minimum time limits are set for different steps in the procedure.[61]

Moreover, the proposal does not comply with the GCR's requirement to pay particular attention to persons with special needs.[62] According to the GCR, states should have mechanisms 'for identification, screening and referral of those with specific needs to appropriate and accessible processes and procedures'.[63] This entails that children are referred to best-interest determination procedures, that victims of human trafficking and other forms of exploitation receive victim care and stateless persons enter statelessness determination procedures. Moreover, this implies that asylum procedures should be adapted to the special needs of applicants.

In line with the GCR, the Procedures Directive obliges Member States to identify applicants with special needs and exclude them from the border procedure if no adequate support can be provided to them there. Nevertheless, many Member States do not have effective mechanisms in place for this purpose (EPRS 2020, p. 114). Moreover, several Member States apply border procedures to cases of (unaccompanied) minors (EPRS 2020, p. 116). The Proposal for an amended Asylum Procedures Regulation does not guarantee the identification of and support to asylum applicants with special needs. The border procedure can still be applied to minors of 12 years and older.[64] The Commission also has not explained how the problem of the lack of identification procedures for asylum seekers with special needs in existing border procedures will be solved.

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57 COM(2020) 611 final, Art 41(3).

58 'Admissibility, Border Procedures and Safe Country Notions' (Vedsted-Hansen 2020), in: (Carrera and Geddes 2021).

59 COM(2020) 611 final, p. 5.; 'Admissibility, Border Procedures and Safe Country Notions' (Vedsted-Hansen 2020), in: (Carrera and Geddes 2021).

60 COM(2016) 467 final, p. 47.

61 COM(2016) 467 final, p. 21 and p. 28.

62 This includes (unaccompanied and separated) children; women at risk; survivors of torture, trauma, trafficking in persons, sexual and gender-based violence, sexual exploitation and abuse or harmful practices; persons with medical needs or disabilities; those who are illiterate; adolescents and youth; and older persons.

63 GCR, paras. 59–60.

64 COM(2020) 611 final, pp. 11, 14–15, 17, 27.

6. Systematic and De Facto Detention

Both Compacts require that immigration detention be a measure of last resort and promote the development of alternatives for such detention.[65] This resonates with the protection of the right to liberty in international law, with the UN Human Rights Committee being of the opinion that 'irregular entry on its own cannot justify detention' (Tsourdi 2020, p. 172). In this section, we will argue that the normalisation of pre-entry procedures, which the Pact entails, makes compliance with the right to liberty as stipulated by the Compacts increasingly difficult, if not impossible.

In the first place, the Pact is not clear as to what extent the integrated border procedure entails the use of detention. The Proposal for a Screening Regulation leaves it up to individual Member States whether or not they use detention during the screening. The Proposal for an amended Asylum Procedures Regulation determines that the use of detention is regulated by EU law, but it leaves unanswered the question whether these procedures actually require detention. Instead, it seems to suggest that border procedures can be used without the use of detention.[66] This is striking, not in the least because the Commission has always been of the opinion that border procedures 'imply detention'.[67] As applicants for asylum have a right to remain on the territory of the Member States, at least until they have received a decision on their application for international protection, securing non-entry will in most cases *require* the use of detention (International Commission of Jurists 2021).

By not making clear when and under what circumstances the fiction of non-entry requires detention, the integrated border procedure will not put an end to the existing situation in the EU, in which the qualification of a stay at the border differs considerably per Member State. Thus, a stay at the border in comparable circumstances may amount to detention in one Member State, while it does not in another Member State (EPRS 2020, pp. 81–84). This inevitably results in instances of de facto detention—the use of detention without a legal basis. Indeed, research has shown that in many Member States, a legal basis for practices that in actual fact amount to detention is lacking (EPRS 2020, pp. 81–84, 121, 132, 204–5). De facto detention is not reconcilable with the right to liberty and it ipso facto hinders the legal assessment whether it has been used as a last resort.

Research has also shown that currently, EU Member States as a rule do not assess whether less coercive measures than detention can be imposed.[68] General rules regarding alternatives to detention in the particular context of a border procedure are not provided for in the national laws of the Member States.[69] We have seen that the current proposals make the use of a border procedure mandatory in some cases, while they do not provide for mechanisms which assist in the identification of persons with special needs so as to exclude them from border procedures. The result is that the proposed integrated border procedure will likely exacerbate practices of systematic detention at the external borders of Europe (EPRS 2021, p. 96).

The requirement that detention be a measure of last resort also entails that detention cannot last longer than necessary. In this respect, the extension of the border procedure in times of crisis is especially worrisome, because persons can be held at external borders for a maximum of forty weeks plus ten days of screening. Seeing that in such situations, the asylum border procedure may be applied to persons coming from countries with an EU-wide recognition rate of 75% or lower, detention will affect a great many people who are fleeing persecution or war. The way in which the extension of the border procedure in the Crisis Instrument relates to the protection of the right to liberty is not explained by the Commission, but prima facie, it seems difficult to reconcile with the requirement that

[65] See notes 12 above.
[66] COM(2020) 611 final, Art 41(6) and (13).
[67] COM(2016) 467 final, p. 15 and COM(2013) 411 final, p. 4.
[68] Ibid, pp. 89–90.
[69] See notes 27 above.

detention is to be a measure of last resort for which alternatives need to be considered (EPRS 2021, p. 97).

7. What Is the Potential Role of the Global Compacts in Improving the Situation?

This article has demonstrated that the integrated border procedure as proposed by the Commission in the Pact is *disproportionally* shaped to accommodate security concerns of the Member States. As is noted by UNHCR, 'approaches to access to territory and asylum have increasingly been defined by deterrence policies [. . .] a surge in unilateralism by States, a gradual shrinking of the protection space for persons in need of international protection and an erosion of the institution of asylum' (UNHCR 2021, p. 1). This is most pertinently illustrated by two characteristics of the integrated border procedure: the fact that its application becomes *mandatory* in a number of cases and the fact that it is built on the *fiction of non-entry*. However, the Commission's implied claim that these characteristics contribute to achieving the aims of the integrated border procedure is not supported by evidence. The Commission failed to evaluate the existing EU legislation concerning border procedures and it omitted to carry out an impact assessment of the Pact.

It has been pointed out that the unbalanced insistence of the Pact on external border control, while leaving questions of solidarity largely to the discretion of the Member States, will entice continuing violations of international refugee law by States at the external borders of the EU (Radjenovic 2020). According to civil society, the fiction of non-entry in the EU proposals would allegedly obscure the relationship between the individual and the state, possibly even undermining the protection of non-refoulement.[70] This is confirmed by the large-scale human rights violations occurring at external borders, including pushbacks, summary asylum procedures and systematic detention.

The question is whether the Compacts can play a role in restoring the balance between on the one hand legitimate security concerns and on the other hand 'the civilian and humanitarian character of international protection and applicable international law'.[71] It is clear that the identified gaps in the fundamental rights protection of migrants can also be denounced with reference to the Charter of Fundamental Rights of the European Union and binding human rights treaties, such as the European Convention on Human Rights. However, apart from the intense regulatory complexity which is the result of the interface of EU law and international (soft) law, the very interplay between EU law and the Compacts may help to bring legal significance to a perspective, which has so far been lacking in EU immigration law and is lacking in the Pact. It is the perspective of *global* solidarity, the meaning and implications of which cannot be brought entirely under the scope of European protection of fundamental rights. Both Compacts call for a 'a spirit of international solidarity and burden- and responsibility-sharing'.[72] The GCR mentions that it 'represents the political will and ambition of the international community as a whole for strengthened cooperation and solidarity *with refugees* and *affected host countries*'.[73]

If, in the spirit of the Compacts, the Council, the Commission and the Member States would take the interest of global solidarity and responsibility sharing seriously, the binding force of resulting EU law would bring the implementation of the Global Compacts a significant step further (Guild et al. 2019, 2022)[74]. The recent proposals of the European Parliament rapporteurs and UNHCR can assist them to do exactly that. Both the rappor-

[70] See, for example, ECRE, Comments on the Commission Proposal for a Screening Regulation COM(2020) 612 (2020).

[71] See notes 44 above.

[72] GCR, para. 53. See also GCR, paras. 4, 9 and 21 and GCM, paras. 14, 39 and 42.

[73] GCR, para. 4, emphasis added.

[74] Guild et al. (2019) argue that due to the friction between the application of human rights to everyone and the political sensitivities of certain states, the implementation of the Global Compacts depends upon partnerships with non-state actors. See also 'The UN Global Compacts and the Common European Asylum System: Coherence or Friction?' (Guild et al. 2022).

teur on the Proposal for a Screening Regulation[75] and UNHCR (UNHCR 2021, p. 1) have renounced the fiction of non-entry. Moreover, both the European Parliament rapporteur on the amended Proposal for an Asylum Regulation[76] and UNHCR[77] recommend limiting the application of the border procedure to less complex cases. This aligns with the Commission's earlier stance that border procedures should only be used in exceptional circumstances.[78] The Global Compacts may thus serve as advocacy tools in the continuing political negotiations and the legislative process to support the argument that the practices of containment which the Pact proposes through the integrated border procedure not only risk violating international and EU law, but ultimately do not establish a sustainable approach to the global governance of migration (Evan Easton-Calabria 2021, pp. 125–33).

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[76] Draft Report on the implementation of Article 43 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (2020/2047(INI)), pp. 6 and 10.

[77] UNHCR, EU Pact on Migration and Asylum, cit., pp. 3–4.

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Comprehensive Approaches in the Global Compact for Migration and the EU Border Policies: A Critical Appraisal

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Abstract: The quest for safe, orderly and regular migration underpins the UN Global Compact for Migration (GCM) and translates into "comprehensive and integrated" responses to large movements of refugees and migrants. The effort to de-compartmentalise the governance of cross-border human mobility through "comprehensiveness" shapes the overall search for greater policy coherence via regime interaction and shared responsibility within the GCM. A similar effort has been made at the EU level to overcome the "silos approach" characterising the distinct policies on migration, asylum, and border management. This parallelism is particularly meaningful as the reason is twofold: at the operational level, because of the role played by the EU in fashioning the cooperation models underpinning the GCM, which enhances the relevance of EU law and practice for the implementation of the GCM; at the normative level, because the GCM draws on four guiding principles—i.e., sovereignty, good governance, human-centricity, and the rule of law—which are also key features of the EU legal system. Departing from these premises, this article reveals the meaning of "comprehensive and integrated" responses to large movements of refugees and migrants in the GCM and EU border policies. It does so in order to provide a critical appraisal of the legal and policy implications of comprehensive approaches in the global and European governance of cross-border human mobility.

Keywords: large movements of refugees and migrants; governance of cross-border human mobility; the Global Compact for Migration; the Global Compact on Refugees; guiding principles; the European Union; comprehensiveness versus fragmentation; de-compartmentalisation

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1. Introduction

The quest for safe, orderly and regular migration is the quintessence of the UN Global Compact for Migration (GCM), as made immediately evident by its *nomen*. The Compact's denomination underscores the substantive aspiration that underpins its normative structure and institutional architecture, in line with indicator 10.7.2 of the Sustainable Development Goals, i.e., turning dangerous routes and unsafe journeys into regular pathways. According to Objective 23, this goal shall be attained by strengthening international cooperation and global partnerships for "a comprehensive and integrated approach to facilitate safe, orderly and regular migration". This commitment follows up the New York Declaration, which calls for greater international cooperation to deal effectively with large movements of refugees and migrants, and frames this endeavour as the centrepiece of the search for "comprehensiveness" in the new global response to migration and human mobility (Annex I, para. 7 and Annex II, para. 1).

In addition, the New York Declaration acknowledges that the pursuit of "durable solutions" for refugees is a global responsibility, to be addressed through a whole-of-society and whole-of-government approach (para. 16). In the UN Global Compact on Refugees (GCR), this approach to "comprehensiveness" translates into international cooperation and the mobilisation of civil society under the auspices of the Global Refugee Forum and the Global Refugee Sponsorship Initiative. Thus, both Compacts seem to provide a more comprehensive "architecture" to the substance of international migration law (IML)—to

use the very effective metaphor by Aleinikoff (2007) describing international legal norms on migration as "substance without architecture".

Revealing and reflecting on gaps, pitfalls, and the potential of "comprehensiveness" to hinder or, on the contrary, enhance good governance and individual agency within the GCM is the prime aim of this research (see, *mutatis mutandis*, Biermann et al. 2009; Young 2018). Comprehensiveness, in the sense of the GCM (para. 41), is intended as the search for greater policy coherence via regime interaction, having as a touchstone the overarching respect for the rule of law and the human rights of people on the move (Betts and Kainz 2017). In the GCM, this endeavour is accompanied concurrently by States' commitment to integrate the management of their borders (Objective 11 GCM), while securitising international travel is a cross-cutting and comprehensive concern, occupying at least one-third of its objectives (Koslowski 2019). These goals are connected to the basic premises of IML as rooted in the sovereign right of States to decide on the admission of aliens to the territory. The principle of sovereignty is indeed a core guiding principle of the GCM (para. 15(c)), which shapes cooperation on integrated border management (IBM) within the remit of Objective 11, together with "the rule of law, obligations under international law, and the human rights of all migrants, regardless of their migration status" (para. 27) (Carrera et al. 2018).

While border management is intrinsically linked to the well-established sovereign power to exclude aliens from access to the territory[1], the call for cooperation on IBM is quite novel in the international setting. The operational notion of IBM has been developed at national and regional levels and plays a crucial role within the EU legal system (see, among many, Hobbing 2005; Carrera 2007), where it is devoted to "eliminate loopholes between border protection, security, return, migration, while always ensuring the protection of fundamental rights" (COM(2022)303, para. 1). As such, this notion goes necessarily beyond the scope of international cooperation within the framework of the protocols attached to the Palermo Convention (see Molnár and Brière 2022). Its distinctiveness relates to the effort to overcome the "silos approach" characterising national policies on migration, asylum, and border management through a comprehensive and intersectoral governance of cross-border human mobility (Moreno-Lax 2017a; Wagner 2021).

Although the EU has not yet adopted the GCM[2], its input towards framing IBM as a global goal within the remit of the GCM has been lucidly demonstrated (Molnár 2020, p. 331). In this sense, the EU integrated management system for external borders may be considered a model for the development of "international, regional and cross-regional border management cooperation", with a view to "facilitating safe and regular cross-border movements of people while preventing irregular migration" (Objective 11 GCM, para. 27(a)). Furthermore, the EU integrated border management system does not operate in a vacuum, as it is embedded into a legal system premised upon the prominent role given to the rule of law and protecting the human rights of all, regardless—at least in principle—of their migration status. These axiological components of the EU legal system are shared by the GCM, which also has the centrality of national sovereignty in common. This explains why insights from the EU trend towards de-compartmentalisation of EU migration, asylum, and border management policies might be also significant for the implementation of the GCM.

Departing from a reflection on the principle of sovereignty as the major source of fragmentation of the IML (Section 2), this article explores the search for comprehensiveness in the GCM and EU border policies, by focusing on the interplay between the quest for safe pathways and the commitment to integrated border management. First, it does so at a theoretical level, through a systemic and contextual interpretation of the GCM (Section 3). Subsequently, analysis draws on the lessons learned from the EU governance of cross-

[1] See, eloquently, ECtHR [GC], decision of 5 May 2020, No. 3599/18, *M.N. and Others v. Belgium*, para. 89.

[2] The *Proposal for a Council Decision authorising the Commission to approve, on behalf of the Union, the Global Compact for Safe, Orderly and Regular Migration in the field of immigration*, COM(2018)168, was withdrawn by the European Commission in 2019.

border human mobility for advancing the understanding of "comprehensiveness" at the operational level (Section 4).

This analysis adds to existing literature on the fragmentation of international law (see, among many, Sur 1997; Fischer-Lescano and Teubner 2004; Dupuy 2007; Koskenniemi 2007; Broude and Shany 2011; Young 2012; Peters 2016) and the "asymmetry" of IML (see, e.g., Lillich 1984, p. 122; Cole 2006; Opeskin 2009, p. 27; Molnár 2015) by showing that the call for a comprehensive and integrated response to migration and human mobility cannot be considered an element of intrinsic advancement in terms of consistency between the aims and means of the IML. On the one hand, such a call may be framed as a trigger to strengthen migrant and refugee rights; on the other, it may turn into a particularly insidious conceptual framework for innovative techniques of "cooperative deterrence" (Gammeltoft-Hansen and Hathaway 2015), expanding the legal hiatus between the individual right to leave any country and the state prerogative to exclude aliens from access to their territory. The conditions under which this ambivalent interaction between the quest for safe and regular pathways and cooperation on border management may lead to the enhancement—or (vice versa) to a further dilution—of the legal entitlements of migrants and refugees are identified in the concluding section (Section 5), with a view to contributing to the debate stimulated by the International Migration Review Forum (IMRF).

2. The Sovereign and the Migrant: Retrospectives on the Fragmentation of IML

Free movement is among the earliest rules on the treatment of aliens by political entities (Purcell 2007). Plato, in his fifth book of *The Laws*, already warned that "the absolute prohibition of foreign travel, or the exclusion of strangers, is impossible, and would appear barbarous to the rest of mankind" (Jowett 2010, p. 156). As a result, the right to leave and the right to enter any country have developed in parallel for centuries. These rights were naturally tempered by the interests of the governing entity, as they have never been conceived of as absolute rights (Chetail 2017, p. 19). However, early developments of the corpus iuris governing human mobility clearly confirm that the ethos of hospitality has underpinned the first elaborations of the right to asylum (Crépeau 1995). At the same time, the Westphalian endorsement of Hobbesian sovereignty as the overarching principle steering international relations[3] triggered a decisive fracture between emigration and immigration. The asymmetry between the human right to leave any country and the octroyed concession to enter a foreign country, to be granted by the sovereign State, is the major heritage of this fracture in contemporary international law (Chetail 2014).

The impact of sovereignty on the development of the IML as a fragmented and complex regime has been widely explored (see, among many, Opeskin et al. 2012; Chetail 2019). National sovereignty is the primary source and a key determinant of the asymmetry between the two poles of the movement of people across international borders, which has contributed to the fragmentation of IML in a number of different ways.

At first, freedom of movement and residence rights were only recognised within state borders, while the right to leave any country was framed as universal (see Art. 13 of the Universal Declaration of Human Rights—UDHR; Art. 12 of the International Covenant on Civil and Political Rights—ICCPR).[4] Meanwhile, attempts at reconciling emigration as a human right with immigration as a matter for national regulators have triggered the liberalisation of human mobility within the Global North (Minderhoud et al. 2019). Alongside the proliferation of sectoral and regional designs on the free movement of persons—such as the multilateral cooperation framework on service providers in the General Agreement on Trade in Services and the Schengen cooperation within the European Union—the "bifurcation of human mobility" along the North/South axis has expanded the room for externalisation and double standards (Spijkerboer 2018). Similarly, differential

[3] On national sovereignty as the overarching principle framing the State—i.e., sovereignty as a frame—and steering international relations—i.e., sovereignty as a claim—see further, Walker (2013).

[4] See also OHCHR-IOM, *Migration, Human Rights and Governance: Handbook for Parliamentarians*, No. 24/2015, pp. 19–20.

legal treatment of aliens rooted in nationality remains commonplace, because—as recently reaffirmed by the International Court of Justice (ICJ) in *Qatar v. United Arab Emirates*—it falls beyond the scope of the prohibition of discrimination on "national origin" set forth in Art. (2) and (3) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)[5].

Second, the protection offered by international refugee law (IRL) to certain groups of aliens mirrors the fracture between the regulatory levels at which the international movement of people has been traditionally addressed by configuring refugee status as a self-contained exception to the rule (Goodwin-Gill and McAdam 2021). Complementary protection afforded by international human rights law (IHRL)—although universal (Art. 14 UDHR)—does not go beyond the right to seek protection, while it frames the enjoyment of asylum as a state-dependent right (Grahl-Madsen 1980). Thus, the most prominent limitation to the sovereign power to control access to the territory consists of a ban on States wishing to remove aliens who may risk severe and irreparable harm in the country of origin. In this sense, the prohibition of refoulement has been neatly qualified as "a piece in the international struggle for the enforcement of fundamental rights" (Schabas 2007, p. 47). This prohibition has offered individuals a *locus standi* before international and municipal *fora* to complain against removals leading to a real risk of persecution or serious harm, while interdicting penalisation for spontaneous arrivals and unauthorised entry of would-be refugees (Goodwin-Gill 2001).

Third, the tide of human rights, together with globalisation, have prompted a revival of the Hobbesian will to punish (Fassin and Kutz 2018). On the one hand, IHRL challenges state sovereignty from the inside, while on the other, by making state borders more porous and less manageable, globalisation challenges it from the outside, disproportionally affecting migration and refuge at the borders. Coupled with the functional outsourcing of public powers to disembodied and delocalised entities by receiving States, this revival of the cogency of borders has triggered the development of a rich toolbox of *non-entré* policies, which has been thoroughly explored and illustrated by the scholarship (see, among many, Gammeltoft-Hansen and Hathaway 2015; Gammeltoft-Hansen and Tan 2017; Carrera et al. 2019b).

This explains why—with over 281 million people on the move[6]—the adoption of Global Compacts has been seen as an unprecedented opportunity. Even if they are non-binding frameworks of result-oriented commitments (Gammeltoft-Hansen et al. 2017; Guild and Grant 2017), it has been claimed that they could "become a pivotal regulative tool", leveraging on a global governance approach to develop "a new understanding of normativity in international law" (Hilpold 2021, p. 18).

The legal aspiration for a new legal paradigm governing human mobility across international borders has—in turn—called into question how to make the global governance of large movements of migrants and refugees "work for all" (UN Doc. A/72/643). The responses provided by the Global Compacts, especially by the GCM, seem to reverse the fragmentation of the IML by developing a comprehensive normative framework for the governance of cross-border human mobility. These developments are illustrated in the next section, in order to offer an overview of their potential impact on the asymmetry between the sovereign right to exclude and the human right to move across the borders.

3. Clustering the GCM's Guiding Principles: Bridging the Gap or Widening the Hiatus?

This section examines the scope and content of "comprehensiveness" within the normative architecture of the GCM, by taking into account the interplay between the quest for safe, orderly and regular migration and cooperation on border management. This interplay is featured in the guiding principles outlined in para. 15 of the GCM, which

[5] ICJ, judgment of 4 February 2021 (preliminary objections), *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Qatar v. United Arab Emirates*), para. 83.

[6] *World Migration Report 2022*, International Organisation for Migration (IOM), Geneva, p. 2.

pivot around four determinants building and explaining interconnections among all soft commitments; i.e., national sovereignty, good governance, human-centricity, and the rule of law[7].

These determinants intersect all migration-specific objectives—as listed in para. 16—and can be further articulated as cutting across two main clusters of commitments, the first intergovernmental and second human centred. Yet, the potential effect this cross-cutting and interconnected approach might have on the implementation of the GCM remains undetermined, primarily because of the lack of any political option on the normative or logical pre-eminence of one determinant over the others (Panizzon 2022)[8]. Indeed, as the scholarship has demonstrated (see, among others, Pécoud 2021; Martín Díaz and Aris Escarcena 2019), the negotiation and implementation of the GCM has been affected by a marked tendency to de-politicise the major dilemmas fragmenting the global governance of international migration—a tendency that has sharply diluted the original commitment (and aspiration) to make migration "work for all" (UN Doc. A/72/643).

Thus, the following subsections attempt to capture the inherent tension between the old logic of fragmentation and the new search for policy coherence through comprehensive approaches. On the one hand, they show how the lack of political consensus over the normative or logical differentiation (Elias and Lim 1997) of the GCM's commitments, together with a defective proceduralisation of the mechanisms and indicators to make migration management more unbiased (Kleinlein 2019), reproduce the fragmentation of IML within the GCM. On the other, analysis shows how the very same idea "that we are all countries of origin, transit, and destination" (Objective 23, para. 39, GCM) might advance—at least on paper—a more equitable and comprehensive model of responsibility-sharing. The areas of major friction are examined from the perspective of the two main clusters identified above—that of international cooperation and that of the human rights' holders.

3.1. Cluster 1: International Cooperation

This subsection investigates the interrelation between Objectives 23 and 11 of the GCM, as steered by the GCM's principles pertaining to the intergovernmental realm; i.e., national sovereignty and migration governance. It does so in order to assess how this interrelation may shape international cooperation in the field of migration and asylum; that is, either by consolidating existing trends of global migration governance "without migrants" (Rother 2013b; on the notion of "migration governance", see also Betts 2011; Koslowski 2011) or envisaging innovative models of cooperation in line with the claim for *good* governance[9].

3.1.1. Shared Responsibility within the "Migration Cycle": A Possible Reading of Objectives 23, 2, and 5, in Combination with Objectives 11 and 21

The rationale upon which the call for international cooperation in managing large movements of migrants and refugees is rooted is twofold: first, it is linked to the idea that promoting closer cooperation among all countries throughout the "migration cycle" (para. 16 GCM) may contribute to better governance at the bilateral, regional, and global level (para. 39(e) GCM); second, it puts forward the assumption that the achievement of better governance of migration may reinforce the principles of solidarity and shared responsibility (para. 39 GCM).

The causal nexus between a less fragmented migration governance—aligning cooperation with the migration cycle—and the principle of equitable burden and responsibility sharing is mediated, within the GCM, by the idea that cross-border human mobility may

[7] The *IMRF Progress Declaration* (UN Doc. A/AC.293/2022/L.1), endorsed by the UN General Assembly on 7 June 2022 (under item 15 A/76/L.58), reiterates their central role.

[8] This is confirmed by the *Second Report on the Implementation of the GCM*, UN Doc. A/76/642, which has been rightly criticised for its vagueness, making it difficult to secure good faith implementation (Grundler and Guild 2022).

[9] On establishing "good governance of migration" as an explicit goal of the UN, see UN Doc. A/71/728, para. 41.

represent, if well-managed, a global common good, in connection with the values and principles embodied in the UN Charter (see Arbour's Closing remarks at GCM). That is why para. 11 of the GCM frames the "overarching obligation to respect, protect and fulfil the human rights of all migrants, regardless of their migration status" as a shared responsibility—a notion with a well-established relevance for international cooperation in the human rights field (Salomon 2007) and vis-à-vis the collective responsibility towards refugees (Hurwitz 2009).

Objective 23, therefore, is closely connected to two other goals: the one enshrined in Objective 2, which concerns the root causes of forced migration, and that put forward in Objective 5, which refers to the availability and enhancement of regular pathways. The interplay between Objectives 23 and 2 provides upstream solutions to forced migration. It pinpoints cooperative patterns based on "the rule of law and good governance, access to justice, and protection of human rights" (para. 18(b) GCM) with a view to minimising adverse drivers and structural factors that compel people to leave their country of origin. The interrelation between Objectives 23 and 5 offers, in turn, downstream responses to mass and protracted displacement, "in which refugees find themselves in a long-lasting and intractable state of limbo" (UNHCR ExCom EC/54/SC/CRP.14).

In addition to this goal, which is significant for the GCR too, the GCM extends the notion of regular pathways beyond the remit of IRL, by putting forward the idea that a better management of large movements of migrants and refugees cannot help but facilitate labour mobility (paras 21 and 22(g)) and family reunification (para. 21(i)). That facilitating human mobility is intended as the key premise to successful cooperation on migration is evident from the recurrent reference to this goal—mentioned 62 times in the text of the GCM (Crépeau 2018). The emphasis on facilitating human mobility translates into three major commitments: first, the de-casualisation of the migration status, by the recognition of legal identity (para. 20) and easing the transition from one status to another (paras 22(g) and 23(h)); second, the adoption of a rights-based approach to the principle of non-discrimination, which allows differential treatment only in accordance with IHRL (para. 31); and third, the promotion of an evidence-based public discourse and data-driven policies, in order to re-shape perceptions concerning migration and fight persistent stereotypes (para. 33).

By advancing the idea that large movements of migrants and refugees can be governed by granting safe passage and regular statuses, the GCM proposes an alternative to the dominant containment approach steering international cooperation on migration under the headship of the Global North (Gammeltoft-Hansen and Tan 2017). This alternative model, relinking "the rule of law and good governance" with "access to justice and protection of human rights" (para. 18(b) GCM), is, however, merely sketched out and presented as the re-statement of existing governance models. Moreover, its central feature—i.e., the facilitation of safe and regular cross-border movements of people—is construed in a dyadic relationship with the prevention of irregular migration (para. 27).

In this way, the containment rationale, embedded in the dominant approach to cooperation on migration, resurfaces from the legal texture of the GCM and downplays the call for regularisation of human mobility. The word choice confirms this reading: indeed, while the notion of "labour mobility" crosscuts all GCM Objectives dealing with regularisation of migration pathways, the expression "labour migration" is confined to very specific aspects, mostly concerning the implementation of existing commitments. As "labour mobility" invariably alludes to frequent to-and-from movements between countries of origin and destination, but does not refer to settlement, behind this notion lies the idea that "mobile" labour migrants are not in principle eligible for stable settlement in destination countries.

The intrinsic source of inconsistency laying at the very basis of the quest for safe pathways becomes apparent when considering the other principle shaping intergovernmental cooperation within the GCM: i.e., national sovereignty. The new global governance of large movements of migrants does not only uphold this principle (recital 7 of the preamble), but elevates it to a guiding principle, compacting the unity of purpose of participating States

(para. 15), and to the fundamental organisational principle governing integrated border management (para. 27).

Due to the prerogative of States to distinguish between regular and irregular migration[10], the shared responsibility "to respect, protect and fulfil the human rights of all migrants, regardless of their migration status"—set forth in para. 11 of the GCM—has to be squared with "different national realities, policies, priorities, and requirements for entry, residence, and work", set forth at the domestic level (para. 15, *lit.* c).

As domestic authorities are primarily in charge of the balancing exercise inherent in these different realities, policies, priorities, and requirements, national responses are the prime implementing instrument of the GCM. The interconnectedness between the border regime and human mobility (Betts 2010) thus rests on those state authorities that determine the ultimate significance of the borders; either as a means to prevent unauthorised journeys or as a tool to organise safe passages (Arbel 2016). As a result, within the sense of Objective 23, the management of cross-border human mobility in a coherent and effective fashion is disconnected from the commitment to "responsible" migration—to be intended as a responsibility *for* and *towards* migrants and refugees, within the meaning of indicator 10.7 of the 2030 Agenda for Sustainable Development (Guild 2018). Cooperation on cross-border human mobility is made dependent, instead, upon the blending of operational cooperation on integrated border management (Objective 11) and deformalized partnerships on readmission and reintegration (Objective 21).

The interplay between Objectives 11 and 21 GCM reveals that the efficiency of return and reintegration mechanisms shall be chiefly achieved via anticipatory border governance. This necessitates an emphasis on pre-departure cooperation, aimed at pre-filtering people on the move and curbing the migration journey, in order to reduce the resulting number of returnees (para. 27(c)) and the related risk of displacement upon return (para. 37(b)). Correspondingly, managing national borders "in a coordinated manner, promoting bilateral and regional cooperation, ensuring security for States, communities, and migrants" (para. 27) requires enhanced "cooperation on the identification of nationals and issuance of travel documents to facilitate returns and readmission" (para. 37(c))—a goal that, within the GCM, is connected to the duty on States to readmit their own nationals (Objective 21), while within the GCR, it is associated with refugees' dignified return (para. 11).

3.1.2. On Possible Inferences: Does the GCM Advance a Duty of Intergovernmental Cooperation on Return/Readmission?

Remarkably, both Compacts negatively construe the right to leave any country and to return to the country of origin/habitual residence, emphasising the importance of the return dimension, in connection with the duty to "[m]inimize the adverse drivers and structural factors that compel people to leave" (Objective 2). This limited and partial understanding of the right to leave will be considered in the next section from the perspective of individual entitlements. However, the exegesis of the right to leave in the GCM is also relevant regarding international cooperation on migration because it "fragments" the migration cycle (para. 16 GCM) by neatly separating cooperation on readmission from the activation of new channels for regular migration. As a consequence, the good governance of large movements of migrants and refugees throughout the migration cycle appears restricted to labour migration based on skills-matching with national economies of receiving countries (Objective 5).

In addition, although the customary nature of the right to return to one's own country—as reproduced in Art. 12(4) ICCPR—is undisputed, it has been rightly pointed out that the existence (and nature) of a corresponding duty of intergovernmental cooperation on return/readmission of nationals is more controversial (Guild and Weatherhead 2018), especially when it comes to the removal and deportation of rejected asylum seekers (Noll 1999). In this sense, the GCM's emphasis on the responsibility towards the international

[10] On the need to keep and reinforce existing legal categories, refer to the GCM co-facilitators' position of 5 March 2018, available here.

community of migrant-sending countries for large movements of migrants and refugees appears problematic.

From a legal viewpoint, it allows migrant-receiving countries to advance a normative claim in negotiations on minimising drivers and factors of involuntary migration (Objective 2). This shift cannot be regarded as having a mere "para-law" function—in the sense indicated by Peters (2018)[11]. It seems, instead, to mark an attempt to streamline international cooperation on readmission by advancing an *opinio necessitatis*—if not yet *iuris*—to making countries of origin accountable for unauthorised departures and difficult returns.

Content-wise, "helping migrants at home", before they are compelled to leave, and escorting them back home when they have no legal title to stay is the motto synthetising this shift. The legal aspiration to trace and control human mobility across borders is, therefore, theoretically and practically connected to the reproduction of unbalanced international relations between the Global North and the Global South, rhetorically mediated by protection needs. Thus, notwithstanding the GCM's call for interconnectedness between migration-specific policies (e.g., labour migration) and non-migration-specific policies (trade, education, energy, and investment), this unbalanced relationship cutting across the GCM may replicate and even fortify cooperation on externalisation and responsibility shifting, along the lines of the "consensual containment" paradigm (Giuffré and Moreno-Lax 2019; see also Lavenex 2016; Vitiello 2019; Panizzon and Vitiello 2019).

3.1.3. On Ambivalent Models and Tricky Assumptions: What Does "Data-Driven Governance" Mean for "Good Governance"?

Operational cooperation affecting migrants in transit and assistance with border management are represented as a means to reduce unauthorised human mobility for life-saving purposes, as clearly enshrined in Objective 8 on coordinated efforts for search and rescue at sea, or for humanitarian purposes, as indicated in Objective 9 on transnational responses to migrant smuggling.

From this perspective, the GCM crystallises data-driven and evidence-based state practice and regulation, which legitimises the recourse to the protection argument to put forward containment cooperation (Moreno-Lax 2018). This is the case of cooperation protocols aimed at facilitating "cross-border law enforcement and intelligence cooperation in order to prevent and counter smuggling of migrants so as to end impunity for smugglers and prevent irregular migration" (para. 25(c)) and for the other types of deformalized cooperation (e.g., technical arrangements and migration partnerships) listed in Objective 23.

Similarly, the anticipatory approach to integrated border management emerges from the prominent role assigned to information and communications technology, alongside intelligence cooperation, in steering human mobility across the borders. Objective 3 expressly prioritises the information of migrants to raise awareness of the risks of irregular migration, while Objective 1 endorses an evidence-based model of decision-making on migration, based on "accurate and disaggregated data". Objective 12, aimed at strengthening the predictability of migration procedures, alongside the identification of migrants required under Objective 4, are other fundamental elements connected to this model of evidence-based governance.

While procedural standardisation (para. 28, *lit.* c) and universal recognition of travel documents (para. 20, *lit.* b) may enhance the protection of people on the move, their clashing with the return rationale may turn them into the means to downplay migrants' right to an effective remedy at the borders and privacy rights. Similarly, evidence-based governance of migration may help reverse anti-immigrant narratives spreading in the

[11] As Peters (2018) points out, the GCM may have different functions: first, bolstering the progressive development of IML, by supporting the formation of an *opinio iuris* on the recognition of safe pathways ("pre-law"-function); second, codifying customary international norms and being a hermeneutic parameter for integrating lacunae ("para-law"-function); and third, enhancing the effective implementation of hard law by providing operational and interpretative guidance ("law-plus"-function).

Global North. However, if comprehensive data collection is not guided by any overarching principle other than national interest, the result cannot but reflect this premise.

3.2. Cluster 2: Migrant and Refugee Rights

This subsection matches the results obtained from the analysis of the normative interplay between Objectives 23 and 11 of the GCM at the intergovernmental level with the other core determinants steering and orienting the implementation of the GCM; i.e., human-centricity and the rule of law. It does so in order to assess the potential impact on migrant and refugee (substantive and procedural) rights of international cooperation in the two fields of action identified by Objectives 23 and 11. Therefore, the rights covered by the analysis belong to two macro areas: those connected to the right of entry and those related to the right to stay.

The analysis departs from the major issue at stake during the negotiation process of the GCM—which lucidly emerges from most of the plenary statements rendered at the Marrakech Conference; i.e., the exigency to reassure States that the quest for safe pathways would not further erode sovereign control over external borders[12]. The emphasis on leaving untouched the dichotomy between migrants and refugees responds to this exigency of mitigating States' concerns and affects the implications of "comprehensiveness". Yet, it does not merely translate into the adoption of two different Compacts. It also implies the need for a complex balancing act—within the scope of the GCM—between the quest for human centricity and the preservation of state prerogatives of border control.

Entry and exit rights are impacted by this inherent tension in a twofold manner: first, in relation to the function of the principle of non-refoulement as a "method of promoting global observance of human rights" of people on the move (Schabas 2007, p. 47), and second, with reference to the function of the right to leave as a trigger of the right to seek asylum (Guild 2013; Moreno-Lax 2017a, p. 378; Goldner Lang and Nagy 2021, p. 447). Similarly, the rights to stay and to legal identity of migrants are affected by this tension, which also makes the prohibition of discrimination conditional on the "distinctions, exclusions, restrictions, or preferences [. . .] between citizens and non-citizens"—in the sense of Art. 1(2) CERD.

This understanding of the prohibition of discrimination has been recently upheld by the ICJ, in the abovementioned case *Qatar v. United Arab Emirates*, where it aligned with the ordinary meaning of Art. 1(2) CERD, as well as with the consolidated jurisprudence of specialised human rights courts such as the European Court of Human Rights (ECtHR)[13]. Nonetheless, the ICJ's decision to negate its jurisdiction *ratione materiae* appears striking in light of the CERD Committee's view—as expressed early on in a parallel case—that discrimination based on nationality may fall within the scope of the Convention[14]. In addition, although the case was decided by a solid majority, it is remarkable that most of the minority judges came from developing countries (see further on this Ulfstein 2022). Among the extra-legal factors that may have influenced the ICJ's decision, there is the alleged risk of impacting the rigid compartmentalisation of migrant categories underpinning IML and IRL.

Although the GCM upholds this rigid compartmentalisation, the following analysis challenges it by showing its intrinsic contradiction with the goal of creating a comprehensive "cooperative framework addressing migration in all its dimensions" (para. 4 GCM), and—more specifically—with human-centricity and the rule of law.

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12 All of the statements are available on the website of the Intergovernmental Conference on the GCM. See, among others, the Statement by the UN Secretary-General, António Guterres, dispelling the myth that "The Compact will allow the United Nations to impose migration policies on Member States, infringing on their sovereignty".

13 See, e.g., ECtHR [GC], judgment of 23 June 2008, No. 1638/03, *Maslov v. Austria*.

14 CERD Committee, decision of 27 August 2019 on the Admissibility of the Inter-State Communication Submitted by Qatar Against the UAE, para. 63, UN Doc. CERD/C/99/4.

3.2.1. Entry Rights and Non-Refoulement: Or Why the GCM Does Not Call a Spade a Spade

Objective 21, committing States to "facilitate and cooperate for safe and dignified return", codifies the principle of non-refoulement in its extensive form, covering developments under IHRL and EU law[15]. The definition of the non-refoulement principle is accompanied by the prohibition of collective expulsion and the call for recognising due process rights to returnees.

Nonetheless, the GCM does not contain any textual reference to the expression "non-refoulement". The lack of any terminological reference to this internationally recognised expression is not without significance. Although the content of the principle is upheld and endorsed by the GCM, the choice to omit any reference to the evocative terminology of "non-refoulement", alongside the positioning of this duty within the remit of Objective 21, downplays the principle's function as both a source of positive obligations triggering access to rights for people on the move and an expression of "the collective responsibility of the community of States, stated already by Grotius and Vattel, that persons seeking asylum shall be able to find an abode somewhere" (Grahl-Madsen 1980, p. 54). This choice appears to be restraining any progressive development of a universal "human right to flee"[16], opposable vis-à-vis destination countries.

Such a right—situated at the interplay between the individual's right to leave and the state's obligation not to remove aliens-in-peril—would be seemingly consistent with the acknowledgment that "migrants and refugees may face many common challenges and similar vulnerabilities" (para. 3 GCM) and that all migrants may be *compelled* to leave (paras 12, 18, 18(b), 21(g), and 21(h) GCM). The progressive development of this right would mirror the principle of "leaving no one behind", which commits States to delivering the Sustainable Development Goals under the 2030 Agenda. Furthermore, such a development would document the existence of a grey area of migrants who fall beyond or between consolidated legal statuses (Guild and Weatherhead 2018) and whose unmet protection request is at the origin of many contemporary migratory crises.

However, as lacking international binding norms recognising a human right to flee, its enjoyment would remain bound to regional/national legislation granting asylum seekers a temporary right to enter and remain pending the determination of their status. In addition, an extensive exegesis of the right to leave any country, in conjunction with positive obligations extending from non-refoulement, would bridge the gap between the limited right to remain and the full entitlement to enter and reside on the territory of the host State—an outcome that cannot be inferred from state practice (Higgins 1973; Hailbronner 1996; Guild 2017; Hannum 2021). Finally, the affirmation of a human right to flee would presuppose the rebuttal of the presumption that the attainment of any stable and fair distribution of the responsibility for large movements of migrants and refugees requires the limitation of human mobility of aliens-at-risk (Noll 2007). Although the Compacts do not expressly envisage the development of responsibility-sharing frameworks based on physical relocation—such as, at the regional EU level, the Dublin system (Maiani 2017)—a systemic interpretation of the call for "innovative solutions" (para. 14 GCM and paras 20–27 GCR) does not allow to exclude the endurance of the paradigm based on limited human mobility.

[15] Objective 21 contains a clear reference to the obligation not to expel an alien to a State where his or her life would be threatened, set forth in Art. 23 of the Draft Articles on the Expulsion of Aliens. In addition, by adopting a broad notion of "irreparable harm", the GCM goes beyond the scope of Art. 33 of the Geneva Convention and upholds the development of the concept in IHRL and EU law. This is confirmed by a note of the OHCHR, stressing the importance of the principle within the framework of readmission (Objective 21), IBM (Objective 11), and search and rescue (SAR) activities (Objective 8).

[16] Such a potential development was envisaged (inter alia) by Moreno Lax at the Thematic Discussion IV of the GCR.

3.2.2. Exit Rights and Push Factors: On the Ambivalent Purpose of the Right "Not to Migrate"

Human-centricity necessitates putting human dignity at the core of any decision affecting people on the move. GCM Objective 2, on cooperation aimed at minimising the adverse drivers and structural factors that compel people to leave their country of origin, is clearly inspired by this rationale. The goal of minimising the adverse drivers of forced migration is grounded on a number of interrelated actions, including investment in human capital (para. 18, a–g) and the development of crisis-management tools to curb the effects of environmental degradation (para. 18, h–l). Its fulfilment would need the eradication of poverty; a genuine engagement to reverse the trend of climate change; and empowerment paths through education, food security, protection of vulnerabilities, and enhancement of the rule of law in migration countries. That is why Objective 2 is by far the most ambitious objective of the GCM.

The attainment of this goal may have a twofold impact on human mobility across international borders. By backing a faster, safer, and cheaper transfer of remittances, it could help reduce emigration and forced displacement, especially if the money that migrants send back home is channelled into virtuous circles of sustainable development. However, reducing the adverse drivers of migration may also expand voluntary departures and elevate the circularity of human capital across transnational frontiers. That is why Objective 2 of the GCM should be read in combination with Objective 5, stressing the key role of labour mobility partnerships, along with the need to expand and diversify the "availability of pathways for safe, orderly and regular migration" for vulnerable aliens (para. 21 GCM).

While the liberalisation of labour mobility is grounded on existing options and draws from relevant ILO standards and guidelines (para. 21, a–f), the expansion of safe passages for vulnerable aliens builds upon national and regional practices for humanitarian admission through visa options, private sponsorship, family reunification, and planned relocation and refugee resettlement (para. 21, *lit.* g, h, i), lacking any proceduralisation of related cooperation at the global level[17]. Nonetheless, the acknowledgement of the disaster–migration nexus in the GCM adds to national and regional practices by formalising a direct link between forced displacement and environmental degradation at the international level (Kälin 2018). This move should not be underestimated, especially by comparison with the GCR, where it is merely stated that the adverse effects of climate change "increasingly interact with the drivers of refugee movements" (para. 8).

From this analysis, it might be inferred that the right "not to migrate"—as put forward in GCM para. 13—is to be understood as an expression of the individual freedom of choice about migration, which imposes on States the correspondent duty to "work together to create conditions that allow communities and individuals to live in safety and dignity in their own countries". However, respecting the individual decision to migrate may clash with Objectives 9–11, prioritising cooperation on migration "management" and the fight against unauthorised migration, including "pre-reporting by carriers of passengers" (Objective 11, para. 27, *lit.* b). Indeed, while cooperation on ensuring the right "not to migrate" is theoretically linked to individual choice about migration, in practice, this freedom of choice may be pre-empted by cooperation on migration containment and border security, which often goes beyond the mere fight against irregular migration.

The way in which these contrasting goals may trigger a sharp limitation of migrant and refugee mobility rights has been underlined by leading scholars (see, among many, Gammeltoft-Hansen et al. 2017; Costello 2018), who have pointed out that the very same concept of migration and refugee "management" (Geiger and Pécoud 2010) embeds individual protection claims within the remit of travel and border security policies (Betts 2010), preventing migrants from gaining agency and representation (Rother 2013a). Thus, the right "not to migrate", as carved out from the human right to leave, appears to suit

[17] The importance of opening these pathways to allow States to "regain control over their borders" has been stressed by the Special Rapporteur on Human Rights of Migrants, Felipe González Morales, in the *Report on a 2035 Agenda for Facilitating Human Mobility*, UN Doc. A/HRC/35/25, para. 17.

an ambivalent interpretation in the follow-up processes of the GCM. A systemic interpretation of the right "not to migrate" in light of the interplay between Objectives 23 and 11 may in fact represent a leeway to strengthening consensual containment policies even further, especially if the commitment to tackle the root causes of forced migration and mass displacement is not taken seriously.

All in all, both the lack of nominal reference to the principle of non-refoulement and the affirmation that migration shall not be "an act of desperation"[18] are not problematic per se. Yet, their contextual and systemic reading within a system of governance prioritising cooperation on integrated border management over human-centricity risks divesting their content from the expected function as bridges to the fragmentary relation between the human right to leave and the sovereign right to exclude.

3.2.3. Aliens' Treatment upon Entry: On the Rights to Legal Identity and Non-Discrimination

The comprehensive solutions for inter-state cooperation on Objectives 23 and 11 GCM have the potential to adversely affect key individual rights set forth in the GCM, such as the right "not to migrate" and the principle of non-refoulement. Similarly, they seem to affect the right to legal identity, which is of incommensurable importance to preserving the safety and regularity of international mobility, as well as to reducing statelessness.

This right is recalled in Objective 4, committing receiving States to provide migrants with adequate documentation and to "facilitate interoperable and universal recognition of travel documents, as well as to combat identity fraud and document forgery, including by investing in [. . .] biometric data-sharing, while upholding the right to privacy and protecting personal data" (para. 20, *lit.* b). This goal aligns with the commitment of States of origin to cooperate "on identification of nationals and issuance of travel documents for safe and dignified return and readmission", including through biometric identifiers (para. 37, *lit.* c).

The close correlation of the State's duty to recognise migrants' right to legal identity with the digitalisation of border controls, as well as with cooperation on return and readmission, dilutes the potential of this right in terms of advancing the human centricity of the global governance of large movements of migrants and refugees. Again, the digitalisation of the borders triggers the risk of transformation—at the operational level—of the right to legal identity into the right to be identified for return purposes.

Setbacks dependent on the prioritisation of the cluster of rules on global governance over human centricity and the rule of law may also materialise in the realm of aliens' treatment during their stay. The GCM does not commit States to limit recourse to criminal liability against *sans papiers*, nor does it expressly refer to regularisation of undocumented migrants—as it was the case in the Zero Draft (Brouillette 2019, p. 5). Thus, even if Objective 7 commits States to address and reduce vulnerabilities in migration, inter alia by facilitating access to rights for irregular migrants and members of their families (para. 23, *lit.* i), this leaves States' discretion towards undocumented migrants totally untouched.

More generally, the limitation of States' discretion, on the basis of the "overarching obligation to respect, protect and fulfil the human rights of all migrants, regardless of their migration status" (para. 11), rests on a delicate balancing exercise to be conducted at the national level. States' power to differentiate the treatment of aliens is, from this viewpoint, a key trigger of the fragmentation among migratory statuses, aimed at limiting the enjoyment of universal human rights by irregular aliens.

This is confirmed by Objective 17 GCM, dealing with the elimination of all forms of discrimination, which focuses on the application of the general non-discrimination clause for personal characteristics, but does not commit States to curb differential treatment based on nationality or migration status in domestic law. Rather, the regular/irregular

[18] Statement of Archbishop Bernardito Auza, Permanent Observer of the Holy See to the UN, *The Holy See in the Preparatory Processes of the Global Compact For Safe, Orderly And Regular Migration*, 19 October 2018.

divide adds to the dichotomy migrant/refugee, outlining intersecting areas of exclusion and denialism.

Although it can be doubted that effective cooperation on regular migration presupposes this compartmentalisation[19], the GCM perpetuates a limited understanding of the principle of non-discrimination when it comes to the recognition of the universality of human rights of people on the move. Examples of this limitation in binding international rules can be drawn from Arts 14, 21, and 22 ICCPR and Art. 15 of the European Convention on Human Rights (ECHR), which legitimise a differentiated treatment between aliens and citizens justified by democratic society's interests. Even more strikingly, Art. 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) allows distinctions among citizens and denizens on the basis of States' interest in "promoting general welfare".

These distinctions are often justified by reference to migration policy and state sovereign right to protect the borders[20]. However, the trend to reframe any migratory issue at the domestic level as an issue of migration control, to be covered by the exception of Art. 1(2) CERD, has been aptly questioned by prominent scholars (Spijkerboer 2018) and human rights bodies (e.g., the CERD Committee in *Qatar v. United Arab Emirates*)[21]. And, yet, this trend resurfaces from the GCM and its emphasis on well-managed transnational movement of people.

4. On Implementing the GCM through Comprehensive Approaches: Lessons Learned from the EU Border Policies

The systemic interpretation of the GCM, which was highlighted in Section 3, reveals that the legal implications of "comprehensiveness" may differ markedly when applied to the cluster of rules on international cooperation and to that on human centricity. This observation raises further questions concerning how to streamline the impact of comprehensive approaches at the implementing stage, with a view to enhancing, simultaneously, good governance and individual agency. This section draws on the lessons learned from the EU governance of cross-border human mobility pertaining to the functioning of "comprehensiveness" at the operational level, with the aim of contributing to the IMRF follow up. Comprehensiveness is in fact one of the distinctive features of cross-regional border management cooperation at the EU level. In the 2020 Strategic Risk Analysis for European Integrated Border Management (EIBM), the EU Border and Coast Guard Agency—Frontex—identified key challenges in the area of border management and return that need to be addressed "in a coherent, integrated and systematic manner".

Among them, two are particularly relevant, as they shape the overall search for greater policy coherence within the EIBM and related external cooperation. The first is the facilitation of "legal crossing, including for the benefit of tourism and trade", which is pursued through the "use of non-intrusive identification technologies (e.g., fingerprints, facial recognition), while fully respecting fundamental rights" (COM(2022)303, para. 3(g)). The second is the need to tackle "increased international migration, secondary (intra-EU) migratory movements and cross-border smuggling activities" (para. 3(d)(ii)) via prevention of unauthorised border crossings and enhanced return, in order to "strengthen the internal security of the EU and its citizens" (para. 5).

The preventive rationale of the EU border policies is, therefore, mitigated by the facilitation of legitimate travel, alongside the recognition that "[i]ndividuals who seek protection must be granted access to the procedures, while those who do not must also be protected against non-refoulement" (para. 5). In addition to the full acknowledgement of asylum-related rights, the protection of fundamental rights is recognised as an overarching component, which crosscuts all dimensions of the EIBM, ensuring "that effective border

[19] For instance, as pointed out by Guild and Weatherhead (2018), the acknowledgement of the regular/irregular divide in Arts 5 and 68 ICRMW did not enhance international cooperation on labour migration.

[20] ECHR, judgment of 28 May 1985, No. 9214/80 and two others, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, para. 67.

[21] See *supra* at 13.

control and return policy are in line with EU and Member States' international obligations and values" (para. 5). This goal is to be attained in the spirit of solidarity and shared responsibility by EU Member States[22], holding primary responsibility for law enforcement activities, and EU Institutions and Agencies, orchestrating and coordinating cooperation both at the policy level and at the implementation stage. Thus, the principle of shared responsibility works as "an operational translation of the shared competence of the EU and Member States for the implementation of integrated management of the EU's external borders" and is complemented by the duty to cooperate in good faith and the obligation to exchange information (para. 4).

Within this layered migration governance (Kunz et al. 2011; Scholten and Penninx 2016), the nexus established between the sovereign right to control borders and large movements of migrants and refugees is, therefore, steered by internal security concerns, also related to the protection of EU citizens (Carrera et al. 2019a). At the same time, this goal is mediated by the promotion and protection of fundamental rights and the rule of law, which also applies extraterritorially, when EIBM-related activities, imputable to the EU and its Member States, take place inside the territory of third countries (Moreno-Lax and Costello 2014).

This approach feeds the Union's self-representation as a promoter of good governance in its relations with the wider world (Art. 3(5) of the Treaty on EU—TEU) and sketches out an axiological hierarchy between the border security regime and the human rights and refugee regimes, in both EU internal and external action. However, this axiological hierarchy, which operates at the normative level, does not shield the EIBM from its security-driven rationale at the operational level, nor does it create an effective and comprehensive remedial toolbox to ensure normative or logical pre-eminence of human and refugee rights through justiciability (Fink 2020). Rather, the recent expansion of the EIBM's operational dimension, with the most recent reform of Frontex and the establishment of its standing corps, has the potential to further expand the gap between the security-driven rationale of cooperation at the EU's external borders and the prominent role of fundamental rights and the rule of law within the EU legal framework (Section 4.1). Moreover, the security-driven rationale not only guides operational cooperation within the EIBM, it is also embedded in border procedures under the New Pact on Migration and Asylum (Section 4.2) and affects TCNs' treatment within the EU territory (Section 4.3). However, while in the first two areas—i.e., EIBM and border procedures—the security-driven rationale is advanced through comprehensive approaches, in the latter—i.e., the treatment of aliens in Europe—the application of "comprehensiveness" to migrants' fundamental rights appears retrogressive. EU policies on legal migration and TCN integration are, therefore, still dominated by a "silos approach", which appears only in part justified by the inherent limits of EU competences.

4.1. Comprehensiveness under the EIBM

The link between the management of human mobility, asylum, border surveillance, and the internal security of the Schengen area has been established and reinforced in EU policy and practice through recent decades (Brouwer 2008; De Bruycker et al. 2019; Mitsilegas et al. 2020). This development has been paralleled by a tendency to blur the legal boundaries between the respective legal regimes for purposes of operational cooperation within the EIBM, advancing a security-driven understanding of "comprehensiveness" (Hanke and Vitiello 2019).

The construction of the EU's smart borders clearly points in this direction. On the normative side, this goal has required the creation of a layered infostructure, integrating the functioning of the so-called Entry Exit System (EES) with the Visa Information System (VIS) and the European Travel Information and Authorisation System (ETIAS). On the operational side, the adoption of the EES led to the amendment of the Schengen Border Code (SBC) in order to operationalise automated border controls via the introduction of

[22] On the legally enforceable trust-based loyalty among EU Member States, deriving from the principle of solidarity, see the Court of Justice of the EU (CJEU) [GC], judgment of 6 September 2017, C-643/15 and C-647/15, *Slovakia and Hungary v. Council*, for which Labayle (2017).

"e-gates" and "self-service systems" (see Regulation (EU) 2017/2225). The digitalisation of visa processing, envisaged by the Commission in order to create "better synergies between EU visa policy and EU external relations", completes the construction of the EU's smart borders (see Regulation (EU) 2021/1134 and COM(2018)251).

Additionally, the strengthening of the EIBM counter-terrorism component has been pursued through amendments of the SBC allowing for systematic checks against law enforcement databases on all persons (Regulation (EU) 2017/458). Furthermore, three other layers of amendment to existing legislation have contributed to shaping the EU's "smart borders": the recasting of the Schengen Information System (SIS II), to improve the use of biometric identifiers and include automated fingerprint search functionality for law enforcement and return purposes (Tassinari 2022); the extension of the European Criminal Records Information System to third country nationals (ECRIS-TNC); and the empowerment of the EU Agency for the operational management of large scale IT systems in the area of freedom, security, and justice (eu-LISA).

The comprehensive control over human mobility has also been boosted by means of enhanced interoperability of information systems for borders and visas, on the one hand, and for police and judicial cooperation, asylum, and migration, on the other (Curtin 2017; Brouwer 2020; Vavoula 2020). Concurrently, Frontex has been mandated to boost the "operational interoperability" between the Eurosur system and a complex web of non-EU risk analysis networks dispersed along key migratory routes (Regulation (EU) 2019/1896, Art. 8(1)(s)). Moreover, de-compartmentalisation has been pursued through the integration of the Eurosur Fusion Services within the European Maritime Information Sharing System by means of a massive deployment of sensor and satellite technology and enhanced inter-agency cooperation (Val Garijo 2020).

In this way, the EU's smart borders become part of an anticipatory border governance, based upon pre-emption of unauthorised human mobility and automated data gathering/processing. Within the European Agenda on Security, they allow "a more joined-up inter-agency and cross-sectoral approach" to hybrid threats, by blending migration management, counterterrorism, and external defence policy settings (Carrera and Mitsilegas 2017, p. 8). This approach prompts the blurring of regulatory boundaries between different EU policies and overcomes the division of rules and competences characterising the "different silos" of European policies having a security component within the realms of the Common Security and Defence Policy (CSDP) and the Area of Freedom, Security and Justice (AFSJ)[23].

Comprehensiveness under the EIBM is, therefore, purposed to enhance the interconnectedness between the border regime and human mobility in order to improve the protection of borders. Even if this approach is intended to promote a less-fragmented EIBM, operating in full compliance with fundamental rights, including data protection, its security-driven rationale dilutes the quest for human centricity and respect for the rule of law. As a result, human mobility across external borders has been managed by neatly distinguishing the treatment and access rights of people from the Global North from those belonging to the Global South, with the former widely liberalised and the latter stringently regulated (Mau et al. 2015).

However, this is not necessarily a consequence-by-design of high-tech and digitalised borders. Digitalisation is, in fact, theoretically neutral for fundamental rights and may even be used to enhance protection, for instance, by using Eurosur Fusion Services to enhance the search and rescue capability of saving lives at sea or to help identify vulnerable persons and channel asylum seekers by the appropriate procedure (COM(2022)303, paras 5(12) and (17)). Similarly, high-tech innovation may be devoted to enhance monitoring for accountability purposes, by allowing the recording of any possible incident happening at the external sea borders and involving potential human rights violations via forensic technologies (Pezzani 2019). Nonetheless, as the system is risk-driven and unauthorised

[23] On the legal challenges linked to this cross-sectoral approach, see, e.g., EDPS, *Reflection paper of 17 November 2017 on the interoperability of information systems in the area of Freedom, Security and Justice*, p. 9.

mobility is *ipso facto* considered to be a hybrid threat[24], such an outcome is hindered, in practice. Thus, the quest for comprehensiveness contributes to widening the gap between the normative and operational cornerstones of the management of large movements of people across the European borders.

4.2. De-Compartmentalisation under Schengen Cooperation and EU Migration and Asylum Law

Schengen cooperation is premised on the preservation of internal security, triggering (inter alia) the prevention of irregular migration headed to the EU, the intensification of migration-related policy checks inside the territory of the EU to curb the so-called secondary movements (De Somer 2020), and the establishment of an integrated return management system to facilitate the removal of third country nationals who do not enjoy the right to remain in the EU. The same security rationale guides the allocation of asylum responsibilities under Dublin cooperation, which is inspired by the "idea that each Member State is answerable to all the other Member States for its actions concerning the entry and residence of third-country nationals and must bear the consequences thereof"[25].

Furthermore, the multifaceted strategy for surveillance and control—carried out by EU Member States in response to mass displacement beyond its external borders—has led to the development of two parallel trends. First, the externalisation of these responsibilities to neighbouring countries through increasingly advanced forms of de-territorialised surveillance and contactless control (Moreno-Lax 2020), which are premised on bilateral relations with third countries (e.g., Italy and Libya, Spain and Morocco, Greece and Turkey), but also among the Member States (e.g., the cooperation on "informal readmission" between Italy, Slovenia, and Croatia)[26]. Second, the reproduction of the main features of the extraterritorial governance of migration at the Member States' internal borders, intended to exclude unauthorised mobility from the reach of core universal human rights.

The latter trend has been shaped by two interrelated legal premises revolving around the rivalry of territorial access to rights (Schlegel 2020): *(i)* the legal fiction of non-entry within the Member States' territorial jurisdiction[27] and *(ii)* the functional approximation of internal border checks to external border surveillance, prompted by an extensive reading of the public policy exceptions to the prohibition of internal border controls[28].

The combined effect of these trends has sharply restricted the access to and enjoyment of asylum in Europe, while raising further human rights concerns due to the militarisation of migration management (Mitsilegas 2019), the proliferation of border violence (Kuskonmaz and Guild 2022), and the de-humanisation of people on the move (Moreno-Lax 2018).

The proposals set forth in the New Pact on Migration and Asylum add to this complexity by advancing the idea of de-compartmentalising EU policies on international protection, migration, and border management for purposes of efficiency and sustainability. The combined reading of the proposals for a Regulation on the pre-entry screening (COM(2020)612) and a Regulation on migration and asylum management (COM(2020)611) seems to uphold the development of this idea, by strengthening the "extraterritoriality triggers" in the governance of territorial asylum in Europe, while presupposing a further expansion of the EU external action to divert migration to third countries (Cassarino and Marin 2022).

This picture is completed by the proposed reform of the SBC (COM(2021)891) to respond to the unscrupulous recourse to the clauses for the temporary reintroduction of border controls by the Member States (Guild 2021a; Morvillo and Cebulak 2022)[29]. While attempting to preserve the area of free movement from inter-state mistrust and external

[24] See, e.g., European Council Conclusions of 21–22 October 2021, EUCO 17/21, para. 19.

[25] CJEU, judgment of 26 July 2017, C-646/16, *Jafari*, para. 88.

[26] This cooperation led to chain refoulement on the Balkan route, also condemned by the ECtHR, judgment of 18 November 2021, Nos 15670/18 and 43115/18, *M.H. and Others v. Croatia*.

[27] See, e.g., European Parliament Resolution of 10 February 2021, *Implementation of Article 43 of the Asylum Procedures Directive*, P9_TA(2021)0042.

[28] For which see CJEU [GC], judgment of 19 March 2019, C-444/17, *Arib*.

[29] For which, see CJEU [GC], judgment of 26 April 2022, C-368/20 and C-369/20, *Landespolizeidirektion Steiermark*.

shocks, the reform may legitimate a further expansion of interstate cooperation on informal readmissions. That could be a foreseeable consequence of abandoning the stand-still clause set forth in Art. 6(3) of the so-called Return Directive, which limits this cooperation to existing bilateral arrangements on the removal of irregular aliens detected "outside of the vicinity of internal borders" (recital 27 of the proposed reform of the SBC). Additionally, the reform promotes comprehensiveness through enhanced police cooperation under Art. 23 SBC[30], pointing out how police cooperation and the digitalisation of internal borders may help bridge the gap between the freedom of movement in Art. 22 SBC—which does not allow differential application on national basis[31]—and the safeguarding of internal security under Art. 72 of the Treaty on the Functioning of the EU (TFEU). In doing so, it is grounded on the proposals to add a Eurodac category to fingerprint people given temporary protection[32] and to adopt an EU bill on screening covering people rescued during SAR operations at external borders[33]. These proposals are accompanied by a (new) solidarity mechanism for the (voluntary) relocation of people rescued at sea, which should help reach a fairer balance between solidarity and responsibility within the framework of EU immigration and asylum policies.

Although these proposals use de-compartmentalisation to overcome the impasse of Schengen cooperation and the Dublin system, they are construed such that they expand the recourse to the abovementioned legal fiction of non-entry for "undesirable" migrants and asylum seekers. For them, the de-compartmentalisation of EU Schengen and asylum cooperation seems fated to dilute or postpone territorial access to rights and to asylum within the jurisdiction of the Member States[34]. From this perspective, administrative requirements at the external borders and migration-related policy checks at the internal borders become "the most dangerous law of the land" (Crépeau 2017, p. 13).

4.3. Compartmentalisation of Regular Migration and EU Citizen-TCN Denizen Divide

Security-driven comprehensiveness impacts the human-centricity of EU migration and asylum policies at both the external borders and extraterritorially. Compartmentalisation and a "silos approach" in tandem affect the treatment of aliens within the territory of Member States, triggering multiple intertwining fractures between different lanes of regular or quasi-regular residence.

For migrants holding a regular residence permit, this approach translates into a plurality of legal statuses—mostly linked to the skills divide—which create a patchy picture of many shades of "fairness" (Vitiello 2022a, p. 175). For asylum seekers and undocumented migrants at risk of refoulement, the sectoral approach triggers the fracture between the right to remain—framed as a diminished condition, which cannot be equated to the entitlement to a residence permit[35]—and the right to enter the labour market. As confirmed by the Report "Making Integration Work" of the Organisation for Economic Co-operation and Development (OECD), the split between asylum and labour paths for TCNs holding a right to remain represents one of the main hindrances to comprehensive strategies of integration and inclusion. The overall result is an increasing casualisation of access to socio-economic rights for TCNs (UN Doc. A/HRC/47/30, para. 55 ff.), thwarting the European rule of law (Tsourdi 2021).

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30 Justice and Home Affairs Council, 9–10 June 2022, Press Release 534/22.

31 Refer, e.g., to CJEU, judgment of 13 December 2018, C-412/17 and C-474/17, *Touring Tours*, underlining that national legislation on carrier sanctions, requiring transport operators to check passengers' passports and residence permits in intra-EU services, has an equivalent effect on external border checks and is, therefore, contrary to the SBC. See also CJEU [GC], judgment of 22 June 2010, C-188/10 and C-189/10, *Melki and Abdeli*.

32 On the recourse to this form of protection for Ukrainian refugees, see Council Implementing Decision (EU) 2022/382.

33 Council of the EU, *Asylum and migration: the Council approves negotiating mandates on the Eurodac and screening regulations and 21 states adopt a* declaration *on solidarity*, Press Release 580/22.

34 The CJEU has reacted to this trend in a number of recent judgments, among which refer to the judgment of 30 June 2022, C-72/22 PPU, *Valstybės sienos apsaugos tarnyba*. On the self-restraint of the ECtHR, see, e.g., the judgment of 5 April 2022, Nos 55798/16 and four others, *A.A. et al. v. North Macedonia*, paras. 114–15.

35 See Art. 9 of Directive 2013/32/EU.

The compartmentalisation of TCN legal statuses is accompanied by a limited understanding of the principle of non-discrimination on national basis (Art. 18 TEU; Art. 21(2) EU Charter of Fundamental Rights—EUCFR)[36], compared with the general non-discrimination clause based on personal characteristics (Art. 19 TFEU, Art. 21(1) EUCFR). This fragmented approach to non-discrimination does not allow the principle of equality laid out in Art. 20 EUCFR to play a role in firming up the enjoyment of national treatment or proximate rights for TCNs within the EU legal system (Robin-Olivier 2022).

This fragmentation is justified by the EU citizen-TCN denizen divide under EU law[37]. On the one hand, European citizens' right to free movement has been connoted as a full right to immigrate to a Member State that is different from the State of origin. In this way, the enjoyment of the so-called fourth freedom (Trachtman 2009) has realigned the universal human right to emigrate with European citizens' right to immigrate, sharply limiting—if not setting aside—EU Member States' sovereign power to determine the conditions for admission of foreigners who are European citizens and their families[38]. On the other hand, for TCNs holding a regular residence permit, whose family members are EU citizens, compartmentalisation ensures the preservation of the privileged status of EU citizens; however, if this family link is lost, the other connection criteria (e.g., duration of legal residence and exercise of free movement rights as a former family member of an EU citizen) remain weak and unable to ensure stable residence and the preservation of a regular status[39].

More generally, compartmentalisation, alongside the degree of discretion left by EU law to national authorities in the fields of TCN integration and legal migration, allows Member States to disconnect issues of territorial admission and legal sojourn of aliens from those of TCN treatment and access to rights, including socio-economic rights (Carrera et al. 2019c). This "lane switching" (Vankova 2022) contributes to putting the feasibility of a holistic human rights exegesis of migrant and refugee rights into jeopardy and, simultaneously, fosters a binary nexus between the preservation of States' sovereign control on borders and cooperation with third countries in the field of readmission (Cassarino 2022) and development aid (Panizzon 2017; Seeberg and Zardo 2020).

5. Conclusions

The role of the EU in advancing a less fragmented global governance of migration has been highly significant, both as a source of innovative cooperative models and as a laboratory for their implementation. As reaffirmed by the 2020 European Regional Review of the GCM, EU law and practice seem equally pertinent to the debate on future applications of the GCM in the aftermath of the IMRF.

One key aspect on which further attention should be devoted regards the relation between policy coherence and comprehensive responses to large movements of migrants and refugees. At the EU level, this dyad has been high on the political and institutional agenda since the launch of the Global Approach to Migration and Mobility (GAMM), back in 2011, gathering particular momentum with the 2015 refugee crisis[40]. Most recent developments, linked to the increasing risks of dismantling Schengen and Dublin cooperation, and aggravated by the war in Ukraine, have further strengthened the functional nexus between the quest for policy coherence and a holistic approach to migration, asylum, and border management.

[36] For which, see CJEU, judgment of 4 June 2009, C-22/08 and C-23/08, *Vatsouras and Koupatantze*, para. 52.

[37] CJEU [GC], judgment of 2 September 2021, C-930/19, *Belgian State*.

[38] On the nature of this limitation and its strict application to citizens of EU Member States, which excludes a possible extension to TCNs by analogy, see CJEU, judgment of 9 June 2022, C-673/20, *Préfet du Gers et Institut national de la statistique et des études économiques*.

[39] CJEU [GC], judgment of 2 September 2021, *Belgian State (Right of residence in the event of domestic violence)*, case C-930/19.

[40] European Parliament Resolution of 12 April 2016, *The Situation in the Mediterranean and the Need for a Holistic EU Approach to Migration*, P8_TA(2016)0102.

As a result, the direction in which the reform of EU migration governance seems to be heading shows the prospective expansion of de-compartmentalisation strategies, based on the notion of "comprehensiveness", in the search for an efficient and sustainable balance between solidarity and responsibility. In this sense, de-compartmentalisation of EU policies appears to be part of a stable trend targeting comprehensive and holistic approaches as the appropriate means to an end of reducing "the distributive asymmetries on the ground"[41]. At the same time, the aim embedded in the New Pact of de-compartmentalising EU policies on international protection, migration, and border management seems to be deeply affected by national interests, which are mostly conveyed by claims over the pre-eminence of the principle of sovereignty in the management of external borders.

At the EU level, this principle is well recognised and ensures equality of the Member States before the Treaties and respect for their "national identity" (Art. 4(2) TEU). However, its degradation to national interest has impacted the exercise of EU competences, especially in the AFSJ, while negatively affecting solidarity and responsibility sharing (Karageorgiou and Noll 2022; Moreno-Lax 2017b; Thym and Tsourdi 2017), also within the New Pact (De Bruycker 2020).

In connection with this trend, compartmentalisation remains the rule within the governance of regular migration, affecting the treatment of aliens holding a legal entitlement to stay in Europe and their prospects of integration. Though a silver lining may be found in the pursuit of synergies between the EU immigrant integration policy and the European Pillar of Social Rights (COM(2020)758, para. 3), legal migration and the treatment of aliens in the EU remain anchored to a retrogressive understanding of comprehensiveness. Partly justified by the EU citizen–TCN denizen divide, this understanding seems much more dependent upon the lack of political will to overcome the "silos approach" than on the limits of EU competence in the field (Vitiello 2022a, p. 184).

The case of the EU migration governance clearly confirms that comprehensiveness is an ambivalent concept that may serve the purpose of a more balanced and sustainable understanding of human mobility, but may also strengthen existing patterns of securitisation and containment. As such, its relationship with the notion of policy coherence should be better substantiated. If we accept "the systemic promotion of mutually reinforcing policy actions [...] creating synergies towards achieving the agreed objectives" as a viable definition of "policy coherence"[42], then overcoming fragmentation or siloed approaches is just one facet. Without making sure that policy actions are owned by people and integrate their claims, this facet alone may be unsuited to promote any transformative agenda. This is clearly demonstrated by the systemic and contextual interpretation of the GCM highlighted in Section 3. Indeed, within the GCM, the outcome of comprehensive and interconnected approaches seems to depend on a blurred differentiation between the two main clusters of rules around which the GCM's Objectives pivot. This differentiation may be construed along two axes: the first matching national sovereignty and good global governance and the second running along the *continuum* between human-centricity and the rule of law.

This article contends that the GCM establishes a stronger nexus between the determinants of the axis pertaining to the intergovernmental realm, by plainly functionalising good governance to national sovereignty claims. As a result, the main achievements of the GCM are likely to be obtained in the portion of the "quadrant" matching international cooperation on migration management with sovereignty-based concerns, while the degree of consideration for individual agency remains variable and undetermined (see Figure A1, Appendix A). At the same time, a functional nexus between the determinants of the other axis can hardly be detected, so that the new global governance of migration appears largely reproductive of existing trends of migration management "without migrants" (Rother 2013b).

Content-wise, the tangible result is a blurred connection between the GCM's guiding principles, which has been attained either through legal and operational layering

[41] On the failure of the EU to "accurately gauging the distributive asymmetries on the ground", see Maiani (2020).

[42] *Policy Coherence for Sustainable Development 2018: Towards Sustainable and Resilient Societies*, Organisation for Economic Co-operation and Development (OECD), Paris.

(Panizzon 2022) or "lane switching" (Vankova 2022). Layering has allowed the targeting of integrated border management as the prime venue for cooperation on safe, orderly and regular migration, while lane switching has granted the endurance of a conservative approach to the immigrant/refugee dichotomy[43]. Although this blurring exercise may be seen as an attempt to curb the fragmentation of IML, it risks expanding the room for cherry-picking and deviation at the national level, by offering States *à la carte* solutions for security-driven migration policies (Farahat and Bast 2022). This risk, which has materialised in relation to the EU policy on integrated border management and its defective accountability system (Guild 2021b; Kilpatrick 2022), has been acknowledged by the UN Special Rapporteur on the Human Rights of Migrants in his 2021 Report on pushback practices (UN Doc. A/HRC/47/30, paras. 53–56).

At the same time, this article argues that the volatile and unbalanced relation between the determinants of the two axes along which the GCM's commitments are construed may trigger the progressive development of nascent rules of international law, especially in the field of international cooperation on the readmission of aliens. Even if this progressive development may enhance the overall comprehensiveness of the global governance of migration, by unifying existing trends that have developed at the local/regional level, it may, simultaneously, produce retrogressive results in terms of policy coherence. Similarly, if not channelled through a shared understanding of policy coherence, those comprehensive responses to the quest for safe, orderly and regular migration risk thwart the accomplishment of the GCR's goals, which seem to be equally trapped in an obsolete "contained mobility" approach (Carrera and Cortinovis 2019).

Reversing these trends would necessitate a further development of the axis on human-centricity and the rule of law within the global governance of migration. This would require a strong political consensus on the substance of procedural rights associated with human mobility—a consensus of the type on which effectiveness and legitimacy of international law generally rest (Peters 2017). By exerting leverage on a broad understanding of the rule of law, such a shift may provide a more balanced exegesis of the different normative inferences that may be determined by departing from the same GCM's objectives. Enhancing accountability for human rights violations at the borders, together with a rule-of-law-based understanding "good governance", would thus become a more achievable result.

Additionally, reorienting the quest for safe, orderly and regular migration onto a rule-of-law/human-centricity track may help counter the wide discretion enjoyed by national authorities in migration matters, by putting the emphasis on collective responsibility for migrants and refugees. This would in turn reconnect the search for comprehensiveness to the quest for policy coherence, while diluting durable hurdles impacting intergovernmental cooperation on human mobility—as has been proven by the EU's response to the war in Ukraine (Vitiello 2022b).

This may seem an impossible path. Nonetheless, this perception may change if the search for "comprehensiveness" is fully aligned with a rule-of-law-based understanding of policy coherence, which fully acknowledges that "the rule of law is not a passive standard but a shape-shifter of long pedigree" (Dauvergne 2004, p. 607).

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[43] The immigrant/refugee dichotomy is a distinctive feature of the new global governance of large movements of migrants and refugees. As eloquently affirmed by the Ambassador Mr. João Vale de Almeida, Head of the EU Delegation to the UN, at the opening session for the GCM's Zero Draft: "since the aim of the Global Compact is to enhance international cooperation on safe, orderly and regular migration and reduce irregular migration—and the negative implications it has for countries of origin, transit, and destination as well as for migrants themselves—the text should better distinguish between regular and irregular migrants. It should avoid any language that might be interpreted as justification or even an incentive for irregular migration".

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Appendix A

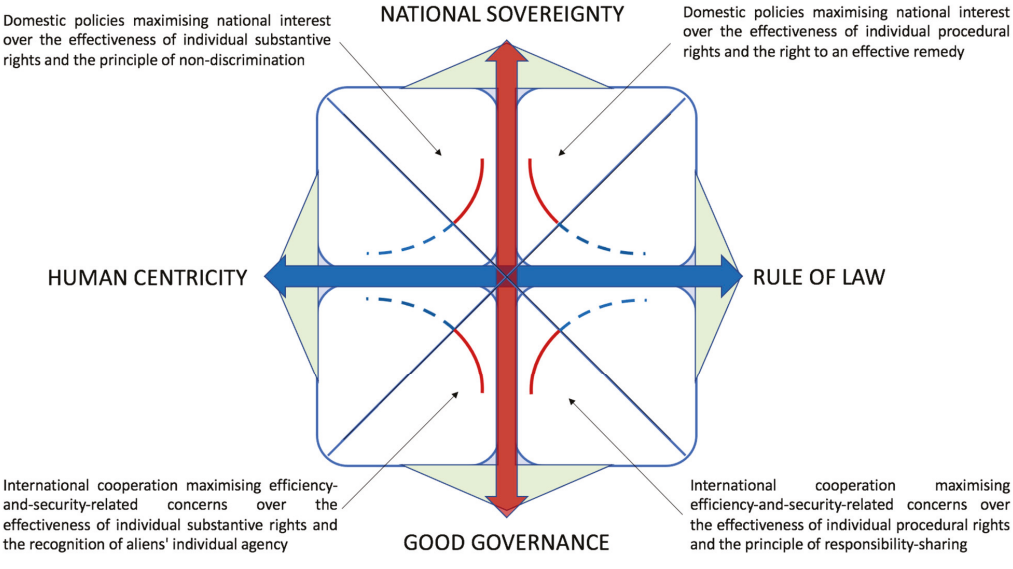

Figure A1. Determinants of the comprehensive approach interconnecting the GCM objectives.

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The Follow-Up and Review Mechanisms of the Global Compacts: What Room Is There for Human Mobility in the Context of Disasters and Climate Change?

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Abstract: Human mobility in the context of disasters and climate change (HMDCC) is a complex problem, which is planetary in scope and intergenerational in its impact. From the mid-seventeenth century's little ice age to the rising sea levels due to climate change, people have been driven to move by environmental factors for a long time. Yet, an international treaty regime that addresses the protection needs of persons mobile due to environmental factors has never been created. Against this backdrop, the Global Compacts were negotiated to reflect a "sophisticated" understanding of HMDCC, and their adoption enables cooperation on a wide range of policies and laws to this effect. Examining the implementation of the Global Compacts with respect to the commitments relating to HMDCC, this article finds that States and non-State actors have cooperated to address data gaps and to incorporate mobility considerations into national frameworks on climate change and disaster management. However, States must implement all dimensions of their commitments relating to HMDCC, especially with regards to the facilitation of migration as an adaptation strategy to disasters and climate change, in order to build a comprehensive approach.

Keywords: global compact for safe; orderly and regular migration; global compact on refugees; climate change; disasters; human mobility; migration; displacement; international cooperation

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1. Introduction

On 13 December 2021, a loud outcry was raised when Russia and India voted against the draft United Nations (UN) Security Council resolution that casted climate change as a threat to international peace and security (International Crisis Group 2021). Tabled by Ireland and Niger, and supported by 113 States, the draft resolution is a testament to the urgent need to globally address the effects of climate change and disasters (UN 2021). Simply put, climate change contributes to more intense and frequent sudden-onset disasters, such as cyclones, and slow-onset disasters, such as desertification (IPCC 2021). This aggravates stressors people are already experiencing (hence the idea that climate change is a "threat multiplier") and fuels instability (UN 2019). It also adversely impacts the enjoyment of fundamental human rights, including the right to life (Human Rights Committee 2020; United Nations Committee on the Rights of the Child 2021).

One of the most significant effects of climate change and disasters are on human mobility (Burson et al. 2018). Human mobility here can be understood to consist of three types of movement: migration (generally refers to voluntary movement), displacement (generally refers to involuntary movement) and planned relocation (refers to the resettlement of groups of individuals, generally with government assistance). Human mobility in the context of disasters and climate change (HMDCC) ranges from internal to cross-border, from temporary to permanent, and from planned to unplanned movement (Ferris and Weerasinghe 2020). In 2020 alone, a series of devastating disasters internally displaced 30.7 million people globally (IDMC 2021). Furthermore, as many as 216 million people could

move within their own countries across 6 regions of the world due to slow-onset climate change impacts by 2050 (World Bank 2021).

It is no wonder then that when the negotiations for the Global Compacts began in 2016, the adverse impacts of climate change, disasters and environmental degradation became an integral part of the discussions right off the bat. The zero drafts of both compacts incorporated measures to address the protection needs of persons moving in the context of disasters and climate change, which survived with modifications until adoption (GCM 2018a; GCR 2018a). The adopted versions call for coherent approaches to address HMDCC (McAdam and Wood 2021). The Global Compact for Migration dedicates the only thematic cluster in the whole document to "natural disasters, the adverse effects of climate change and environmental degradation" (GCM 2018b). It calls for strengthening resilience and preventing displacement to help people stay, on the one hand, and preparing for planned and regular migration to allow people to move out of harm's way, on the other (GCM 2018b). The Global Compact on Refugees designates environmental factors as "drivers which interact with root causes of refugee movement" (GCR 2018b). It also draws attention to avoiding protection gaps and enabling all those in need of international protection to find it (GCR 2018b).

This article examines how States translated their commitments under the Global Compacts with respect to HMDCC. To do so, it first places HMDCC in international law and policy by drawing attention to the significant efforts made before the adoption of the Global Compacts. It then examines the content of the commitments with respect to HMDCC in the Global Compacts. Next, it briefly describes the follow-up and review mechanisms devised to monitor the implementation of the Global Compacts, followed by an analysis of the measures taken with respect to HMDCC during implementation.

This exercise contributes to understanding the content and the implementation of States' commitments under the Global Compacts with respect to disasters and climate change. It also produces valuable insights for the 2023 Global Refugee Forum, as well as related international processes, such as the UN General Assembly's elaboration of a binding convention on the protection of persons in the event of disasters, the UN International Law Commission's (ILC) preparation of an issues report on the protection of persons in the event of sea-level rise, and the work of the newly appointed Special Rapporteur on the promotion and protection of human rights in the context of climate change.

2. Zooming out: HMDCC in International Law and Policy Prior to the Adoption of the Global Compacts

Especially since the "rebirth" of the studies on the migration-environment nexus in the 1980s, international actors have been attempting to address HMDCC (Mayer and Crépeau 2017; Piguet et al. 2011). However, these attempts have been fragmented and focused on particular aspects of HMDCC instead of offering a comprehensive approach.

For instance, looking at the security nexus, the UN Security Council has held open debates and Arria Formula meetings on the issue of climate change, international peace and security since 2007 (for example, UNSC 2007, 2015). Although the open debates have not led to the adoption of resolutions on the topic, the Security Council has expressed its "concern that possible security implications of loss of territory of some States caused by sea-level-rise may arise, in particular in small low-lying island States" in a Presidential Statement in 2011 (UNSC 2011).

Another example is the focus on cross-border displacement. In 2012, Switzerland and Norway initiated a State-led consultative process named the Nansen Initiative, which eventually led to the adoption of a legally non-binding agenda, the Nansen Agenda for the Protection of Cross-Border Displaced Persons in the Context of Climate Change (Nansen Initiative 2015; Gemenne and Brücker 2015). Currently, the Platform on Disaster Displacement (PDD) implements the Agenda—which is endorsed by 109 governmental delegations—by promoting measures and bringing together partners (Kälin 2015).

The piecemeal approach to addressing HMDCC has been particularly evident in international treaty regimes. Here, international actors concerned themselves with interpreting the responsibilities of States to address particular aspects of HMDCC under the respective treaties. For instance, the UNHCR Executive Committee mandated the organisation to look at the issue of international protection of "environmentally displaced persons" since 1989 and played a significant role in the interpretation and application of the Refugee Convention and its Protocol to HMDCC (Goodwin-Gill and McAdam 2017). Under the auspices of the UNFCCC, a Task Force on Displacement was established in 2015 to work on "averting, minimizing and addressing displacement related to the adverse impacts of climate change" (UNFCCC 2016, 2018). Within the auspices of the UNCCD, Member States adopted a decision to study the role desertification/land degradation and drought play as one of the drivers that causes migration (UNCCD 2017). Similarly, interpreting the responsibilities of States under International Labour Standards, the ILO has been focusing on labour migration in the context of environmental changes, and advocating that migration has the capacity to be an effective adaptive strategy to environmental changes (Kagan et al. 2017).

The relevant responsibilities of States under general international law principles have also been studied by experts. For instance, the UN ILC adopted the Articles on the Protection of Persons in the Event of Disasters in 2016 (ILC 2016; UNGA 2016a; Bartolini 2019) and the International Law Association has adopted the Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise in 2018 (ILA 2018). Notably, the former instrument aims to "facilitate the adequate and effective response to disasters, and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights", whereas the latter instrument reaches beyond that to address the admission, stay and return of non-citizens in the event of sea-level rise (ILC 2016; Vidas et al. 2019).

The main commonality in these initiatives is the emphasis on a human rights-based approach. The UN Human Rights Council has adopted several resolutions addressing human rights and climate change since 2008 (for example, HRC 2008, 2014, 2020a), which play a pivotal role in the interpretation and application of international human rights treaties to HMDCC (OHCHR 2020). For instance, the first mention of human rights in the context of the UNFCCC was made in 2010 with a reference to the Human Rights Council's Resolution 10/4, which was adopted a year earlier (UNFCCC 2010; HRC 2009). Furthermore, the Human Rights Council has pioneered the creation of key Special Rapporteurs who have conducted studies which have been contributing to the understanding of HMDCC. For instance, the work of John Knox, the Special Rapporteur on Human Rights and the Environment, has led to the identification of framework principles on the enjoyment of a safe, clean, healthy and sustainable environment (HRC 2018).

Acknowledging that HMDCC is too complex and the danger of oversimplifying is too great, these initiatives served as important vehicles to explore and promote comprehensiveness (Naser 2021).

3. Zooming in: The Global Compacts and HMDCC

Against the backdrop of over three decades of fragmented efforts to develop approaches to address HMDCC, the New York Declaration for Refugees and Migrants, which launched the negotiation and consultation processes for the Global Compacts, started with the acknowledgement that people move "in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors", as well as for a combination of reasons including environmental, economic, social, political and developmental reasons (UNGA 2016b).

The added values of the Global Compacts to addressing HMDCC are threefold. First, the Global Compact for Migration attempted to provide a (more) comprehensive approach to HMDCC through a "packaging exercise" of the existing obligations and common understanding of States particularly under Objectives 2, 5, 7, 18 and 21 (Kowlowski 2019; Panizzon 2017). Objective 2 of the compact concerns the minimization of the adverse

drivers and structural factors that compel people to leave their country of origin. Paragraphs (h) to (l) of this objective are dedicated to natural disasters, the adverse effects of climate change and environmental degradation, in which States have committed to:

(h) strengthen the joint analysis and sharing of information to better map migration movements;
(i) develop adaptation and resilience strategies to manage sudden-onset and slow-onset natural disasters, the adverse effects of climate change and environmental degradation, taking into account the potential implications for migration;
(j) integrate displacement considerations into disaster preparedness strategies and promoting cooperation;
(k) harmonise and develop approaches and mechanisms at the subregional and regional levels;
(l) develop coherent approaches by taking into account State-led consultative processes, such as the Nansen Protection Agenda and the PDD.

Objective 5 complements the above commitments by aiming to enhance the availability and flexibility of pathways for regular migration. States have particularly committed to facilitate labour mobility in accordance with the ILO standards, guidelines and principles in compliance with international human rights law, such as through free movement agreements, visa liberalization or multiple-country visas, and labour mobility frameworks. Paragraph (g) commits States to developing or building on existing national and regional practices for admission and stay based on compassionate, humanitarian or other considerations for migrants compelled to leave their countries of origin owing to sudden-onset natural disasters and other precarious situations. Furthermore, under paragraph (h), States have specifically committed to cooperate to identify, develop, and strengthen solutions for migrants compelled to leave their countries of origin owing to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, including by devising planned relocation and visa options in cases where adaptation in or return to their country of origin is not possible.

States have further committed to addressing and reducing vulnerabilities in migration under Objective 7, to invest in skills development and to facilitate the mutual recognition of skills, qualifications and competences under Objective 18, and to commit to upholding the prohibition on the collective expulsion and return of migrants when there is a real and foreseeable risk of death, torture or other cruel, inhumane and degrading treatment or punishment, or other irreparable harm, in accordance with international human rights law under Objective 21.

Second, the Global Compact on Refugees communicates States' most recent understanding of the refugee—climate change nexus. In paragraph 8, States recognised that:

> [w]hile not in themselves causes of refugee movements, climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements. In the first instance, addressing root causes is the responsibility of countries at the origin of refugee movements. However, averting and resolving large refugee situations are also matters of serious concern to the international community as a whole, requiring early efforts to address their drivers and triggers, as well as improved cooperation among political, humanitarian, development and peace actors.

With this statement, States have endorsed the UNHCR's interpretation that under the Refugee Convention and its Protocol, the refugee definition does not expressly cover those fleeing natural disasters, environmental degradation, or climate-related factors. However, situations of "nexus dynamics", where the refugee criteria interact with disasters or the adverse effects of climate change, arise, which may entitle people to international refugee protection (for a discussion on how the Global Compact on Refugees makes "inroads" into the overall paradigm of refugee protection, see, Alexander and Singh 2022).

Furthermore, in paragraph 63, the Global Compact on Refugees also refers to providing guidance and support for measures to address other protection and humanitarian challenges, which includes "measures to assist those forcibly displaced by natural disasters". This acknowledgement, in turn, feeds into the implementation of the commitments in paragraph 61, which must be conducted "in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it".

Third, both compacts offer a systematic approach to addressing HMDCC, which can be grouped under four non-exclusive headings: prevention, facilitation, protection, and cooperation. Prevention can be understood as tackling the conditions that might lead to displacement in the context of disasters and climate change in the first place (see Objectives 2(i) and (j) of the Global Compact for Migration, and paragraph 8 of the Global Compact for Refugees). Facilitation refers to opening-up regional and international migration pathways to enable people to use migration as an adaptation strategy to disasters and climate change (see Objectives 2(k), 5 and 18 of the Global Compact for Migration). Protection takes many forms, from integrating HMDCC considerations into existing laws and policies to providing temporary protection and humanitarian stay arrangements (see Objectives 2(j), 5(h) and (g), 7, 21 of the Global Compact for Migration, and paragraphs 8, 61 and 63 of the Global Compact on Refugees). Finally, cooperation, although embedded throughout the compacts (Panizzon 2022), can specifically be understood to measures such as collecting and sharing information to better map HMDCC, developing coherent approaches by taking into account cooperative platforms such as the PDD, as well as seeking support from the international community to address "external forced displacement that may result from sudden-onset natural disasters and environmental degradation" (see Objectives 2(h) and (l) of the Global Compact for Migration, and paragraphs 12 and 63 of the Global Compact on Refugees).

As this brief analysis of States' commitments under the Global Compacts demonstrates, significant dimensions of HMDCC were addressed for the first time in an integrated fashion. The outcome is not an exhaustive descriptive list of possible legal and policy options, nor is it a prescriptive list in favour of creating a new protection mechanism to address HMDCC. For instance, services mobility under World Trade Organization's General Agreement on Trade in Services, the so-called WTO GATS Mode 4, is not included. This is a missed opportunity, because GATS Mode 4 contains legally binding commitments that multilaterally open the national services markets for natural persons (Panizzon 2010). Developing new commitments or improving on the existing commitments under GATS Mode 4 could facilitate migration as an adaptation strategy. States' commitments with respect to HMDCC therefore captures the understanding that, whilst preparing for planned and regular migration to allow people to move out of harm's way is important, strengthening resilience and preventing displacement to help people stay is also crucial (McAdam 2021). This calls for, on the one hand, facilitating migration as an adaptation strategy to the impacts of disasters and climate change via, for instance, devising free movement agreements, visa liberalization, and recognizing qualifications to allow access to labour mobility. On the other hand, it also calls for allowing people to stay by integrating displacement considerations into disaster preparedness as well as by developing adaptation and resilience strategies.

4. The Follow-Up and Review Mechanisms of the Global Compacts as Opportunities to Cooperate to Address HMDCC

4.1. A Brief Introduction to the Follow-Up and Review Mechanisms

The follow-up and review mechanisms of the Global Compacts enable concrete frameworks for action and provide the opportunity to internationally cooperate to implement States' commitments (Guild and Wieland 2020). Since both compacts refer to the impacts of climate change, natural disasters and environmental degradation, it would be expected that the implementation stage would lead to the development of dedicated policy and legal responses on HMDCC.

Looking at the Global Compact for Migration, there are three pillars of implementation: the UN Network on Migration, the International Migration Review Forum (IMRF), and a capacity-building mechanism. These mechanisms can be viewed as hybrid fora, where experts and laypersons contribute to the debate, to support the implementation efforts of States (Watson and Robinson 2021). The UN Network on Migration is an inter-agency group bringing together some thirty-eight UN agencies. The IMRF is the primary inter-governmental global platform for Member States to discuss and share progress on their implementation, which took place for the first time in May 2022. Finally, the capacity-building mechanism consists of a connection hub, a start-up fund, and a global knowledge platform as an online open data source. The start-up fund, called the Migration Multi-Partner Trust Fund, was launched in May 2019 and has raised over USD 28 million, a number which was far from the capitalization target of USD 70 million by the time of the first IMRF (MPTF 2022). The Migration Network Hub was launched in 2021, which provides an interactive knowledge platform to fulfil the commitments in the compact.

"Concerted efforts" have been devised to support these formal mechanisms, which include regional and sub-regional dialogues, Member State and stakeholder consultations as well as the UN Secretary-General's biennial report on implementation (GCM para 40–44).

Turning to the Global Compact on Refugees, the primary mechanisms for follow-up and review are the Global Refugee Forum, the high-level officials' meetings, and the annual reporting of the UNHCR to the UN General Assembly. Furthermore, an indicator framework was developed to support implementation, which was published in July 2019 (UNHCR 2019a). The first Global Refugee Forum took place shortly after in December 2019 and generated some 1,400 pledges (UNHCR 2019b). To increase transparency, a digital platform where pledges and contributions from various stakeholders, including the private sector, sports, faith-based and civil society organisations, as well as cities, municipalities and local authorities, was developed (UNHCR 2019c). To increase inclusivity, the Global Academic Interdisciplinary Network on refugee, other forced displacement and statelessness issues was also launched in 2019 (UNHCR 2020).

4.2. Analysing the Implementation of the Global Compact for Migration with Respect to HMDCC

During regional reviews encompassing five different regions, and the IMRF, States discussed their progress and challenges in implementing the Global Compact for Migration (UN Secretary-General 2022; IMRF 2022a). Whilst some countries opted to adopt national implementation plans, others incorporated the compact into their existing frameworks or observed that their existing frameworks sufficiently reflected the objectives of the compact (UN Secretary-General 2022). Recalling the four non-exclusive groupings mentioned before (namely, prevention, facilitation, protection and cooperation), the measures taken by States to implement their commitments on HMDCC will be analysed.

With respect to prevention, the UN Economic Commission for Europe (UNECE) reflected an "ambition to enhance knowledge of and approaches to addressing migration drivers" (United Nations Network on Migration 2020). For this purpose, Germany convened an independent Commission to develop recommendations on root causes of displacement, which were delivered in 2021 (German Federal Foreign Office 2021). Denmark supported the Office of the UN High Commissioner for Human Rights projects on "strengthening human rights fulfilment in migration governance and border management in the Middle East and North Africa region" (United Nations Network on Migration 2020).

With respect to protection, several countries, including Bolivia, Botswana, France and Uganda, have incorporated climate change considerations into their national migration policies before the compact. Nepal and Vanuatu drafted policies focused on human mobility stemming from environmental factors. Peru reported that it is developing a specific national plan of action to address climate-related drivers of migration, and Belize reported that it is integrating human mobility and planned relocation into its climate strategy. Furthermore, Guatemala stated that its 2019 revision of its National Plan of Action on Climate Change is integrating human mobility considerations (UN Secretary-General 2022). Fiji established

the Climate Relocation of Communities Trust Fund in 2019, which supports the planned relocation of communities affected by climate change (Fijian Government 2019). The US Task Force to President on the Climate Crisis and Global Migration recommended to the government, inter alia, options for the "protection and resettlement of individuals displaced directly or indirectly from climate change" in 2021 (Task Force 2021).

With respect to facilitation, the Intergovernmental Authority on Development (IGAD) Ministers of Foreign Affairs adopted the Protocol on the Free Movement of Persons in 2020, which includes provisions allowing people affected by disasters to enter and stay in IGAD member states (IGAD 2020). The Community of Portuguese Speaking Countries (CPLP) signed a mobility agreement that will permit the granting of visas and residence permits as well as the movement of citizens (IMRF 2022a).

With respect to cooperation, the International Data Alliance for Children on the Move was launched in 2020 to address data gaps and strengthen statistics, which acknowledges disasters as one of the drivers of displacement (IDAC 2020). The Migration Multi-Partner Trust Fund funded 12 joint programmes as at the end of November 2021 (UN Secretary-General 2022). The joint programme with IGAD was launched in 2021 and aims to address migration in the context of disasters and climate change by bringing together various governments, UN and other entities (ILO 2021). The UN Network on Migration established the thematic priority of migration in the context of disasters, climate change and environmental degradation in 2021, supported by the UNFCCC Task Force on Displacement and ILO, to contribute to policy coherence and the implementation of Objectives 2, 5 and 7 of the compact (United Nations Network on Migration 2021a). The Global Mayors Task Force on Climate and Migration was launched in 2021 to address the impacts of the climate crisis on migration in cities and to accelerate global responses (Mayors Migration Council 2021).

In addition to these measures, the UN Network on Migration has also contributed to COP26 of the UNFCCC, in which it called for States to interlink the Global Compact for Migration, the Sendai Framework for Disaster Risk reduction and the Agenda for Sustainable Development (United Nations Network on Migration 2021b).

4.3. Analysing the Implementation the Global Compact on Refugees with Respect to HMDCC

As of 26 May 2022, over 1600 pledges and contributions have been made by several stakeholders to implement the Global Compact on Refugees (Global Compact on Refugees Digital Platform 2022). Several of these relate to HMDCC, which will be examined in three groupings, namely: prevention, protection and cooperation. Facilitation heading is left out as it relates only to the Global Compact for Migration.

With respect to prevention, Denmark pledged to strengthen resilience of communities and institutions in respect of climate change and conflict, thereby reducing displacement and irregular migration, with a new multi-year programme targeting the Sahel region and the Horn of Africa. The programme seeks to support local solutions to problems reinforced by climate change in urban and rural areas with particularly affected local populations (Legacy ID 4289). Sweden pledged to reduce the negative impacts on the climate and environment in the response to refugee situations, by, amongst others, funding and support to UNHCR for Phasing out of Fossil Fuel (Legacy ID 4336).

With respect to protection, Lesotho pledged to develop a plan for suitable solutions to help refugees in the country in its national disaster management plan (Legacy ID 1047). Nigeria established the Ministry of Humanitarian Affairs, Disaster Management and Social Development in 2019 and pledged to replace its Act establishing the National Commission for Refugees by 2023 to incorporate the protection of migrants and internally displaced persons under its mandate, with a view to streamlining competencies of relevant agencies at Federal and State level and to facilitating their cooperation with other national and international partners (Legacy ID 1205). Mauritius pledged to integrate approaches to avert, minimise, and address displacement related to the adverse impacts of climate change into relevant national processes, including the process to formulate and implement national adaptation plans (Legacy ID 1241). Somalia committed to the relocation and reintegration of

50,000 internally displaced persons, which was premised on the 178,000 new displacements recorded in the first half of 2019, of which 106,000 was caused by disasters (Legacy ID 1282). The Philippines revised its internal Livelihood Seeding Program—Negosyo Serbisyo sa Barangay (LSP-NSB) Guidelines to include refugees and stateless persons in the programme, which aims to extend assistance to micro, small, and medium enterprises by providing livelihood kits to identified beneficiaries to restore and improve their businesses affected by natural and human-induced calamities (Legacy ID 3043). Korea pledged to allocate more than USD 50 million of its budget to fund its Multilateral Development Cooperation Project. According to its guidelines from 2021, the project focuses on the resettlement and social integration of refugees, and disaster risk reduction resulting from climate change (Legacy ID 3050).

With respect to cooperation, Zimbabwe committed to work with UNHCR, relevant United Nations Agencies, and other partners, in organising a regional symposium on the impact of climate change on protection and humanitarian issues (Legacy ID 1279). Rwanda pledged to undertake environmental protection and rehabilitation in refugee hosting areas, and joint assessment of environmental risks by UNHCR and the World Bank research fellows are studying refugees and host communities' vulnerability to climate and disaster risk hazards (Legacy IDs 1104 and 1352). The Marshall Islands committed to support regional and sub-regional cooperation, processes and frameworks related to addressing root causes, strengthen preparedness and enhance capacity to avert, minimize and address internal and external displacement as a result of disaster, environmental degradation and the adverse effects of climate change, and to join the Group of Friends of the PDD and support its work in the Pacific and elsewhere (Legacy ID 3111). The EU adopted a new Strategy on Adaptation to Climate Change in February 2021, and a Disaster Risk Reduction programme under the 11th European Development Fund (2020–2026) for Africa, the Caribbean and Pacific states. Furthermore, it expressed commitments to "more reliable, comparable and timely data for evidence-based action to improve the lives of refugees and their hosts", including through direct support for the newly established UNHCR-World Bank Data Centre, and to disaster preparedness and responses, including through greater attention to the impact of climate change (Legacy IDs 4099, 4105 and 4106).

Stakeholders representing the private sector, civil society and academia have also made relevant commitments on the impacts of climate change and disasters with respect to contributing to data collection and evaluation, as well as planning and action (see, for example, Legacy IDs 3055, 4033, 4034, 5064, 5081, 5111, 5118, 5169, 5184, 5230). For instance, Intersos committed to providing legal protection to different groups and individuals impacted by situations of conflict or natural disasters, and to conduct a lessons learnt research (Legacy ID 5194).

5. Future Implications: Putting the Global Compacts at the Centre of International Cooperation for HMDCC

A couple of observations can be made based on the above analyses. First, the measures taken to implement the commitments with respect to HMDCC in both compacts demonstrate efforts by a variety of stakeholders, which span across local to federal State actors, as well as non-State actors. Second, the primary aims of the measures are to improve data gaps and statistics and to incorporate human mobility considerations into domestic climate change and disaster preparedness frameworks. Third, and despite the second, more work needs to be conducted to implement all dimensions of the commitments with respect to HMDCC (on States ignoring the compacts, see, Cornelisse and Reneman 2022). Particularly, as the Global Compact for Migration stresses, facilitating mobility in accordance with international labour standards and human rights of migrants is a key adaptation strategy to the adverse impacts of disasters and climate change. However, noting the developments in the IGAD region and CPLP with respect to the free movement of persons, and the US Task Force's recommendation to create humanitarian protection for people facing serious threats to their lives because of climate change, little has been done to open up legal pathways for

cross-border mobility. This is especially the case for movement between developed and developing countries (as opposed to only between developing countries).

As an intergenerational and global complex problem (Brunnée 2019), HMDCC continues to receive attention from several international processes (on fragmented responses to migration in general, see, Cottier and Losada 2021). The IMRF and the Global Refugee Forum are invaluable additions to these processes, which present an opportunity to more comprehensively reflect on how to address HMDCC, therefore allowing for the breaking of silos. For instance, in May 2022, in the Progress Declaration of the first IMRF, States stated that they "will" strengthen their efforts to enhance and diversify the availability of pathways for safe, orderly and regular migration, including in response to disasters, climate change and environmental degradation (IMRF 2022b, para. 59). States also highlighted that climate finance efforts have been insufficient (ibid., para. 27). This is line with the call of the PDD prior to COP26 to the UNFCCC to increase climate finance because it is needed for supporting developing countries to address climate change-related displacement (PDD 2021).

Despite the promise of comprehensiveness to address HMDCC under both compacts, significant relevant developments have not been mentioned in the Progress Declaration, even though some of these have specifically referenced the relevant objectives of the Global Compact for Migration—for instance, the UNCCD secretariat's report on the impacts of desertification, land degradation and drought as one of the drivers that causes migration (UNCCD 2019), the report of Cecilia Jimenez-Damary, the Special Rapporteur on the Human Rights of Internally Displaced Persons, on internal displacement in the context of the slow-onset adverse effects of climate change (HRC 2020b) and the report of the UN Secretary-General's High Level-Panel on Internal Displacement (UN Secretary-General 2022). Furthermore, States have not clarified crucial questions related to HMDCC, such as the applicability of the obligation to not return (*non-refoulement*) individuals to places facing severe impacts of disasters and climate change, as was discussed by the UN Human Rights Committee in its landmark *Teitiota* decision (Human Rights Committee 2020).

If the Global Compacts are to be the foundation of concerted efforts for policy coherence, then it is crucial to utilize their implementation process to engage more rigorously with current and future international developments. These would include, for instance, the upcoming report of the UN ILC Study Group on the protection of persons in the context of sea level rise (ILC 2018, 2020). Furthermore, since 2020, the UN General Assembly has been elaborating on a legally binding convention on the basis of the ILC's articles on the protection of persons in the event of disasters (UNGA 2020). More recently, in 2021, the Human Rights Council recognised for the first time that having a clean, healthy and sustainable environmental is a fundamental human right, and created a new Special Rapporteur on the Protection of Human Rights in the Context of Climate Change (HRC 2020a, 2021). The UN Child Rights Committee recognised in its Saachi et al. decision that States parties have effective control over the source of carbon emissions that contribute to the causing of reasonably foreseeable harm to children outside their territory (United Nations Committee on the Rights of the Child 2021). States must embrace the follow-up and review processes of the compacts as opportunities to reflect on the implementation of their commitments with respect to HMDCC in lieu of international legal and policy developments.

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GCM Objective 13: In Search of Synergies with the UN Human Rights Regime to Foster the Rule of Law in the Area of Immigration Detention

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Abstract: Reflecting the focus of this Special Issue on "Rule of Law and Human Mobility in the Age of the Global Compacts," this article contributes to the discussion on the threats to the rule of law posed by immigration detention through the lens of the Global Compact for Safe, Orderly and Regular Migration (GCM). In GCM's Objective 13, states committed to use immigration detention only as a measure of last resort, work towards alternatives and draw from eight sets of actions to realise this commitment. Given the attention the GCM attracts, its nonbinding character and the voluntary nature of its review can be used by states as justification for their inadequate implementation of binding human rights obligations and insufficient reporting on implementation to the supervising bodies. While acknowledging these challenges to the rule of law, this article explores the ways the GCM can actually foster the rule of law in the area of immigration detention. To strengthen the rule of law principles of legality, legal certainty, prohibition of arbitrariness, access to justice and the right to an effective remedy, Objective 13 needs to support a binding human rights regime by preventing arbitrary detention and its implementation at the domestic level. The article discusses the interplay between Objective 13 on the one hand, and, on the other, the International Covenant on Civil and Political Rights, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and Convention on the Rights of the Child at three levels—the detention provisions, the support provided to states for the implementation of these provisions and the monitoring of states' implementation—and it proposes means to strengthen the synergies between the two frameworks.

Keywords: administrative detention; rule of law; proportionality; alternatives to detention; review of detention; Global Compact for Migration; human rights treaty bodies

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1. Introduction

The deprivation of liberty of refugees, asylum seekers and migrants[1] for reasons related to their migration status[2] is one of the most controversial measures states apply in the pursuit of border control, migration management and asylum policies. Reliable reports from all world regions, including recurrent recommendations from all UN human rights treaty monitoring bodies (OHCHR 2022b)[3] document the widespread use of immigration detention, including in relation to children and other vulnerable groups, often without adequate opportunity to seek judicial review of their detention and in substandard conditions. In some cases, persons are subjected to immigration detention, but authorities refuse to

[1] The article will use the term "migrants" in an inclusive manner to also encompass refugees and asylum seekers, although these categories of persons benefit from additional safeguards under refugee law instruments. For a discussion on the detention-related provisions of the Global Compact on Refugees applicable to asylum seekers and refugees, see (Majcher 2019a, p. 101–4).

[2] This is the definition of immigration detention used by the UN Committee on Migrant Workers, see (CMW 2021, para. 15).

[3] See Section 4.1.

qualify the measure as deprivation of liberty. Rather, they adopted a euphemistic narrative (Grange 2013), arguing that they merely restrict persons' freedom of movement. Such informal (de facto) detention is often applied in border contexts and results in persons being detained in unofficial places and in inadequate conditions. However, in other contexts, immigration detention is clearly regulated in domestic law and carried out in generally adequate conditions. Yet, as a corollary, this particular transparency and compliance with domestic law often leads to the normalisation (trivialisation) of deprivation of liberty. What all forms of immigration detention have in common is that the persons subject to it are ultimately detained for who they are rather than for what they have done. Even in the case of persons breaching conditions of entry or residence, the conditions apply solely to migrants, especially those subject to entry visa requirements.

Immigration detention is usually administrative in character. Regulated in administrative migration or asylum legislation, immigration detention is said to merely be an adjunct of immigration status-related procedures. To support this stance, states argue that this measure is nonpunitive and truly "administrative" (Leerkes and Broeders 2013). Yet, in practice, due to the duration and conditions of and treatment in detention, these arguments do not hold. Worse even, the administrative characterisation of immigration detention removes important detention safeguards that otherwise apply (Majcher 2020, 2021a). Unlike penal detention, administrative immigration detention is primarily imposed by the executive, and the decision power rests with the administrative authorities (Joinet 1990, para. 22). It requires neither criminal charges nor trial, so fair trial guarantees do not typically apply. Administrative detention is not in itself prohibited under international law, but it should be used solely as an exceptional measure (Joinet 1990, para. 19). Since it involves deprivation of liberty without judicial guarantees and leaves broad discretionary powers to the executive, it leads to a serious risk of fundamental human rights violations (Joinet 1990, para. 51, 67 and 82(a)). The widespread use of administrative detention arguably poses a danger beyond the violation of individual rights; it could subvert the regular penal justice system and ultimately undermine the rule of law (International Commission of Jurists 2012, pp. 10–11). Indeed, immigration detention risks violating several principles that are the necessary elements of the rule of law, including legality, legal certainty, prohibition of arbitrariness (including prevention of misuse of powers), access to justice and respect for human rights (including the right to an effective remedy) ((Venice Commission 2011, pp. 10–16)). Thus, there is an underlying tension between immigration detention and the rule of law. To mitigate this tension, immigration detention should be used exceptionally, as a very last resort, and be subject to review by courts.[4]

This article contributes to the discussion on the challenges posed by immigration detention to the principles embraced by the rule of law. It does so through the lens of the Global Compact for Safe, Orderly and Regular Migration (GCM) (UN General Assembly 2018), in line with the focus of this Special Issue dedicated to the "Rule of Law and Human Mobility in the Age of the Global Compacts." The GCM devotes one of its 23 objectives to immigration detention: Objective 13. In the objective, states committed to use immigration detention only as a measure of last resort and to work towards alternatives to detention.[5] To fulfil this commitment, states will draw from eight sets of actions. However, a question arises: Does Objective 13 undermine or strengthen the rule of law in the area of immigration detention? Arguably, the GCM has the capacity to impact the rule of law in both contrasting

[4] According to the UN Special Rapporteur against Torture, "judicial control of interference by the executive power with the individual's right to liberty is an essential feature of the rule of law" (Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002, para. 15), and the same view was expressed by the European Court of Human Rights, see (ECtHR 2001, para. 22). According to the UN Working Group on Arbitrary Detention, "habeas corpus is indispensable in a State governed by the rule of law as a safeguard against arbitrary detention", see (WGAD 2011, para. 61). These two requirements can be broken down into several detailed requirements, see (Fordham et al. 2013, p. 6)

[5] Compared to the zero draft, the final version of Objective 13 offers stronger safeguards overall, except for the detention of children, see (Majcher 2019a, p. 94–100; Stefanelli 2018).

manners. First, it may weaken the rule of law in the framework of immigration detention since the fulfilment of its objectives can be construed as optional.[6] The GCM explicitly highlights the fact that it is a nonbinding cooperation framework (para. 15(b)); the content of Objective 13 (like all the GCM objectives) is framed as "commitment" and the eight sets of implementing actions are understood as policy instruments and best practices (para. 16). Thus, given the nonbinding character of the GCM[7] and the voluntary nature of the review of the GCM's implementation, it could be assumed that the GCM renders it optional for states to observe and report on the implementation of their pre-existing and binding international human rights obligations related to immigration detention (Grange and Majcher 2020). This would directly impede the rule of law principles of legality, legal certainty and the prohibition of arbitrariness.

On the other hand, it can be argued that Objective 13 has the ability to strengthen the rule of law in the field of immigration detention.[8] This article aims to explore this proposition. To indeed foster the rule of law in the context of immigration detention, the GCM, and Objective 13 in particular, would need to support, rather than weaken, the binding human rights framework regulating immigration detention[9] and its implementation at the domestic level. Specifically, it should further the very objective of this binding framework to ensure that immigration detention, as administrative detention, is used exceptionally, as a last resort. Further, in line with the rule of law principles of the prohibition of arbitrariness, access to justice and the right to an effective remedy, it should ensure that immigration detention is subject to a judicial review. In this light, this article aims to identify synergies between the GCM and the existing normative regime protecting migrants from arbitrary detention. To this end, the interplay between the GCM and the UN human rights treaty regime will be assessed at three levels, namely, the detention provisions (Section 2), the support provided to states in their implementation of the relevant detention provisions (Section 3) and the mechanisms for monitoring states' implementation (Section 4). The discussion will end with a few concluding thoughts (Section 5).

2. Detention Provisions

To reconcile immigration detention with the rule of law principles of legality, legal certainty, prohibition of arbitrariness, access to justice and right to a remedy, immigration detention, as administrative detention imposed without charges and trial, should be used exceptionally and be liable to a judicial review. These two requirements are laid down in the international legal framework regulating immigration detention, which is based on the prohibition of arbitrary deprivation of liberty. Indeed, Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that everyone has the right to liberty and no one should be subjected to arbitrary arrest or detention.[10] The right to liberty has been subsequently enshrined in conventions addressing specific categories of persons. The detention provisions of these treaties build upon and expand Article 9 of the ICCPR. Relevant for the present assessment are Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) (Grange 2018, pp. 72–73) and Article 37 of the Convention on the Rights of the Child (CRC),

[6] For a broader discussion on the rule of law under the GCM and the Global Compact on Refugees, see (Favi 2022, p. 2–4).

[7] The legal nature of the GCM triggered debates in academia; for instance, see (Farahat and Bast 2022; Gammeltoft-Hansen et al. 2017; Hilpold 2021; Panizzon and Vitiello 2019).

[8] Indeed, the GCM explicitly refers to the rule of law among its guiding principles. Specifically, it recognises that "respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance. This means that the State, public and private institutions and entities, as well as persons themselves, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and are consistent with international law" (para. 15(d)).

[9] Legal scholars agree that the GCM restates and even reinforces existing legal standards regulating migration and that the international human rights framework remains crucial for the GCM implementation, see (Chetail 2020, p. 334–35; Guild 2020, p. 249; Guild et al. 2019; Molnár 2020, p. 322–23).

[10] The UN Human Rights Committee has explicitly highlighted that "everyone" also includes refugees, asylum seekers and migrants (HRC 2014, para. 3).

which prohibit the arbitrary detention of migrant workers (and their families) and children, respectively. Under the international human rights framework regulating immigration detention, in order for detention not to amount to the prohibited arbitrary detention, it should at least be a measure of last resort, in line with the principles of lawfulness, necessity and proportionality (2.1) and be subject to a review and accompanied by the necessary procedural safeguards (2.2).[11] Do the provisions of Objective 13 of the GCM conform to these requirements?[12]

2.1. Last Resort

For immigration detention to be a measure of last resort, it should comply with the requirements of legality, necessity and proportionality stemming from international human rights law.

The requirement of legality (lawfulness) is explicitly spelled out in Article 9(1) of the ICCPR and Article 16(4) of the ICRMW, which provide that no one should be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law. Regarding the grounds for detention, under the aforementioned articles of the ICCPR and ICRMW, immigration detention would be arbitrary in the absence of particular reasons specific to the individual (legitimate objective), such as an individualised likelihood of absconding, a danger of crimes against others or a risk of acts against national security (HRC 2014, para. 18; CMW 2021, para. 20). The principle of legality goes beyond mere conformity with domestic law, however. According to the settled jurisprudence of the European Court of Human Rights, which can inspire other monitoring bodies due to the similar phrasing of the relevant detention provisions, the requirement of legality entails that domestic legislation authorising detention should satisfy the general principle of legal certainty. This means that it should be sufficiently accessible, precise and foreseeable in its application in order to avoid any risk of arbitrariness (ECtHR 2008a, para. 23, 2008b, para. 110–1). The requirement of legal certainty then implies that the grounds (reasons) for detention should be clearly and exhaustively listed in the legislation (WGAD 2018, para. 22). Indeed, the law authorising detention should not leave ample room for the authorities' discretion to decide on and apply detention (CMW 2021, para. 23). Moreover, to ensure that detention is an exceptional measure of last resort, the legislation should contain a presumption in favour of liberty (CMW 2021, para. 24). These standards should guide the understanding of the requirement of lawfulness under the GCM. Indeed, Objective 13 of the GCM provides that states will ensure that any immigration detention is based on law, and in the implementing actions, states committed to ensure that detention decisions have a legitimate purpose (para. 29(c)).

Besides lawfulness, the requirements of necessity and proportionality circumscribe the use of immigration detention. In order not to be considered arbitrary, immigration detention should be necessary in all the circumstances of the case and proportionate to the ends sought, for example, to prevent absconding (HRC 2006, para. 7(2)). In line with the authoritative interpretation of Article 9(1) of the ICCPR, the decision must consider relevant factors on a case-by-case basis and not be based on a mandatory rule for a broad category. It must also take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding (HRC 2014, para. 18). Likewise, under Article 16(4) of the ICRMW, migrants may be detained only as a last resort and states should implement all available alternative measures before resorting to detention. Alternatives to detention are thus a practical expression of the requirements of necessity and proportionality and ensure that detention is applied as an exceptional measure (CMW 2013, para. 26, 2021, para. 25, 47; WGAD 2018, para. 16, 23 and 24). Objective 13 of the GCM contains detailed provisions on alternatives to detention. It

[11] The third set of requirements stemming from the prohibition of arbitrary detention relates to the conditions and regime of detention, see (Majcher 2019b, p. 490–531).

[12] This section builds upon the assessment in (Grange and Majcher 2020, pp. 294–98) and (Majcher 2019a, pp. 94–100). For a concise discussion on Objective 13, see (Chetail 2020, pp. 259–60).

provides that states will ensure that detention complies with the requirements of necessity, proportionality and individual assessment and will use detention only as a measure of last resort. States also commit to prioritise noncustodial alternatives to detention that are in line with international law. The implementing actions further detail the approach to alternatives to detention. Accordingly, states will promote, implement and expand alternatives to detention, favouring noncustodial measures and community-based care arrangements, especially in the case of families and children (para. 29(a)). Furthermore, states will consolidate a comprehensive repository to disseminate the best practices of alternatives to detention, including by facilitating regular exchanges and the development of initiatives based on successful practices among states and between states and relevant stakeholders (para. 29(b)). This effective commitment to alternatives to detention can help states comply with their obligations under the ICCPR and ICRMW to use detention only when there are no available alternatives to detention in a given case.

As regards children, initially, the last resort principle guided the approach in international human rights law. It relied on Article 37(b) of the CRC, which provides that children could be detained only exceptionally, as a last resort. By implication, as with respect to adults, states had to strive to place migrant children in alternatives to detention. The Human Rights Committee (HRC) still adheres to this approach. Accordingly, under Article 9(1) of the ICCPR, migrant children should not be deprived of liberty except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also considering the extreme vulnerability and need for care of unaccompanied children (HRC 2014, para. 18). The stance of the international community has evolved, with increasing emphasis being placed on the principle of the best interests of the child under Article 3(1) of the CRC rather than that of the last resort. This has triggered the gradual emergence of a norm against the detention of migrant children (Grange and Majcher 2017, pp. 281–82). Detaining a child is at variance with the ICRMW and CRC. According to the Committee on Migrant Workers (CMW) and Committee on the Rights of the Child (CRC Committee), the last resort principle that applies to juvenile criminal justice is not applicable to immigration proceedings because it conflicts with the best interests of the child. Thus, immigration detention is *never* in the child's best interests and, hence, should be forbidden. By implication, since the immigration detention of children is not lawful, alternatives to detention are not applicable. Rather, according to the CMW and CRC Committee, unaccompanied children are entitled to special protection and assistance and, like citizen children deprived of their family environment, should be placed in alternative care and accommodation. For families with children, states should develop noncustodial, community-based solutions (CMW 2021, para. 40–45; CMW and CRC Committee 2017, para. 10–13). Over the past few years, the prohibition of child immigration detention has been called for by several other human rights bodies and mechanisms, including the UN Special Rapporteur on Torture (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2015, para. 80), the UNHCR (UN High Commissioner for Refugees (UNHCR) 2017), the UN Working Group on Arbitrary Detention (WGAD) (WGAD 2018, para. 40), and the Special Rapporteur on the Human Rights of Migrants (SRHRM) (SRHRM 2020, para. 86(a)).

Objective 13 of the GCM does not fully reflect the current approach of the international community towards the prohibition of child immigration detention (Muntarbhorn 2019). It still calls for alternatives to detention, hence relying on the last resort principle. More specifically, among the implementing actions, Objective 13 commits states to ensure the availability and accessibility of a viable range of alternatives to detention in noncustodial contexts, favouring community-based care arrangements that guarantee access to education and healthcare, and to respect the right to family life and family unity. Therefore, states are merely expected to work to end child immigration detention (para. 29(h)) rather than forbid

it completely.[13] Despite the language reflecting the traditional approach towards child detention based on the last resort principle, Objective 13 can be interpreted as prohibiting child immigration detention in line with the above-discussed interpretation of the principle of the best interests of the child. In fact, the GCM explicitly promotes existing international legal obligations in relation to the rights of the child and upholds the principle of the best interests of the child as a primary consideration in all situations concerning children in the context of international migration (para. 15(h)). In combination with the principle of non-regression, explicitly affirmed by the GCM (para. 15(f)), this means that the GCM cannot be used as a justification for states to set aside the non-detention rule under the ICRMW and CRC. Rather, to paraphrase the text of the relevant implementing action under Objective 13, states should end child immigration detention immediately and place children in community-based care arrangements (which would then not be alternatives to detention).

2.2. Review of Detention

In line with both the rule of law principle of access to justice and the prohibition of arbitrary detention under international human rights law, immigration detention should be subject to review. To be able to seek review of the lawfulness of their detention, migrants need to have access to several procedural safeguards.

Information is a very basic precondition for access to justice. Under Article 9(2) of the ICCPR, anyone who is arrested should be informed, at the time of arrest, of the reasons for their arrest and of any charges against them. Similarly worded, Article 16(5) of the ICRMW requires that this information be provided, as far as possible, in a language that the person understands. Therefore, the detention order should contain information on the factual and legal basis for the detention and the available remedies (CMW 2021, para. 60, 61 and 70). This safeguard is also provided in the GCM. Among the implementing actions, states committed to ensure that all immigration detainees are informed about the reasons for their detention in a language that they understand (para. 29).

To initiate and participate in the review or appeal proceedings, migrants often need legal and linguistic assistance. According to the CMW's authoritative interpretation of Article 16(4) of the ICRMW, detained migrants must have access to legal representation and advice to challenge the detention decision. If necessary, access to free and effective legal aid should be ensured to render access to justice truly operational (CMW 2013, para. 27, 2021, para. 68). This principle is upheld by international human rights mechanisms, including the WGAD (WGAD 2018, para. 35) and the SRHRM (SRHRM 2012, para. 72(a)). Likewise, under the implementing actions of Objective 13 of the GCM, states committed to ensure that immigration detainees have access to legal orientation, assistance and information. In addition, detainees are to have access to free or affordable legal advice and the assistance of a qualified and independent lawyer (para. 29(f) and (d)). Unlike Article 9(4) of the ICCPR, Article 16(8) of the ICRMW explicitly provides for linguistic assistance. Accordingly, when migrants attend review proceedings, they should have the assistance, if necessary and without cost to them, of an interpreter if they cannot understand or speak the language being used. The same requirement was spelled out by the SRHRM (SRHRM 2012, para. 72(a)). The GCM, on the other hand, does not address the pivotal issue of linguistic assistance. However, states should not interpret this silence as the absence of relevant principles in that regard.

As regards the review of detention, under Article 9(4) of the ICCPR and Article 16(8) of the ICRMW, migrants are entitled to take proceedings before a court so that it decides without delay on the lawfulness, necessity and proportionality of detention and orders

[13] Among all the provisions of Objective 13, the question of the detention of children triggered the most heated debate during the negotiations, and child detention provisions in Objective 13 were subsequently watered down. Initially, states fundamentally committed to end the practice of child immigration detention. However, they still committed to provide alternatives to detention, which in itself contradicts ending child detention, see (Majcher 2019a, pp. 96–97).

release if the detention is unlawful. States need to ensure automatic review, as the HRC and CMW require that immigration detention be reassessed at reasonable periods of time as it extends in time (HRC 2014, para. 18; CMW 2021, para. 63). The scope of judicial review should not be confined to a formal assessment of the person's migration status since review should individually examine the elements pertaining to the arbitrariness of detention (CMW 2021, para. 63). Under the implementing actions of Objective 13, detainees should have access to justice and the right to regular review of detention (para. 29(d)). Reflecting Article 9(5) of the ICCPR, Article 16(9) of the ICRMW provides that migrants who have been victims of unlawful arrest or detention should have an enforceable right to compensation. This is absent from the GCM, which is a gap and presents the risk of norms not being respected.

In summary, overall, Objective 13 reflects the detention norms and standards under the international legal framework, ensuring that detention is a measure of last resort subject to a judicial review. The few gaps in the objective are highlighted above. The nonmandatory nature of the GCM should not lead to an understanding that respecting migrants' right to liberty is optional for states. Given the existing binding detention framework, the provisions of Objective 13 and most of the implementing actions are not optional, as similar requirements stem from international treaties or principles laid down by international human rights mechanisms. Thus, Objective 13 can be seen as a tool for states to practically implement already existing human rights norms and standards.

3. Support for States' Implementation

As human rights detention norms and standards under the HRC, ICRMW and CRC on the one hand, and Objective 13 on the other, are generally aligned, it is worth comparing what type of assistance states can benefit from for the implementation of these provisions. This section looks at forms of support for the interpretation of the relevant provisions (3.1) and capacity building (3.2).

3.1. Interpretation of Detention Provisions

All nine core human rights international treaties, including the ICCPR, ICRMW and CRC, established "treaty bodies" charged with monitoring treaty implementation by state parties. Serviced by the Office of the High Commissioner for Human Rights (OHCHR), the treaty bodies are committees of independent experts who are persons of high moral character, impartiality and recognised competence in human rights and the field covered by the relevant convention. These experts, nationals from states party to the relevant treaty, are nominated and elected for fixed, renewable terms of four years, having regard to equitable geographical distribution and balanced gender representation. Although elected by state parties, experts serve in their personal capacity. The 18-member HRC, the 14-member CMW and the 18-member CRC Committee monitor the implementation of the ICCPR, ICRMW and CRC, respectively (OHCHR 2021b). Treaty bodies work by consensus. Given their composition and work methods, treaty bodies are independent, expert bodies competent in providing authoritative interpretations of their treaty provisions. Indeed, among the functions of the treaty bodies is the adoption of the so-called General Comments, which provide for the authoritative interpretation of the content of the provisions of the respective human rights treaty and state party obligations, or address broader, cross-cutting issues (OHCHR 2021a). To strengthen and harmonise their work and increase clout, some treaty bodies have adopted Joint General Comments. The HRC, CMW and CRC Committee have adopted General Comments addressing the question of immigration detention under the relevant provisions. In fact, the analysis of the detention provisions in the previous section relied mainly on these documents.

In 2014, the HRC adopted General Comment No.35 on Article 9 of the ICCPR, which includes one paragraph specifically addressing immigration detention, underscoring the principles of lawfulness, necessity, proportionality, review of detention, detention condi-

tions and the question of child detention (HRC 2014, para. 18). In 2017, the CMW and CRC Committee issued a Joint General Comment on states' obligations regarding the human rights of children in the context of migration. Both committees affirmed that the principle of the best interests of the child supersedes the last resort principle in the context of immigration detention and, since detention is never in the child's best interests, children should never be placed in immigration detention. This interpretation is based on Articles 16 and 17 of the ICRMW and Article 37(b) of the CRC (CMW and CRC Committee 2017, para. 5–13). Most recently, in 2021, the CMW adopted General Comment No. 5 on migrants' right to liberty and freedom from arbitrary detention, which provides a detailed guidance to states on fulfilling their obligations under Articles 16 and 17 of the ICRMW. The General Comment reaffirms the requirements of lawfulness (legality), necessity, proportionality, priority of alternatives to detention, non-detention of migrant children and vulnerable persons, review of detention, conditions of detention and monitoring of detention places. Crucially, the CMW seeks to ensure that the implementation of the GCM detention provisions is in line with the interpretation of the relevant provisions of the ICRMW, as it stressed that one of the aims of the General Comments is to provide guidance to states on implementing the GCM (CMW 2021, para. 8). Given the authoritative interpretation of the detention provisions under the relevant treaties by the treaty bodies and the express commitment of the GCM to implement its objectives in a manner consistent with states' obligations under international law (para. 41), not only the CMW's General Comment No. 5, but also the HRC's General Comment No. 35 and the CMW and CRC Committee's Joint General Comment should guide the understanding of the provisions of Objective 13.

To support GCM implementation, in 2019, the UN Secretary General established the UN Network on Migration. As of early 2022, the Network consisted of 39 members of the UN system for whom migration is relevant, nine of which formed the Executive Committee, including the OHCHR (UN Network on Migration 2022e, 2022g).[14] This convoluted, multitiered construction to support states in their implementation, including interpretation, of the GCM contrasts with the authoritative interpretation of the UN human rights treaties by small-sized independent expert bodies. Further, the International Organization for Migration (IOM) serves as both Coordinator and Secretariat of the Network. This double role empowers the organisation to steer the approach to the understanding of the GCM provisions and set priorities around its implementation and programming. Traditionally dependent on states' funding and implementing states' policies, the IOM is not a UN agency. Despite becoming a related organisation within the UN system, it remains an intergovernmental organisation neither based on an international treaty nor bound to comply with the UN Charter (Guild et al. 2017; Pécoud and Grange 2018). Hence, the risk is that the interpretation of the GCM objectives, Objective 13 in particular, will be informed by states' practices and preferences—reflecting the nonbinding nature of the GCM—and risks watering down the authoritative interpretation of detention provisions of human rights treaties by the HCR, CMW and CRC Committee.

However, as the GCM explicitly underscores, it is based on international human rights law (para. 15(f)) and it should be implemented consistently with states' obligations under international law (para. 41). In line with the Migration Network Terms of Reference, the Network's actions should promote the application of relevant international and regional norms and standards and the protection of the human rights of migrants. Further, the Network should collaborate with other existing "UN system coordination mechanisms" addressing migration-related issues to actively seek out synergies and avoid duplication

[14] Executive Committee provides overall guidance to the work of the Network, setting strategic priorities to support states in the effective implementation, follow-up and review of the GCM. The members of the Executive Committee include: the Department of Economic and Social Affairs (DESA), the International Labour Organization (ILO), the International Organization for Migration (IOM), the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Development Programme (UNDP), the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children's Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC) and the World Health Organization (WHO), see (UN Network on Migration 2022g).

(UN Network on Migration 2022f).[15] In its role as the Secretariat and Coordinator of the Network, the IOM is tasked with ensuring effective collaboration with these mechanisms. The same role is also foreseen for the Executive Committee, as it is mandated with supporting the IOM in coordinating the work of the Network. Considering the above analysis, in the context of Objective 13, it can be argued that the Executive Committee, particularly the OHCHR, should ensure collaboration with the treaty bodies so that their authoritative interpretation of detention provisions in the ICCPR, ICRMW and CRC guides the interpretation of Objective 13.

As of early 2022, the Network had eight working groups, five of which were thematic, addressing specific GCM objectives (UN Network on Migration 2022h).[16] Dedicated to supporting the implementation of Objective 13, the Working Group on Alternatives to Immigration Detention (WG) is tasked with promoting the development and implementation of noncustodial, human rights-based alternatives to detention in the migration context.[17] The WG is led by the UNHCR, UNICEF and the civil society organisation International Detention Coalition. The members include UN bodies and mechanisms (including the SRHRM), other international organisations (IOM, OSCE), research institutions and civil society organisations (UN Network on Migration 2020d). The OHCHR is a mere WG member. As a coleader, however, it would be in a position to contribute institutional knowledge and relevant perspectives as it services the HRC, CMW and CRC Committee. It would also be helpful to include a member of each committee in the WG to ensure synergies with the work of the treaty bodies. Indeed, in February 2020, the Executive Committee did encourage the WG to ensure synergies with the related work of the CMW (UN Network on Migration 2020b).

Given that a key objective of the work of the WG is to support states in preventing and reducing instances of arbitrary detention, the WG should align its understanding of arbitrary detention with the interpretation of this concept by the HRC, CMW and CRC Committee. As already noted, the approach to child immigration detention under Objective 13 does not fully reflect the position of the CMW and CRC Committee, as encapsulated in their Joint General Comment. The WG's ultimate objective is to end the practice of child immigration detention by prioritising alternatives to detention and adequate care arrangements. In line with the human rights framework discussed in the previous section, alternatives to detention are measures applied instead of lawful detention pursuant to the necessity and proportionality requirements. As such, they ensure that detention is a measure of last resort rather than putting an end to detention all together. It would thus be helpful to clarify what is understood under the notion of alternatives to detention in the work of the WG and the Migration Network in general and how this understanding relates to the stance taken by the CMW and CRC Committee. Initially, the WG planned to issue a "common position" on the concept of alternatives to detention (UN Network on Migration 2020c). However, given the WG's lack of a mandate to interpret this term, this initiative was limited to internal discussions. To overcome this obstacle, the Network should officially adopt the authoritative understanding of the concept of arbitrary detention (and, by implication, alternatives to detention) under the relevant HRC and CMW's General Comments and the approach to child immigration detention under the CMW and CRC Committee's Joint General Comment.

[15] These mechanisms are mentioned nine times in the Network Terms of Reference without any details on what they are. There are UN coordination mechanisms on development and humanitarian action, but this seems like a complex labyrinth to navigate when it comes to issues of migration, let alone the protection of the human rights of migrants.

[16] Indeed, the Network may establish Working Groups focusing on specific issues, providing technical advice and inputs to the Network as a whole, including by providing tools and guidelines and facilitating joint action at the regional and national levels (UN Network on Migration 2022f).

[17] More precisely, it aims "at supporting States to prevent and reduce instances of arbitrary detention and to end the practice of child immigration detention by prioritizing rights-based and community-based alternatives to detention and adequate care arrangements for all children, whether unaccompanied and separated or in families."

In 2020, the WG issued a policy guidance on immigration detention in the context of the COVID-19 pandemic to help states implement Objective 13. In this policy brief, the Network calls on states to stop new detentions of migrants for migration- or health-related reasons and to introduce a moratorium on the use of immigration detention, scale up alternatives to detention, release all detained migrants into alternatives to detention and, pending that release, improve conditions in places of immigration detention. The policy brief then sets out several practical recommendations clustered under five headings (prevention, release, placement and case management, regularisation and access to services and conditions in immigration detention) and shares promising practices whereby some governments have released migrants from detention and provided access to healthcare, housing and other services (UN Network on Migration 2020a, 2021a).[18] The policy brief, particularly the positive and negative examples of states' responses, could be helpful for the HRC, CMW and CRC Committee as they review states' implementation of the relevant provisions in the framework of the monitoring procedure discussed below.[19]

3.2. Capacity Building

Established in 2015, the Treaty Body Capacity Building Programme builds on long-existing capacity building programmes developed by the OHCHR. It supports states' engagement with UN human rights mechanisms, including treaty bodies. All 152 signatory states of the GCM are members of the UN and are thus entitled to benefit from the programme. Through its human rights officers, based in the OHCHR regional offices around the world and a dedicated team based in Geneva, the Programme supports the implementation of treaty bodies' recommendations and offers general assistance with ratifications, reporting, follow-up and the implementation of human rights treaties (OHCHR 2021c). The technical cooperation for building state capacity in treaty bodies' reporting usually involves supporting the establishment and strengthening the National Mechanisms for Reporting and Follow-Up (NMRFs). Based within the foreign ministry, the NMRFs are government mechanisms that are charged with engaging with international human rights mechanisms (including treaty bodies), including reporting to these mechanisms and tracking national follow-up, the implementation of the treaty obligations and recommendations emanating from such mechanisms (OHCHR 2016, p. 2–4, 2022a). To ensure coherence in the reporting on the implementation of detention-related provisions under the ICCPR, CMW and CRC on the one hand, and Objective 13 on the other, the NMRFs should be charged with also preparing reports on GCM implementation in the context of the review mechanisms, discussed below,[20] which is currently performed by interior ministries.

A key objective of the UN Migration Network's WG is to facilitate government peer learning activities on the development of alternatives to detention (UN Network on Migration 2020c). So far, the WG has organised three "peer learning exchanges", in November 2020, June 2021 and January 2022. These were closed workshops that brought together government officials from different regions with the aim of offering space for states to discuss their experiences in using alternatives to detention.[21] Given that treaty bodies frequently recommend that states use alternatives to detention,[22] OHCHR officers from the Treaty Body Capacity Building Programme should be present during these peer learning exchanges. It would ensure that the discussions between states are informed by relevant, binding norms stemming from the human rights framework. As demonstrated above,

[18] An annex to the policy brief provides an update of domestic measures to detention during the COVID-19 pandemic, particularly by fleshing out worrying trends and the opportunities to address them.

[19] See Section 4.1.

[20] See Section 4.1.

[21] Although the meetings were closed, WG members were present during the discussions and active in preparing them. The themes of the three consecutive meetings were alternatives to detention in the context of the COVID-19 pandemic; case management for case resolution and leveraging technology in an ethical way in order to scale up alternatives to detention; and the International Migration Review Forum (UN Network on Migration 2022a).

[22] See Section 4.1.

irrespective of the nonbinding form of the GCM, the use of alternatives to detention is derived from binding international human rights norms. Practical solutions shared during the peer learning discussions would also be helpful for the Treaty Body Capacity Building Programme, as it supports states' implementation of the human right treaties.

Based on these peer learning activities, the WG provides input and resources on alternatives to detention to the Capacity Building Mechanism (CBM). Called for directly in the GCM (para. 43), the CBM is meant to support states' implementation of the GCM.[23] It includes an online open data source with migration-related practices (called a global knowledge platform) and a connection hub that facilitates demand-driven and tailor-made solutions for states, including peer-to-peer exchanges, and identifies funding opportunities.[24] Ultimately, these two components of the CBM were merged into the "Migration Network Hub," which was launched in March 2021 to support states in the implementation, follow-up and review of the GCM. This tool is intended to share migration knowledge, expertise, good practices and initiatives related to the GCM among states, practitioners and the UN system via online discussions with peers, webinars, resources and publications and the showcasing of flagship initiatives (IOM 2021). To genuinely support states in their implementation of the GCM, including Objective 13, the Hub should include detention-related recommendations that the treaty bodies, specifically the HRC, CMW and CRC Committee, have addressed to states in the framework of the monitoring procedure discussed below.[25]

The CBM also includes a start-up fund (referred to as the Multi-Partner Trust Fund (MPTF)) for the initial financing of projects supporting states' implementation of the GCM.[26] As of early 2022, the MPTF generated over 28 million USD from donors, mainly member states (Multi-Partner Trust Fund Office 2022). The fund's multi-partner decision-making body consists of Migration Network members, donor and recipient countries and other stakeholders, on a rotating basis, and is chaired by the Coordinator of the Network and supported by the Secretariat of the Network—the role bestowed upon the IOM (UN Network on Migration 2022d). From a rule of law perspective, the financing of projects should be dependent upon the beneficiary countries' compliance with international human rights standards. UN entities at the country level work with national partners to identify their needs through joint analysis and to design joint programmes. To foster synergies, the UN entities applying for financing could link projects based on Objective 13 with supporting states' implementation of detention-related recommendations formulated by the treaty bodies.

In conclusion, there are opportunities to increase the synergies between the support given to states in the implementation of the detention provisions of the HRC, ICRMW and CRC on the one hand, and Objective 13 of the GCM on the other. The first step would be for the WG and the Migration Network in general to endorse and start using the relevant General Comments of the treaty bodies to align the interpretation of Objective 13 with detention-related safeguards stemming from the binding treaties. Conversely, the policy brief on COVID-19 and immigration detention, with its practical recommendation, can be useful for treaty bodies as they review states' policies so that they adopt a coherent approach. To help align the work of the WG with the treaty bodies, a member of each Committee could become a member of the WG. Furthermore, the capacity-building support under both

[23] Precisely, as established in the GCM, the CBM allows states, the UN and other relevant stakeholders, including the private sector and philanthropic foundations, to contribute technical, financial and human resources on a voluntary basis in order to strengthen capacities and foster multi-partner cooperation in pursuit of GCM implementation.

[24] The connection hub was meant to process country requests for the development of solutions, identify adequate implementing partners, connect the request to similar initiatives and solutions for peer-to-peer exchange and potential replication, ensure effective set-up for multi-agency and multi-stakeholder implementation and identify funding opportunities, including by initiating the start-up fund.

[25] See Section 4.1.

[26] It is a UN financing mechanism receiving voluntary financial contributions from states, the UN, international financial institutions and other stakeholders, including the private sector and philanthropic foundations.

frameworks should be coordinated. The Treaty Body Capacity Building Programme could be involved in the peer-learning discussions between states on alternatives to detention convened and facilitated by the WG. To ensure that the capacity-building assistance to states for their implementation of the GCM is contingent on their respect for detention-related obligations under the human rights treaties, the Migration Network Hub should include detention-related recommendations that the HRC, CMW and CRC Committee issued to states within the monitoring procedure. Further, MPTF funding for projects implementing Objective 13 should be dependent upon the beneficiary countries' compliance with relevant international detention-related human rights standards.

4. Monitoring of States' Implementation of the Detention Provisions

Whereas the content of detention standards under the ICCPR, ICRMW and CRC on the one hand, and Objective 13 on the other, is generally aligned, their implementation at the domestic level differs considerably. With the ICCPR, ICRMW and CRC being treaties, each state party to these conventions has an obligation to take steps to ensure that everyone in its territory can enjoy the rights set out therein. In contrast, the implementation of the GCM reflects its nonbinding character. Accordingly, states commit to fulfil the objectives of the GCM through bilateral, regional and multilateral cooperation while respecting national policies and priorities (para. 41). To foster the rule of law in the context of immigration detention, the GCM, and Objective 13 in particular, would need to support, rather than weaken, the implementation of the binding detention-standards at the domestic level. Furthermore, the review of the implementation of Objective 13 should assist in the monitoring of the implementation of the detention provisions of the ICCPR, ICRMW and CRC. The following discussion compares procedures to monitor the implementation of human rights treaties and the GCM (4.1) and presents another review procedure that could inspire improvements in the GCM review (4.2).

4.1. Treaty Bodies Monitoring vs. GCM Review

The key mandate of the nine treaty bodies, including the HRC, CMW and CRC Committee, is to monitor how states implement the relevant conventions. Within the monitoring procedure, states are obliged to submit periodic reports to the relevant treaty body on their domestic implementation of the conventions.[27] In light of all the information available, the relevant treaty body reviews the report in the presence of a state party's delegation by engaging in "constructive dialogue." The committee spends two half-day sessions examining each country and concludes the review by adopting "concluding observations" that set out its concerns and recommendations. To close the reporting cycle, in each periodic report, states are required to report on concrete measures aimed at implementing the treaty body's recommendations laid down in the previous concluding observations (OHCHR 2012, p. 22–30).[28] The procedure offers ample possibility for civil society engagement. In fact, at three stages of the monitoring cycle, NGOs can submit written information on their states' human rights performance, and, during the review, they can meet with the committee ahead of the session concerning their country. In the past five years (2017–2021), the nine treaty bodies addressed immigration detention in approximately 137 concluding observations in total, of which 47 percent concerned European and Western countries, 21 percent concerned Asia-Pacific countries, 17 percent concerned Latin American and Caribbean countries and 15 percent concerned African countries.[29] Out of the total number of concluding observations, 23 percent were issued

[27] States are obliged to submit reports on the implementation of the ICCPR every four years, and on the implementation of the ICRMW and CRC every five years.

[28] Some treaty bodies, including the HRC, have introduced a follow-up procedure within which they request, in their concluding observations, that states report back within a year on the measures taken in response to specific recommendations or "priority concerns".

[29] Figures and estimates in these paragraphs are based on concluding observations retrieved using the search function of the Universal Human Rights Index database (OHCHR 2022b). Keywords to identify issues relating to immigration detention in the concluding observations, namely "Arbitrary arrest & detention," "Conditions

by the Committee against Torture, 18 percent each by the HRC and Committee on the Elimination of Racial Discrimination, 14 percent by the CRC, 12 percent by the CMW and 11 percent by the Committee on the Elimination of Discrimination against Women (OHCHR 2022b).[30] This demonstrates that immigration detention is a cross-cutting issue for the nine core human rights treaties, and all the committees are sensitive to detention practices in countries under their review. This body of recommendations clarifies and details the international human rights framework regulating immigration detention, and the GCM's Objective 13 should be interpreted in accordance with it.

The HRC, CMW and CRC Committee regularly look at the question of immigration detention within the monitoring procedure and issue specific recommendations to states. Like the General Comments discussed above, the concluding observations help interpret the relevant detention provisions under the ICCPR, ICRMW and CRC and, in addition, adapt them to the domestic context. In its 25 relevant concluding observations, the HRC urged 14 countries to apply alternatives to detention and 11 countries to ensure that detention is a measure of last resort, explicitly relying on the principles of necessity and proportionality regarding seven countries. In six cases, the HRC recommended that detention be subject to a review, and in five cases, it recommended that detainees have access to legal assistance. The HRC is still inconsistent regarding the detention of children: in six cases, the Committee urged the country to ensure that the detention of children is a measure of last resort, whereas five countries were called upon not to detain children at all. For its part, in 17 relevant concluding observations, the CMW urged 12 countries to ensure that detention is an exceptional measure of last resort and 11 countries to apply alternatives to detention. The Committee is precise as regards the requirements of alternatives to detention. Countries should give clear reasons why alternatives cannot be implemented in the specific case. The Committee addressed the review of detention in at least four concluding observations. The CMW requires that detention be reviewed within 24 h by an independent and impartial judicial authority. In five cases, the Committee called upon the country not to detain children. Finally, in its 19 relevant concluding observations, the CRC Committee urged 10 countries not to detain children. However, at the same time, the Committee urged five countries to place children in alternatives to detention, so more coherence would be helpful. Crucial to benefiting from child-specific rights is identification as a child, and the Committee frequently recommends that states put in place adequate age determination procedures.

In contrast to the monitoring procedure of the treaty bodies, the review of states' implementation of the GCM is based on a voluntary "state-led approach" (GCM, para. 48).[31] The key review mechanism is the International Migration Review Forum (IMRF), serving as an "intergovernmental global platform" open to states to discuss and share progress in the implementation of the GCM (GCM, para. 49).[32] Organised and supported by the Migration Network, the IMRF is convened under the auspices of the UN General Assembly every four years and held "at the highest possible political level." There is a risk that CMW (and even HRC) sessions taking place in Geneva might eventually be overshadowed by New York-based meetings, carried out at the highest political level and outside of the relevant authoritative and binding legal framework. The role of the treaty bodies in the monitoring of states' implementation of their immigration detention

of detention," "Persons deprived of liberty: definition of torture & ill-treatment" and "Persons deprived of liberty: concept of places of deprivation of liberty," were cross-filtered through the "Concerned persons/groups" category by selecting "Migrants," "Non-citizens," "Refugees & asylum seekers" and "Stateless persons."

[30] The remaining three treaty bodies (the Committee on Enforced Disappearances, Committee on the Rights of Persons with Disabilities and Committee on Economic, Social and Cultural Rights) issued very few recommendations on immigration detention during that period.

[31] This triggered concerns in academia; for instance, see (Desmond 2020, p. 235; Grange and Majcher 2020, p. 300; Guild and Grundler 2022).

[32] The IMRF will alternate with regional reviews, which will inform each edition of the IMRF (GCM, para. 54). The regional reviews, organised across five regions, took place in late 2020/early 2021. For a discussion of the review of the implementation of Objective 13 in the UN Economic Commission for Europe countries, see (Majcher 2021b).

obligations may be diminished as states may feel they can avoid their obligations under the ICCPR, ICRMW and CRC through participation in the GCM review mechanism. A trend whereby UN member states would bypass this framework poses a general threat to the rule of law. It is regrettable that no role was foreseen for the CMW or HRC in the GCM review, as their monitoring would be a relevant input to the review process and a reminder of the existing binding legal framework and monitoring of its implementation by the treaty bodies.

Ahead of the IMRF, states are invited to submit "voluntary GCM reviews", which are understood to be voluntary stocktaking of the implementation of the GCM. These reports should provide brief information on the status of the implementation of all 23 objectives of the GCM, including difficulties in reaching them and measures to address these challenges. For the first IMRF, which took place on 17–20 May 2022, 47 countries submitted their reports—only around 30 percent of the countries signatory to the GCM (UN 2022). Out of the 46 reports the author was able read,[33] 57 percent did not address detention or Objective 13, and 24 percent addressed detention but either inconclusively explained or did not explain at all how they strive to apply it as a measure of last resort. One country, for instance, highlighted that detention is defined in its legislation as a measure of last resort, but then it explained that, in practice, migrants in an irregular situation are detained until their expulsion. Such a measure looks like a mandatory detention applied for the mere fact of being in an irregular situation or as a measure mandatorily accompanying removal. It breaches the requirement to use detention exceptionally as a measure of last resort based on the individual circumstances of the case—as the requirements of necessity and proportionality stipulate. In the same vein, several reports mentioned that, under Objective 13, they work with the IOM on voluntary returns, implying that this measure is considered an alternative to detention. Such an approach is not based on the international human rights framework regulating detention. So-called voluntary departure is an alternative to a forced return, not to detention. Suggesting otherwise would mean that foreseen forced return is always accompanied by detention (which would then be mandatory and, hence, arbitrary detention) and a way to leave detention would be by accepting so-called voluntary departure. There is a risk that such an approach is presented to migrants in detention to compel them to accept a so-called voluntary departure in order to be released from detention (by leaving the host country).[34]

Only four reports addressed the application of alternatives to detention. Turkey provides for alternatives to detention in its legislation. The Republic of Korea has a policy to temporarily suspend detention if it leads to a substantial threat to the person's life, physical well-being or financial security. Mauritania set up a system in 2021 to place vulnerable persons (such as children, women, ill persons, persons with a disability and the aged) in alternatives to detention, such as the state's protection centres, welcome centres run by NGOs or families or communities of the persons' countries of origin. In Kenya, the National Commission on Human Rights issued a report on immigration detention with a view to advocate for alternatives to detention and facilitated high-level meetings on alternatives to detention. Alternatives to detention as an expression of the requirements of necessity and proportionality should be used in practice, rather than merely being provided in law, and should benefit all migrants, not only those in a vulnerable situation. Crucially, discussions on the alternatives to detention and programmes promoting their use in practice should not be detached from the normative framework regulating detention. Specifically, alternatives to detention should be used instead of a lawful detention. If a detention lacks precise grounds, the persons should not be detained at all. Indeed, alternatives to detention are not alternatives to liberty. Personal liberty should be the default option. In this light, it is commendable that five countries stressed that they do not practice immigration detention.[35]

[33] The report of Turkmenistan was submitted in Russian only.

[34] Indeed, such a practice was reported in hotspots on the Greek Aegean Islands, see (Hänsel 2020).

[35] These countries are Ecuador, Guinea Bissau, Kyrgyzstan, Portugal and Uruguay.

The treaty bodies' monitoring procedure shows the importance of independent sources being involved in the process as they often challenge overly positive self-assessment in a state's report. Frequently, concerns expressed by NGOs were reflected in the concluding observations of the treaty bodies. In the context of the GCM review, according to the Migration Network, NGOs with consultative status with the UN Economic and Social Council (ECOSOC) may submit written submissions to be posted on the dedicated website (UN Network on Migration 2021c). Whereas NGO submissions were posted on the website in the framework of the regional reviews, for instance, the UN Economic Commission for Europe (UNECE) region (UN Network on Migration 2022b), they do not seem be made accessible in the context of the IMRF. As of mid-June 2022, the dedicated website listed, alongside the states' reports, only the submissions of international organisations (UN 2022).

Each IMRF lasts four days, but the review of the implementation of the GCM takes place only during four multi-stakeholder round tables, each grouping together between five and seven objectives of the GCM. At the 2022 IMRF, Objective 13 was discussed at the second round table, which covered seven objectives of the GCM. The round table spanned three hours, most it devoted to the speeches of high-level panellists, with only around 45 min reserved for an "interactive discussion" open to interventions from the floor. The underlying objective of the round tables is to provide an opportunity for states (and other relevant stakeholders) to discuss and share progress on the implementation of the GCM (UN Network on Migration 2021c). Although the panellists at the second round table were from IOs and NGOs, there was no country-specific discussion leading to recommendations (UN Network on Migration 2022c). Ultimately, the states' implementation of the objectives of the GCM is not veritably reviewed, and hence, the GCM process should be considered a self-review. This contrasts with the day that the treaty bodies spend on the examination of the implementation of their treaty by states under their review, engaging in discussions with the states' delegations. The treaty bodies' monitoring and the GCM review can be seen as complementary. Whereas the HRC, CMW and CRC Committee review the implementation of the detention provisions by the countries under their review, the IMRF offers a space for debate, commitments and pledges around Objective 13.[36]

At the end of each IMRF, a Progress Declaration will be issued and agreed upon through intergovernmental consultations. Among its functions is to provide an "evaluation of overall progress in respect of the implementation of the GCM." Detention is mentioned in the 2022 IMRF Progress Declaration on a few occasions. The Declaration highlights that "efforts are being made to modernize border-crossing points, including by simplifying procedures and upgrading infrastructure and equipment, to reduce immigration detention, including by implementing noncustodial alternatives to detention in the COVID-19 context." It also underscores that "some states have taken steps to end child immigration detention, advancing efforts to protect and respect the best interests of the child" (UN General Assembly 2022, para. 31). According to the Declaration, "some policies, practices and conditions associated with immigration detention, including arbitrary deprivation of liberty, overcrowding and poor access to basic services have affected the physical and mental health and well-being of migrants, as well as child development" (UN General Assembly 2022, para. 32). Further, "in some instances, public health considerations were used to justify detention or unlawful deportation. States also faced practical challenges in ensuring alternatives to detention with full respect for human rights, particularly with regard to providing adequate living conditions and access to gender-responsive and people-centred services for migrants" (UN General Assembly 2022, para. 36). Among the "Recommended actions to accelerate the implementation of the Global Compact," one concerns detention. Accordingly, states "will consider, through appropriate mechanisms, progress and challenges in working to end the practice of child detention in the context of international migration" (UN General Assembly 2022, para. 57). Whereas this commitment is arguably

[36] Pledges were an important element of the IMRF, see (UN Network on Migration 2021b). The IMRF also provided opportunities for IOs and NGOs to organise side events devoted to specific topics, including alternatives to detention organised by the WG.

weak, the zero draft of the Declaration did not contain it at all. The Declaration contrasts with the concluding observations issued by the treaty bodies to each state under their review in terms of both the manner of adoption and content.

4.2. The Universal Periodic Review as a Source of Inspiration for the IMRF

The Universal Periodic Review (UPR), which is a periodic assessment of the human rights records of all the UN member states, can be relevant to the review of the GCM implementation. Like the IMRF, and in contrast to the treaty bodies' monitoring process, the UPR is a state-led, voluntary, political process. Due to the similarities between the UPR and the IMRF (and regional GCM reviews), the UPR provides inspiration for legal and policy innovations for the improvement of the GCM review. Notwithstanding the political character of the UPR, the review is carried out under the auspices of the UN Human Rights Council and is based on the human rights framework.[37] Since the GCM *rests* on the Universal Declaration of Human Rights, ICCPR, International Covenant on Economic, Social and Cultural Rights and other core international human rights treaties (para. 2), is *based* on international human rights law (para. 15(f)) and should be implemented consistently with states' international law obligations (para. 41), it can be argued that several features of the UPR can be replicated within the GCM review to increase the effectiveness of the process.

Specifically, there are at least four features of the UPR (OHCHR 2020) that could be introduced into the GCM review. First of all, in contrast to self-review and general discussion not addressing specific countries in the framework of the IMRF, within the UPR, each state is reviewed by its peers. The human rights performance of each UN member state is reviewed by the UPR Working Group, consisting of the 47 members of the UN Human Rights Council, but any UN member state can make recommendations to the country under review. The review is led by three states (troika) serving as rapporteurs. This peer-to-peer form of review could be introduced to the GCM review. The review could be performed by the states signatory to the GCM, with a few states, on a rotational basis, in charge of leading the review of each state. The voluntary aspect of the process is preserved in the framework of the UPR as the state under review is not obliged to formally accept any recommendation. Second, the UPR devotes a three-and-a-half-hour session to each state under review. Extending time available for the review of each state's implementation of the GCM would increase the effectiveness of the process.

Third, alongside the states' reports, the discussions during the UPR sessions are based on two compilations prepared by the OHCHR Secretariat: "Compilation of UN information" (information contained in the reports of UN entities) and "Summary of stakeholders' information," which includes input from independent sources (including national human rights institutions and NGOs). The IOM, as the Secretariat of the Migration Network, could cooperate with the OHCHR Secretariat to use excerpts from the "Compilation of UN information," which are relevant to GCM objectives. Crucially, it should include relevant concluding observations issued by the treaty bodies. It would be helpful if the IOM produced a document modelled on the "Summary of stakeholders' information," which would contain information from submissions from independent organisations that are currently supposed to be posted on the dedicated website.[38] Fourth, the country-specific UPR "outcome report" contains all recommendations issued to the state under review, indicating which were accepted by it. The proposed changes to the GCM review would have implications for the outcome document (Progress Declaration), which could draw from the UPR outcome document.

These proposed modifications would require adapting legal and policy bases for the GCM review. However, this would not be unprecedented. The Anti-Personnel Landmines

[37] Similar to the IMRF, the UPR also aims to provide technical assistance, offer capacity-building measures and share best practices in the field of human rights.

[38] However, as noted above, NGO submissions to the IMRF have not yet been posted on this website, see Section 4.1.

Convention initially did not include measures for a review mechanism, but over the years, a strong, multi-tiered mechanism was developed. Alternatively, the UPR itself could review states' implementation of their commitments under the GCM. The UPR evaluates states' respect for their human rights obligations set out in the UN Charter, the Universal Declaration of Human Rights, human rights treaties ratified by the country and voluntary pledges and commitments made by the state. This framework could include the GCM, as it *rests* on the Universal Declaration of Human Rights, ICCPR, International Covenant on Economic, Social and Cultural Rights and other core international human rights treaties (para. 2) and is *based* on international human rights law (para. 15(f)). This would avoid the costly duplication of work and build upon an existing, well-tested model. The current parallel mechanisms reflect the long-standing position of some states, supported by the IOM, as illustrated in the creation of the Global Forum on Migration and Development (GFMD) process in 2007 to deal with migration issues outside of the UN framework.

In a nutshell, the treaty bodies' monitoring process and the GCM review are complementary, and synergies between these processes should be fostered to improve the supervision of states' implementation of their detention-related obligations and commitments. Indeed, in the "voluntary GCM review," states are encouraged to describe efforts to leverage synergies across the various reporting mechanisms of other international agreements (UN Network on Migration 2021c). In addition, the UN General Assembly requested the Secretary-General to ensure that the expertise of the UN system as a whole, including treaty bodies and particularly Geneva-based expertise, is coordinated to support the IMRF and facilitate states' participation in the GCM review (UN General Assembly 2019, para. 7). To prevent creating parallel processes, the IOM, as the Network Secretariat, and the OHCHR, as the treaty bodies' Secretariat, should strengthen the links between their monitoring tasks. The relevant excerpts of the concluding observations should be submitted for the GCM reviews, and the treaty bodies' recommendations should be included in the outcome document of the GCM review. Furthermore, states' voluntary input to the GCM and submissions by other stakeholders could be used by the treaty bodies during the "constructive dialogue" with the state delegation during their review. Beyond treaty bodies, the UPR can inspire several changes in the GCM reviews to make it more effective and can itself be used to review the implementation of GCM commitments.

5. Conclusions

This article contributed, through the lens of the GCM, to the long-standing discussion on the threats to the rule of law posed by the practice of immigration detention, despite the existence of a corpus of relevant provisions stemming from human rights norms and standards. The GCM and Objective 13 may undermine the rule of law in migration governance, including immigration detention regimes. In fact, given the attention the GCM attracts, its nonbinding character and the voluntary nature of its review can be used by states as justification for patchy implementation of their binding human rights obligations and inadequate reporting on this implementation to the supervising bodies. While acknowledging these challenges to the rule of law, this article sought to explore the ways the GCM can actually foster the rule of law in the area of immigration detention. Arguably, to strengthen rule of law principles, Objective 13 would need to support the binding human rights regime preventing arbitrary detention and its implementation at the domestic level by ensuring that detention is used exceptionally, as a measure of last resort, and is subject to a judicial review. In search of synergies between human rights and GCM frameworks, this article discussed the interplay between the ICCPR, ICRMW and CRC on the one hand, and Objective 13 on the other, at three levels. First, as regards detention provisions, Objective 13 overall reflects the detention norms and standards under the international legal framework. Thus, the content of the provisions of Objective 13 and most of the implementing actions are not optional for states. Second, to increase complementarities between the support given to states for the implementation of the

detention provisions of the HRC, ICRMW and CRC on the one hand, and Objective 13 on the other, the Migration Network should align the interpretation of Objective 13 with an authoritative interpretation of detention provisions by the HRC, CMW and CRC Committee. The capacity-building assistance and funds from the Multi-Partner Trust Fund for the projects implementing Objective 13 should be dependent on the beneficiary countries' compliance with international detention-related human rights standards. Third, concerning supervision of the implementation, the treaty bodies' monitoring process and the GCM review are complementary. Whereas the HRC, CMW and CRC Committee veritably review the implementation of the detention provisions by the countries under review, the IMRF offers states a space for debate and to share good practices, challenges and commitments regarding implementation of the GCM. The IMRF should support treaty bodies' monitoring by involving members of the HRC, CMW and CRC Committee, reminding states of their binding human rights obligations and referring to treaty bodies' recommendations in the GCM Progress Declaration. The UPR can inspire several changes to the GCM review to make it more effective, or it could itself review the GCM implementation. Aligning the interpretation, implementation and review of the implementation of Objective 13 within the existing legal framework is necessary for upholding the rule of law in the area of immigration detention and, thus, for the GCM to adhere to its own guiding principles, which include the recognition of respect for the rule of law, due process and access to justice as "fundamental to all aspects of migration governance."

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Refugees as Migrant Workers after the Global Compacts? Can Labour Migration Serve as a Complementary Pathway for People in Need of Protection into Sweden and Germany?

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Abstract: Both the Global Compact for Safe, Orderly and Regular Migration and the Global Compact on Refugees commit states to diversify and expand on labour migration opportunities, in particular by facilitating work-based 'complementary pathways' for the admission of refugees. Yet, almost four years after their adoption, such pathways remain limited in many cases. It is the aim of this article to examine the constraints posed by existing immigration laws to serve as an admission ground for people in need of protection and the key legal, policy and political issues that need to be addressed to allow the commitments related to labour migration pathways contained in the Compacts to be implemented in national legal systems. In so doing, this article applies a legal and political feasibility lens to evaluate why these pathways for persons in need of protection are often small-scale, underutilized by employers and unwelcoming to potential refugees. It employs a comparative case study methodology drawing on more than 30 semi-structured interviews with stakeholders at the international and national levels in Germany and Sweden. The article concludes that the main challenge to the political feasibility of opening work-based complementary pathways for refugees is politicians' and policy makers' traditional thinking of migration and asylum as separate domains. When it comes to challenges to legal feasibility, these stem from entry requirements, lack of sufficient interest among employers who are a key stakeholder in the facilitation of such pathways, as well as issues related to the security of status of potential beneficiaries of such measures.

Keywords: complementary pathways; legal pathways to refugee protection; work-based pathways; Global Compact for Safe, Orderly and Regular Migration; Global Compact on Refugees; migration; refugees; labour migration; policy feasibility; Germany; Sweden

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1. Introduction

In response to increasing restrictions to spontaneous arrivals and to accessible protection opportunities (Chimni 1998; Hathaway 1992; Moreno-Lax 2017), the international community has been advancing the long-standing policy idea of opening legal pathways to protection, additional to resettlement,[1] where traditional durable solutions are not achievable (UNHCR 2019a, p. 5). These so-called 'complementary pathways' include humanitarian admission programmes, such as community sponsorship, allowing individuals or organisations to provide reception and integration support to refugees admitted in a host country (UNHCR 2019a, p. 5), and other migration avenues based on labour migration, education and family reunification. This article focuses on the policy idea to employ labour migration as a complementary pathway for people in need of protection in third countries, understood as 'safe and regulated avenues for entry or stay in another country' and leading to either permanent or temporary residence (UNHCR 2019a, p. 10).

Both the Global Compact for Safe, Orderly and Regular Migration (GCM) and the Global Compact on Refugees (GCR) contain commitments related to enhancing labour

[1] United Nations General Assembly, New York Declaration for Refugees and Migrants, Resolution No. A/RES/71/1 adopted on 19 September 2016, paras 77–79 and Annex I, paras 10 and 14–16.

migration opportunities and facilitating work-based complementary pathways for admission of refugees.[2] On the one hand, 'labour mobility opportunities for refugees, including through the identification of refugees with skills that are needed in third countries' are promoted as part of the GCR.[3] On the other, the GCM calls for enhanced 'availability and flexibility of pathways to regular migration',[4] which could also be beneficial for asylum seekers and refugees in seeking legal access to protection or solutions through onward migration (Costello 2019, p. 647). Past experience shows that when provided with an opportunity for facilitated labour mobility, many people in need of protection would prefer to apply for a work permit rather than go through the cumbersome refugee status determination procedure, and this bears the potential to reduce the workload of national refugee status determination bodies (Crépeau 2018, p. 655). Even though references to those groups have been omitted from the final version of the GCM (Guild et al. 2019, p. 51), their consideration should form part of its implementation process (Costello 2019, p. 647).

The added value of such complementary pathways has also been recognised at the European Union (EU) level.[5] Yet, almost four years after the adoption of the Compacts, such pathways are still far from reality in the EU context,[6] mostly due to their discretionary nature (Vankova 2022, p. 95) and the limited competence in the field of legal migration at the EU level (Farcy 2020).[7] Therefore, it is the aim of this article to examine the constrains posed by existing immigration laws to serve as an admission ground for people in need of protection and the key legal, policy and political issues that need to be addressed to allow the commitments related to labour migration-based pathways contained in the Compacts to be implemented in national legal systems.

In order to do that, the article's research design draws from evaluation and policy analysis studies aiming to interrogate the feasibility of developing complementary pathways at the national level in the EU. According to Majone, policy feasibility 'is defined in terms of all the relevant constraints' (Majone 1975, p. 49), and this article focuses on those of legal and political nature. A legal feasibility examination is needed in order to understand the extent of immigration legislation's accessibility and its suitability to provide security of status for people in need of protection. Furthermore, any normative analysis examining the feasibility of a new policy idea should account for the political constrains that can limit the possibility of realising its goals (Majone 1975, p. 68). Therefore, considering political feasibility can point to an important source of potential disagreement among key stakeholders that can hinder the implementation of complementary pathways for refugees at the national level.

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[2] Even though the Compacts uphold the migrant-refugee dichotomy and distinguish between complementary pathways reserved for recognised refugees and legal pathways for the rest of the migrants, these terms are used interchangeably in this article, using the New York Declaration, para 6 as point of reference. See further the Introduction to this Special Issue and Section 4 of this article. In addition, the terms work-based, labour migration-based and labour mobility pathways are also used interchangeably in this article. Since such pathways are discretionary, their target groups are determined by states and differ. See further (Vankova 2022).

[3] United Nations, Report of the United Nations High Commissioner for Refugees, Part II: Global Compact on Refugees, General Assembly Official Records Seventy-third Session Supplement No. 12 (A/73/12 (Part II)), New York, 2018, para 95.

[4] United Nations, Resolution adopted by the General Assembly on 19 December 2018, Seventy-third session, A/RES/73/195, Annex: Global Compact for Safe, Orderly and Regular Migration, Objective 5, p. 12.

[5] European Union Agency for Fundamental Rights, Legal Entry Channels to the EU for Persons in Need of International Protection: A Toolbox, 2015; European Commission, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM (2016) 197; European Commission, Communication on a New Pact on Migration and Asylum, COM (2020) 609 final; European Commission, Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, C (2020) 6467 final, Brussels.

[6] Under the EU-funded DT4E project, complementary labour mobility pathways will be piloted in Belgium, Ireland and Portugal. Yet, according to information provided by IOM, this is not expected to happen before the end of 2022/early 2023. The United Kingdom is also covered by this project and has already launched the Displaced Talent Mobility Pilot: https://www.talentbeyondboundaries.org/blog/introducing-the-uks-displaced-talent-mobility-pilot (accessed on 7 July 2022).

[7] On the legal nature of the Compacts, see the Introduction to this Special Issue and the contribution of Favi. For a non-EU perspective on the implementation of the Compacts, see the contribution of Alexander and Singh in this Special Issue.

Or as Robert and Zeckhauser note: 'ignore politics, and policy recommendations will fall on deaf ears, accomplishing nothing' (Robert and Zeckhauser 2011, p. 624).

This article employs a comparative socio-legal case study methodology to analyse the possible implementation of such pathways based on Germany and Sweden's immigration laws. These two EU Member States have been among the top ten refugee host countries worldwide (UNHCR 2018)[8] and attracted most of the secondary movements after the so-called 2015 'refugee crisis' (EPRS 2017, p. 4). These are also the two countries with the largest resettlement quotas in the EU[9] and even though they introduced restrictions into their national refugee laws after 2015, Sweden maintained a "welcoming" approach to labour migration and Germany liberalised its immigration legislation aiming to attract skilled migrants. All this made them stand out as countries prone to think creatively about refugee protection and ideal case studies to explore the topic of work-based complementary pathways. Methodologically, alongside legal and policy analysis, the article draws from more than 30 semi-structured interviews conducted between October 2020 and June 2021 with national stakeholders including NGO representatives, lawyers, employers' organisations and trade unions, as well as with international and national policy makers and experts from Germany and Sweden to ascertain their views on the feasibility of using such policy approach. Even though no politicians were interviewed, the interviews that were conducted covered questions related to the political feasibility of initiating labour migration-based complementary pathways for people in need of protection.

This article argues that the main challenge to the political feasibility of opening work-based complementary pathways for refugees is politicians' and policy makers' traditional thinking of migration and asylum as separate domains. When it comes to challenges to the legal feasibility, it concludes that these stem from entry requirements that can be insurmountable for people in need of protection, alongside insufficient interest and incentives among key stakeholders to engage in such policy approach, as well as issues related to the security of status of potential beneficiaries of such measures. Therefore, when designing work-based complementary pathways for refugees, policy efforts need to address both admission conditions and precarious migration statuses equally. This requires the participation of the International Labor Organization (ILO) as an equal partner in the governance of refugee work (Gordon 2021, p. 250), and more specifically in the newly established Global Task Force on Refugee Labour Mobility whose members represent governments, UN agencies, international business and civil society organisations as well as refugees.[10]

The article is structured as follows: It commences with an analysis of the challenges to the legal feasibility of facilitating work-based complementary pathways for people in need of protection (Section 2). It discusses Sweden and Germany's immigration law provisions which can serve as a basis for work-based complementary pathways (Section 2.1) and then moves on to examine the admission and post-arrival legal barriers, as well as barriers outside the law, such as the positions of key stakeholders (Section 2.2). Next, it presents a feasibility analysis of using other national models for the facilitation of work-based complementary pathways, such as the Western Balkan Regulation and community sponsorship programmes (Section 3). It then moves on to an analysis of the political feasibility of facilitating work-based complementary pathways for people in need of protection (Section 4).

[8] Respectively in absolute and relative terms.

[9] See https://www.unhcr.org/resettlement-data.html (accessed on 7 July 2022).

[10] Established in April 2022 in response to the 2019 UNHCR's Three-Year Strategy on Resettlement and Complementary Pathways, Goal 2: Enabling actions, p. 23. See further https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/corporate-initiatives/global-task-force-refugee-labour-mobility.html (accessed on 7 July 2022).

2. Legal Feasibility of Using General Labour Migration Frameworks as Pathways for People in Need of Protection

This section aims to examine the legal feasibility of using existing national provisions which are part of the immigration systems of Sweden and Germany as the basis for work-based complementary pathways. This focus is necessary as the European Pact on Migration and Asylum[11] and the Commission recommendation on legal pathways to protection in the EU[12] demonstrate that, apart from technical support to Member States, no other EU action is envisaged for the facilitation of such labour migration-based into the EU for people in need of protection. This is in line with Article 79 TFEU providing for shared EU competence over labour migration which has resulted in EU secondary law covering only specific categories of migrant workers.[13] Therefore, Member States willing to facilitate such pathways would rely on their national law or a combination of EU and national law to do so (see further (Vankova 2022)).

Furthermore, not all Member States use these EU instruments to the same extent. In the Swedish case, for instance, the EU law on labour migration has had limited effects at the national level (Parusel 2020, p. 55). Alongside Sweden's 'reluctant' approach to implementing these directives, causing delays in their transposition, they are not seen as bringing any added value by labour migrants who have easier access to permits provided by the general labour migration framework (Parusel 2020, p. 55). Unlike Sweden, Germany has been so far the Member State issuing the most Blue Cards in the EU and using the Blue Card Directive as the main legal channel to recruit migrants in highly-skilled occupations.[14] Yet, at the same time, Germany has also recently adopted an ambitious migration law package, showing that it will not 'confine migration policy reform to supranational harmonisation' (Thym 2019).

2.1. The Swedish Aliens Act and the German Skilled Immigration Act as Basis for Work-Based Pathways for People in Need of Protection

The state officials interviewed in both case study countries stressed that the existing general labour migration frameworks are accessible enough to be used as legal pathways for people in need of protection.[15] In Sweden, almost all interviewees referred to the Swedish Aliens Act,[16] which people from refugee producing countries had already used as it provides the basis of 'one of the most liberal' labour migration systems in the OECD area as a result of the reform undertaken in late 2008.[17] The Swedish model was considered a suitable pathway for people in need of protection as it was employer-driven and open to labour migrants from all skill levels, without any labour market restrictions stemming from quotas or labour market tests.[18] After receiving a job offer, the prospective migrant worker

[11] European Commission, Communication on a New Pact on Migration and Asylum, COM (2020) 609 final, pp. 22–23.

[12] European Commission, Commission recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, COM (2020) 6467 final, p. 10.

[13] Such as highly-skilled, seasonal workers, intra-corporate transferees and researchers. See further (Vankova 2022).

[14] Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC, [2021] OJ L 382. In 2019, Germany granted 28.858 Blue Card compared to 2.036 in France and 2.104 in Poland, which were the other two countries issuing most of the Blue Cards. Eurostat, <MIGR_RESBC1>, (last visited 1 March 2022). See further (De Lange and Groenendijk 2021; De Lange and Vankova Forthcoming).

[15] Interview with a state official, Germany, 19 October 2020; Interview with a state official, Sweden, 2 March 2021.

[16] Utlänningslag (2005: 716).

[17] Interview with a state official, Sweden, 2 March 2021; Interview an academic with academic, Sweden, 25 February 2021. See further OECD, Recruiting Immigrant Workers: Sweden 2011, OECD, p. 32. It must be stressed, however, that the analysis in this article covers the period before June 2022, when the Swedish Alien Act's amendments introduced a more restrictive approach.

[18] Interview with a state official, Sweden, 2 March 2021. Yet, it needs to be noted that employers are obliged to advertise their vacancy through the Employment Service and EURES portal for 10 days in order to satisfy the EU principle of community preference but they do not need to justify their recruitment from a third country. See (Parusel 2020). Furthermore, there are pending changes concerning the reintroduction of a general labour market test. See Section 4.

has to submit an application for a residence permit from abroad.[19] As part of this process, applicants need to present a valid passport, demonstrate that their terms of employment are in line with the respective collective agreements, satisfy a maintenance requirement with a salary of at least 13,000 SEK (approx. 1200 EUR) per month before taxes and have their insurance covered by the prospective employer.[20]

Those labour migrants who are granted a residence permit of at least a year, are entitled to the same rights as Swedish citizens in terms of welfare benefits and healthcare (Ahlén and Palme 2020), and can apply for family reunification in line with the Family Reunification Directive[21] without the need to satisfy a maintenance or any other integration requirements.[22] Work permits are bound to a specific employer and occupation for the first two years.[23] Migrant workers are free to change employer after two years and occupation after four years, given that they have obtained permanent residence allowing for full access to the labour market. [24]

Most interviewees in Germany pointed to the opportunities introduced by the new Skilled Immigration Act of 2019,[25] which according to them could provide legal channels for people in need of protection.[26] The new law amended the Residence Act containing the general provisions concerning employment of third-country nationals and made it largely easier for skilled workers below the level of tertiary education to migrate to Germany.[27] General requirements to obtain a permit based on employment include a job offer and proof of completed vocational training in Germany or a foreign vocational qualification that is equivalent to a German one.[28] In case of tertiary education, the qualification must be obtained in Germany, or recognized as equivalent to a German degree.[29] In addition, the Federal Employment Agency needs to verify whether applicants will perform work for which they are qualified and whether the employment conditions are equivalent to those for German workers.[30] Finally, there is an additional requirement for workers above the age of 45 who need to meet a certain salary threshold or demonstrate sufficient savings to prevent reliance on social benefits as pensioners.[31]

When it comes to legal pathways for people in need of protection, the interviewees pointed to the newly introduced job-seeking and vocational training-seeking provisions: a temporary residence permit for up to six months for skilled workers with a vocational training qualification[32] and foreigners below the age of 25 who wish to seek a quality vocational training.[33] Evidence of sufficient resources is an admission requirement in both

[19] Aliens Act, Chapter 6, Section 4. At the time of finalising this article, this rule has been tightened and currently applicants need to present a signed job contract. See Aliens Act, Chapter 6, Section 2. To be able to work in Sweden, a migrant now needs a work permit (Aliens Act Chapter 2, Section 7) and a residence permit for stays longer than 3 months (Chapter 2, Section 5).

[20] Aliens Act, Chapter 2, Section 1; Chapter 6, Section 2. See also the proposal to increase the income level requirement from 1300 SEK to 29,500 SEK: https://www.regeringen.se/4a49f5/contentassets/44ea5209975849a4b758af78ebd8a442/ett-hojt-forsorjningskrav-for-arbetskraftsinvandrare-prop.-202122284.pdf (accessed on 7 July 2022).

[21] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251.

[22] This provision changed in June 2022 and currently the sponsor is subject to a maintenance requirement. See Government Bill, 2021:22:134 and Aliens Ordinance, Chapter 4, Section 4a.

[23] Aliens Act, Chapter 6, Section 2a, 3st.

[24] Aliens Act, Chapter 6, Section 1, 2st. and Section 2a, 3st. For the access to permanent residence, see Aliens Act, Chapter 5, Section 5.

[25] Fachkräfteeinwanderungsgesetz (FEG), BGBl. I, Nr. 31, 20.8.2019, p. 1307–46. In force since 1 March 2020.

[26] Interview with a state official, Germany, 19 October 2020; Interview with an expert, Germany, 20 October 2020.

[27] Interview with a state official, Germany, 22 January 2021; Interview with a state official, Germany, 4 January 2021.

[28] § 18 (2), (3), § 18a Aufenthaltsgesetz (AufenthG)/Residence Act.

[29] § 18 (2), (3), § 18b AufenthG.

[30] § 18 (2) No. 2, § 39 (2) AufenthG.

[31] They need to demonstrate a salary of at least 55 per cent of the earnings ceiling of the general pension scheme. See further § 18 (2) No. 5 AufenthG.

[32] § 20 (1) AufenthG.

[33] § 17 (1) AufenthG.

cases.[34] The former category requires a command of German language commensurate with the work to be performed and a foreign vocational training that is equivalent to the German system. To be eligible for the later provision, apart from the age limitation and good German language skills, the foreigner also needs to be qualified to study at a university.[35] Yet, job-seekers cannot benefit from any social assistance in case they fail to secure a job, as the rules on social security exclude this category (Thym 2019).

Another provision that was identified as an admission pathway for refugees was the permit for vocational training, which provides options for in-company training for those who manage to secure a contract with a German employer. The vocational training could include job-related German language training or require proof of sufficient command of German. Alongside being paid as part of the training curriculum, this temporary residence permit also authorises its holder to work up to 10 h per week in jobs that do not necessarily need to be related to the vocational training,[36] which could mitigate the existing economic self-sufficiency requirement (Thym 2019).

With these legal pathways into Germany, the security of status will depend on finding and keeping employment or retraining successfully as part of the vocational training path that can lead to employment, until one is eligible for permanent residence. However, failure to pass the vocational training exams can lead to a withdrawal of the permit.[37]

2.2. Existing Challenges to Legal Feasibility of Such Approach

In order to assess whether the abovementioned national provisions could serve as a basis for work-based complementary pathways for refugees, Section 2.2 commences with a focus on the constrains outside the law consisting of employers' perceptions to this policy approach and identifying potential candidates for such pathways. It then moves on to examine admission requirements related to visa and travel documents, language knowledge and recognition of qualifications that can be challenging for people in need of protection. It concludes with a discussion of post-arrival issues related to the security of status of potential beneficiaries of such measures.

2.2.1. Employer Organisations' Perceptions

Employers have a central role to play in making work-based legal pathways a reality for people in need of protection, as labour migration to Sweden or Germany cannot commence without a job offer or a work contract, except for job-seeking visas.[38] Notwithstanding the Covid 19 pandemic, employers in both countries experienced labour market shortages and interviewed representatives of employers' organisations confirmed that they were open to hiring foreign workers.[39] However, when it came to recruiting people in need of protection from first countries of asylum, the data collected demonstrate diverging views among employers' organisations. Most of them stressed that companies' starting point would be to look for the right skills and competences, and that the idea to open such pathways did not match this starting point as 'the focus is to give refugees a safe passage from what they need shelter from'.[40] 'That is something not for businesses or businesses organisations to be involved in, this is for politicians.'[41]

Furthermore, the interviewees stressed that most companies would not view refugees based in third countries as a primary target group when it comes to recruiting skilled

[34] § 17 (1) Nr. 2 and § 20 (4) 1 AufenthG. This is a general requirement for almost all residence titles according to § 5 (1) No 1 AufenthG. In the case of employment this requirement is usually fulfilled by the job contract.

[35] § 17 (1) No. 3 AufenthG. The provision requires a school-leaving certificate issued by a German school abroad or a school-leaving certificate entitling the holder to access higher education in the federal territory or in the country where the school-leaving certificate was acquired.

[36] § 16 (3) AufenthG.

[37] Interview with an expert, Germany, 23 October 2020.

[38] On the role of employers, see further (Vankova 2022, pp. 95–97).

[39] Interview with an employers' organization representative, Sweden, 6 April 2021.

[40] Interview with an employers' organization representative, Sweden, 6 April 2021.

[41] Interview with an employers' organization representative, Sweden, 6 April 2021.

personnel.[42] The reason was that companies did not think that they would find the right skills in refugee camps because their main perception was that refugees were low-skilled, rather than having 'recognisable skills'.[43] Alongside the skills and competences, employers were looking for relevant education, language skills, experience and for people 'in a mental position to start working'.[44] For that reason, the interviewees congrued that there was a need for targeted initiatives and institutionalized support to identify potential beneficiaries of work-based pathways among refugees, and that the current bureaucratic process to move them to Sweden or Germany without knowing whether the person might be able to enter and stay poses too high of a business risk.[45] This policy idea was perceived as entailing insecurity and being too complicated, and therefore for most employers it was natural to look at the situation in their own country or in other safe country where potential employees could come through normal procedures.[46]

The analysed data collected as part of this study also suggest sector-based differences. For instance, companies representing the hospitality sector were open to recruiting people from abroad, including those in need of protection, as they were experiencing problems filling positions requiring both qualified, such as chefs, and unqualified workers, such as dishwashers.[47] An interviewee in Sweden also stressed that the country's minimum wage was high in international comparison and it could be attractive to migrants coming from abroad as it could substantially increase their welfare.[48] The German hospitality sector relied mainly on EU citizens coming from Eastern Europe and was also open much more than other sectors to working with refugees who were already in the country.[49]

The findings concerning employers organisations' perceptions demonstrate the need for advocacy and awareness raising in order to attract them as a key stakeholder in the development of work-based pathways for refugees.[50] Their engagement is essential as they can 'build and communicate the business case for hiring refugees and the diversity advantage to other employers' (UNHCR 2019b, p. 31). Therefore, they are represented in the Global Task Force on Refugee Labour Mobility[51] and should be part of every national coalition of stakeholders aiming to design and implement such pathways.[52] But once they are interested, how can employers recruit potential new workers among refugees based in third countries?

2.2.2. Identifying Potential Beneficiaries of Such Complementary Pathways

The GCR links the use of labour mobility as a complementary pathways with the 'identification of refugees with skills that are needed in third countries.'[53] Yet, several interviewees stressed that the identification of refugees could be one of the challenging parts of making such pathways work in practice.[54] NGOs experienced with such projects relied mainly on their existing networks.[55] Indeed, the experience with work-based complementary pathways globally shows that third country employment is made possible with the support of non-for-profit organisations, like the Talent Beyond Boundaries and

[42] Interview with an employers' organization representative, Sweden, 6 April 2021.
[43] Interview with an employers' organisation representative, Germany, 14 May 2021.
[44] Interview with an employers' organization representative, Sweden, 6 April 2021.
[45] Interview with an employers' organisation representative, Germany, 14 May 2021.
[46] Interview with an employers' organisation representative, Germany, 14 May 2021.
[47] Interview with an employers' organization representative, Sweden, 28 April 2021; Interview with an employers' organisation representative, Germany, 14 May 2021.
[48] Interview with an employers' organization representative, Sweden, 28 April 2021.
[49] Interview with an employers' organisation representative, Germany, 14 May 2021.
[50] See also GCR, para 95.
[51] Through the International Chamber of Commerce.
[52] See also GCM's objective 5.
[53] GCR, para 95.
[54] Interview with a NGO representative, Germany, 26 November 2020; Interview with state official, Germany, 19 October 2020.
[55] Interview with a NGO representative, Germany, 26 November 2020; Interview with a NGO representative, UK, 7 December 2020.

RefugePoint, which are in charge of recruitment in successful pilots of Canada, Australia and the UK (Fratzke et al. 2021, pp. 34, 84). For instance, Talent Beyond Boundaries uses a talent catalogue to map the skills and experiences of potential candidates for work-based complementary pathways, and connects them with international employment opportunities.[56] Other possible options identified by the interviewees included using the available infrastructure in first countries of asylum, such as for instance the migration counselling centres developed by the German Agency for International Cooperation (GIZ)[57] or UNHCR's structures supporting community sponsorship.[58] Yet, even if NGOs could reach out to potential beneficiaries of such pathways, states would still need to address obstacles stemming from the existing visa procedures.

2.2.3. Visa Procedure and Travel Documents

Several interviewees stressed that they saw the visa application procedure as a big practical hurdle, as there was a long waiting time at the German embassies' consulates, especially in countries neighbouring Syria.[59] At the time of this writing, a refugee lawyer highlighted that one needed to wait for around 2 years in order to get an appointment in a German embassy.[60] This issue was also among the factors making employers reluctant to engage in such an approach.[61] One interviewee raised a concern that embassies might not be willing to grant labour migration visas to people coming from refugee producing countries, as they would fear that such individuals would apply for asylum once they reached Germany. [62] Embassies might require thorough evidence that 'there will actually be long-standing employment, otherwise they will probably say 'no'.'[63] Even though this was not considered as such an outstanding issue in Sweden, some interviewees also raised concerns in this regard.[64] The need of a fast-track procedure at embassies was highlighted as an essential element that will make such pathways a feasible option.[65]

Another problem identified in terms of entry procedures concerned the travel documents of people in need of protection. An interviewee emphasised that since the 2016 Berlin Christmas market attack, the focus on security in Germany had increased and this had impacted the screening of travel documents.[66] Authorities were quite strict with requiring IDs and passports in order to verify the identity of foreigners before entry, which was a big hurdle for refugees who had not necessarily brought such documents when they left their countries of origin. Those with refugee status under the UNHCR mandate would usually have a UNHCR issued passport but sometimes German authorities would not accept it as a valid ID even in the context of resettlement.

The GCM commitments to providing 'non-discriminatory visa and permit options' and 'reducing visa and permit processing timeframes for standard employment authorizations' that aim to develop flexible and rights-based labour mobility schemes and foster effective skills-matching, are particularly pertinent also for states wishing to develop refugee specific pathways.[67] Yet, alongside visa procedures and travel documents, recognition of qualifications is another requirement that needs to be facilitated.

[56] See further https://www.talentbeyondboundaries.org/talentcatalog (accessed on 7 July 2022).
[57] Interview with a state official, Germany, 19 October 2020.
[58] Interview with an international organisation representative, Germany, 20 October 2020.
[59] Interview with a state official, Germany, 19 October 2020
[60] Interview with a lawyer, Germany, 10 November 2020.
[61] Interview with an employers' organisation representative, Germany, 14 May 2021.
[62] Interview with an employers' organisation representative, Germany, 14 May 2021.
[63] Interview with an employers' organisation representative, Germany, 14 May 2021.
[64] Interview with an international organisation representative, Sweden, 18 February 2021.
[65] Interview with a lawyer, Germany, 10 November 2020.
[66] Interview with a lawyer, Germany, 10 November 2020.
[67] See GCM' Objective 5 (d) and (f).

2.2.4. Recognition of Qualifications

Unlike refugees who have already entered a host country and therefore can go through the process of recognition of their qualifications there, people in need of protection who want to make use of labour migration pathways as a means to seek admission in a host country need to fulfil this requirement in advance, as evidence of such recognition could form part of the visa application process, especially for regulated professions.[68] For instance, according to the German Residence Act, a German or recognized foreign qualification is generally an entry requirement for employment and job-seeking.[69] The German Law on the determination of the equivalence of professional qualifications requires applicants in regulated professions to go through an equivalence assessment on the basis of an application for authorization before they can be allowed to take up or practice a profession regulated in Germany.[70] There is a special procedure, if applicants do not have all the documents requested for the assessment, which is the case for most people in need of protection.[71] As part of this assessment, the applicants need to demonstrate that they intend to pursue gainful employment in Germany that corresponds to their professional qualifications, by providing proof of applying for an entry visa for gainful employment and proof of contacting potential employers or having a business concept.[72] In case of significant differences between the applicants' qualifications and the German requirements, the differences can be compensated for by completing an adaptation course of no more than three years, which can be the subject of an assessment, or by taking an aptitude test in Germany.[73] The visa application process can start only after a positive decision on the determination of the equivalence is taken by the competent authority.[74] In case the qualification has not been fully recognized, a special residence title can be granted to finalise the recognition process.[75] Once the person has entered Germany, the recognition process can continue depending on the individual case and the person can only start working if he or she has sufficient proficiency in German necessary for the work (see Section 2.2.5 below). The only partial exception in this regard concerns those who have practical work experience and aim to enter Germany for completing vocational education under the new Skilled Immigration Act on the basis of an agreement of the Federal Employment Agency.[76]

Interviewees stressed that the recognition process could be a real barrier as it was slow, cumbersome and costly. Interviewees in Sweden commented that despite the possibility for fast-track recognition,[77] 'it takes forever' to have one's qualification recognised.[78] After the application is submitted, it can take up to four months or longer until a recognition statement is issued.[79] In Germany, for asylum seekers with regulated professions who were in the country, it took up to a year and a half or even longer to go through the whole recognition process due to delays caused by existing backlogs and the Covid 19 pandemic.[80] It was usually more complicated to recognise a proof of apprenticeship rather

[68] See further, (Vankova 2022, p. 101).
[69] § 18 (2) No. 3 AufenthG. In case of academic non-regulated professions, however, only comparability is necessary.
[70] Chapter 2 of Berufsqualifikationsfeststellungsgesetz (BQFG). For the list of documents required, see § 12 BQFG. It also needs to be stressed that there is a requirement for most regulated professions that a permission to practise a profession has been granted or promised for. See § 18 (2) No. 3 AufenthG. For the Swedish case, refer to Förordning (2012: 811) med instruktion för Universitets- och högskolerådet, Sections 5–7 and https://www.uhr.se/en/start/recognition-of-foreign-qualifications/ (accessed on 7 July 2022).
[71] § 14 BQFG. Interview with a recognition advisor, Germany, 14 May 2021.
[72] § 12 (6) BQFG.
[73] § 11 BQFG.
[74] Interview with a recognition advisor, Germany, 14 May 2021.
[75] § 16d AufenthG.
[76] § 16d AufenthG.
[77] Interview with a representative of a regional authority, Sweden, 2 March 2021.
[78] Interview with a think thank representative, Sweden, 7 April 2021.
[79] Interview with a representative of a regional authority, Sweden, 2 March 2021.
[80] Interview with a lawyer, Germany, 10 November 2020.

than a university degree, as Germany has quite a specific dual system combining theoretical education with occupational training, different from most other countries.[81]

In both countries, there was targeted support only for refugees who were already in the host country.[82] That meant that people applying from abroad could have difficult time identifying the responsible organisation, especially in Germany where depending on the profession in question, the process could take place at either federal or regional level, and could involve different state and professional associations.[83] The new Skilled Immigration Act was expected to ease this process by requiring the employer to support the employee's application.[84] Yet, this requirement was considered to be a real barrier for people without sufficient recourses[85] or access to financial support,[86] as the cost associated with translation of certificates could reach 5000 EUR in Germany.[87]

Whereas the GCR calls for refugees' skills identification,[88] recognition of prior learning, diplomas, skills and competences is not easily accessible for refugees because of the time and costs associated with identifying the different governmental bodies or professional organisations in charge of verification and issuing the proof of equivalence or else pronouncing a compensatory measure, including an adaptation period or aptitude test. This highlights the importance of advancing the GCR commitment to 'facilitate recognition of equivalency of academic, professional and vocational qualifications'[89] and the GCM details the tools that states can use to achieve that, such as the development of standards and guidelines for recognition of qualifications and non-formally acquired skills in different sectors in collaboration with the respective industries; conclusion of bi-and multi-lateral recognition agreements; and establishment of screening mechanisms of credentials.[90]

2.2.5. Language Knowledge

The GCM also recommends the availability of accessible and remote skills development programmes covering, amongst others, early and occupation-specific language training.[91] The analysed data collected as part of this study illustrate the importance of such measures as most of the interviewees stressed that the knowledge requirement of German or Swedish language respectively could be considered an obstacle to implementing complementary pathways for people in need of protection.[92] Even though the Swedish Aliens Act does not impose a Swedish language requirement, this is a prerequisite for some regulated professions and there are sectors that require a good level of Swedish.[93] The same applies in Germany in regard to health care occupations which require up to B2 level. In addition, the new Skilled Immigration Act requires German language knowledge ranging from A2 level, for instance concerning permits for completing vocational education in line with Article 16d, to language skills in general corresponding to level B1 for persons

[81] Interview with a state official, Germany, 22 January 2021. See further (Kolb 2020, p. 267).
[82] Interview with an employers' organisation representative, Germany, 14 May 2021; Interview with a state official, Sweden, 13 April 2021.
[83] Interview with an expert, Germany, 23 October 2020
[84] Interview with a recognition advisor, Germany, 14 May 2021.
[85] Interview with a state official, Sweden, 13 April 2021.
[86] E.g., refugees in some German states can apply for financial support or sholarships for translation costs or to do some courses as part of the qualifications recognition process. Interview with a recognition advisor, Germany, 14 May 2021.
[87] Interview with an employers' organisation representative, Germany, 14 May 2021.
[88] Para 95.
[89] Para 69. See also para 71. The UK's Refugee Nurse Support Programme provides a good example for recognition facilitation in a regulated profession: https://www.sanctuarypersonnel.com/blog/2022/07/refugee-nurses-boost-nhs-workforce?source=google.com (accessed on 7 July 2022).
[90] See further GCM's objective 18.
[91] Objective 18 (h).
[92] Interview with an expert, Germany, 23 October 2020; Interview with a trade union representative, Germany, 14 May 2021.
[93] Interview with a NGO representative, Sweden, 12 March 2021.

seeking a vocational training.[94] As in Sweden, German companies would require sufficient knowledge of the language even for apprentice contracts (Thym 2019). Therefore, the GCR commitments to facilitate language training need to be considered not only for local integration purposes but also with regards to complementary pathway development.[95]

2.2.6. Security of Status and Labour Exploitation

The interviewed representatives of trade unions and NGOs highlighted problems that are inherent to the labour migration systems in both countries, and need to be taken into account when developing complementary pathways for people in need of protection. The issues at stake concern the precarious migration statuses before beneficiaries of work-based complementary pathways become eligible to access permanent residence, which can increase dependency on employers and make them vulnerable to labour exploitation (Costello 2015; Gordon 2021).[96] The lack of security of residence due to a precarious migration status can lead to triggering of asylum applications as a safety net option.

As mentioned above, labour migrants in Sweden are initially bound to one employer and a specific occupation for the first two years of their permit. When they extend their permit for another two years, they can change employer but still need to stay within the same occupation. Trade unions have documented that due to the employer-driven Swedish system, there have been cases of employers hiring migrant workers to exploit them or selling the job offers that serve as the basis for a work permit application.[97] Since migrant workers were extremely dependent on their employer to stay in Sweden for the first two years and to eventually become eligible for permanent residence permit after four years, they were forced to work for the same employer even when they were not paid the wages they were promised in the original job offer that the employer presented to the Swedish Migration Board. According to the trade union representative interviewed, there were many third-country nationals who came as labour migrants and were abused by unscrupulous employers who made them pay back thousands of Swedish kroner on their wages every month and forced them to work more hours.[98] Some of them came from refugee producing countries and could have applied for asylum status but chose the labour migration pathway. Therefore, they could not go back, which was why 'they keep their heads down even if they have to work 18 h a day for half the salary.'[99] In the case of Germany, similar labour exploitation cases were reported due to the high dependence of refugees on employers.[100]

Another issue specific to the Swedish context concerns the so-called 'competence deportations' (kompetensutvisningar), resulting from residence permit withdrawals when employers fail to apply the initial admission conditions.[101] More specifically, in cases where the Swedish Migration Board discovers discrepancies between the job offer presented by the employer upon the work permit application and the actual work contract (e.g., concerning employment conditions, insurance or salary), migrant workers could be deported if the errors are found to be substantial. Since these are considered as violations of migration law—and not labour law—the only sanction envisaged in migration law is permit withdrawal. One of the cases, for instance, which was successfully appealed, concerned a migrant whose salary for several months was SEK 460 (approx. 44 EUR) less than the salary level agreed

94 Interview with an expert, Germany, 23 October 2020.
95 Para 99.
96 For international standards that needs to be considered when developing such pathways, see further (Vankova 2022, pp. 92–94) and UNHCR Guidelines on International Legal Standards Relating to Decent Work for Refugees, July 2021, available at https://www.refworld.org/docid/60e5cfd74.html (accessed on 7 July 2022)
97 Interview with an academic, Sweden, 25 February 2021; Interview with a trade union representative, Sweden, 2 March 2021; Interview with a think-thank representative, Sweden, 7 April 2021.
98 Interview with a trade union representative, Sweden, 2 March 2021.
99 Interview with a trade union representative, Sweden, 2 March 2021.
100 Interview with a trade union representative, Germany, 14 May 2021.
101 See Aliens Act, Chapter 7, Section 7e.

in the collective agreement.[102] After several court cases stressing that the principle of proportionality had to be applied when assessing permit withdrawal cases, which resulted only in minor changes,[103] amendments aiming to resolve the 'competence deportations' issue are now in the pipeline.[104]

This sub-section demonstrated that national reforms aiming to strengthen the protection of labor migrants' rights, their security of status and access to decent work[105] will contribute to the feasibility of establishing work-based complementary pathways where people in need of protection enter and stay as labour migrants, and do not resort to the asylum system as a safety net. The GCM can be used as an important reference point for such measures,[106] which amongst others are related to the right to just and favourable working conditions; the right to change employer which overcomes ties stemming from migration status related to a particular job, employer and sector; the ability to exercise the right to quit, which when put under constrains can create conditions for forced labour prohibited by the European Convention on Human Rights; and regulating the role of labour recruiters (Costello 2015).

3. Legal Feasibility of Using Other National Policies as Models for Work-Based Complementary Pathways for People in Need of Protection

Having discussed the admission and post-arrival challenges when general labour migration law provisions are employed as pathways for people in need of protection, this section moves on to examine the feasibility of using other national policy models for the development of work-based complementary pathways, namely the so-called "Western Balkans regulation" introduced in German law in 2016, and the refugee community sponsorship, already established in Germany and pending in Sweden. These models were identified on the basis of literature review and discussed with some of the stakeholders interviewed as part of the study.

3.1. 'Western Balkans Regulation'

The increase in asylum applications from the Western Balkan countries in 2014–2015 led to the adoption of the "Western Balkans Regulation" as part of a 'political deal' in 2016 (Kolb 2020, p. 267), which provided a special labour migration pathway for citizens of Albania, Bosnia and Herzegovina, Kosovo, Montenegro, Northern Macedonia and Serbia. This pathway is regulated in Article 26 (2) of the German Employment Ordinance.[107] Applicants from the Balkan countries covered by this provision need a binding job offer and an approval from the Federal Employment Agency consisting of a labour market test and verification that the foreigners are not employed under less favourable terms than German nationals employed in an equivalent position.[108] The regulation allows for any employment and, unlike the general admission criteria of the German labour immigration law, does not require a formal qualification unless the migrant workers are applying for a regulated profession. Initial approval may only be granted if the application for residence permit has been submitted to the respective competent German mission in one of the countries covered by this regulation and are capped to a maximum of 25,000 per calendar year.[109]

Temporary residence permits granted under this provision are renewable, subject to fulfilling the initial admission conditions related to job confirmation and the ability to

[102] MIG 2017: 25.
[103] See further (Herzfeld Olsson 2019). See also the Inquiry into improved system for labour migration, SOU 2021:5.
[104] See Government Bill 2021/22:134 and the Parliament bet. 2021/22:SfU22.
[105] See further UNHCR Guidelines on International Legal Standards Relating to Decent Work for Refugees, July 2021.
[106] See objective 6.
[107] Refer to § 26 (2) Beschäftigungsverordnung (BeschV)/Employment Ordinance.
[108] In line with § 39 (2) AufenthG.
[109] § 26 (2) sentence 3 BeschV.

secure a living by means of employment (Brücker et al. 2021, pp. 9–10), and could provide a path to permanent residence in line with the Residence Act.[110] Furthermore, migrant workers with temporary residence permits entering on the basis of this regulation are eligible for family reunification subject to the requirements of the law,[111] and could make use of social security benefits, e.g., in case of unemployment.[112]

Initially limited until 31 December 2020, the Western Balkan Regulation has been extended to the end of 2023, as it was evaluated as being a successful model (Brücker et al. 2021). Despite the lack of a formal qualification requirement, the evaluation of this instrument has demonstrated that it had attracted many skilled migrant workers in the construction, care and hospitality sectors, and that most of them were engaged in long-term employment (Brücker et al. 2021, pp. 4, 8). Due to the requirement for a job offer, the majority of the beneficiaries of this instrument relied on personal and professional contacts. Therefore, the availability of networks in Germany was considered central to the success of this initiative,[113] which—combined with provisions facilitating mobility- was identified in policy literature as a suitable model for complementary pathways for people in need of protection (Wagner and Katsiaficas 2021, p. 4). Yet, this model was criticised for providing specific labour migration routes on the basis of citizenship as opposed to maintaining the German 'universalist' labour migration scheme.[114] Contrary to the findings of the programme evaluation (Brücker et al. 2021), another interviewee perceived it as enabling mainly circular migration, which made it unsuitable for people in need of protection. [115]

By way of comparison, Sweden's legislation does not envisage such special provisions for labour migration pathways only for citizens of certain countries, with the notable exception of some working holidays agreements (Parusel 2020, pp. 48–49). The Swedish government has limited its role to providing a legal framework that the employers can use themselves to fulfil their labour needs.[116] Therefore, even long-lasting circular migration patterns, as the ones in the berry picking industry with migrant workers coming from Thailand every year, were not facilitated by the government but developed by itself and were driven by the labour market and business connections.[117] Nevertheless, in Sweden it is not so much access to the labour market which is problematic, but rather finding a decent employer and securing a permanent residence without paying the price of labour exploitation. Access to a secure status could become even more difficult considering that the Swedish government currently investigates the possibility of introducing language and civic requirements for permanent residence.[118]

3.2. Community Sponsorship

The community sponsorship model was developed in Canada more than 40 years ago to support the resettlement of Indochinese refugees, where groups of individuals and private organizations shared responsibility with the state in providing refugee reception and integration support.[119] Since 2016, the Canadian government in partnership with the UNHCR and the Open Society Foundations has been working actively on supporting other countries to introduce sponsorship models that meet the specific needs of their national contexts under the auspices of the Global Refugee Sponsorship Initiative,[120] created in the

[110] Refer to §§ 9 and 9a AufenthG.
[111] Refer to § 29 AufenthG.
[112] Refer to German Social Codes SGB II and SGB III.
[113] Interview with a trade union representative, Germany, 14 May 2021.
[114] Interview with an expert, Germany, 20 October 2020. For the critique of this regulation, see for instance (Kolb 2020, p. 267).
[115] Interview with an academic, Germany, 12 May 2021.
[116] Interview with a state official, Sweden, 26 February 2021.
[117] See further (Woolfson et al. 2012; Herzfeld Olsson 2018).
[118] Prop. 2020/21:191, pp. 67–68, SOU 2021:54, p. 74ff; SOU 2021:2.
[119] See largely (Labman 2019, pp. 81–109).
[120] See further (Bond and Maniatis 2022).

margins of the 2016 New York Declaration.[121] The states' increased interest in controlled admission after the so-called 2015 'refugee crisis' (Fratzke et al. 2019) and the reference to the design of community sponsorship initiatives in the GCR[122] have served as an impetus to the piloting or establishment of such programmes in several European states, such as Germany, Ireland, Spain and the United Kingdom (Tan 2021). Furthermore, Belgium, Malta and Portugal pledged to explore pilot community sponsorship models at the 2019 Global Refugee Forum (Tan 2020).

The Recommendation on legal pathways to protection in the EU, which accompanied the EU Pact on Migration and Asylum, linked the development of the future EU approach to community sponsorship with work-based complementary pathways.[123] The technical assistance provided through feasibility studies[124] and funding from the EU to Member States,[125] as well as interviews with European Commission officials and representatives of international organisations and Brussels-based NGOs,[126] indicate that this could be one of the models of work-based complementary pathways to be established in the EU in the short-term. Therefore, this section examines the possibilities for the adoption of such an approach in Sweden and Germany.

Beneficiaries of community sponsorship are either 'named' directly by sponsors, who could also be employers, or referred by UNHCR and assigned to a sponsor for integration support (CEDEFOP 2019, pp. 47–48). The first model creates an independent complementary pathway, whereas the latter one employs UNHCR and state resettlement channels to admit refugees (Tan 2021, p. 2). There are also some hybrid sponsorship models that include both naming and UNHCR-referred resettlement sub programs including in Canada, the United States, Australia and New Zealand.[127] The Canadian experience shows that when community sponsorship serves as a standalone complementary pathway where refugees are 'named', sponsors often secure jobs for newcomers in the companies where they work, in their own firms or through their local networks in advance. This results in a de facto work-related sponsorship with such initiatives mushrooming in Canada since the arrival of Syrian refugees,[128] and illustrates one of its policy strengths. Community sponsorship has the flexibility to support a range of entry pathways without the need to develop a new policy model for each form of sponsor-sponsored relationship, which would be cumbersome to design, and could be limiting in practice.

This means that, along with entering through existing labour migration pathways and obtaining a labour migrant status, beneficiaries of complementary pathways could also arrive through a protection pathway, e.g., humanitarian corridor, and receive a secure status and a job upon arrival in the host country.[129] In cases where labour migration pathways are inaccessible for people in need of protection, the community sponsorship approach has the potential to mitigate the challenges discussed above, such as practical obstacles related to initial admission and issues related to security of status, as the practice so far shows that

[121] New York Declaration, GA Res 71/1, UNGAOR, 71st Session, UN Doc A/Res/71/1.

[122] GCR, Para 95.

[123] European Commission, Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, C (2020) 6467 final, Brussels (2020) para 22.

[124] European Commission, Study on the Feasibility and Added Value of Sponsorship Schemes as a Possible Pathway to Safe Channels for Admission to the EU, Including Resettlement: Final Report, 2018.

[125] See the Asylum, Migration and Integration Fund's call available at https://ec.europa.eu/migrant-integration/news/amif-funding-call-2020-complementary-pathways-for-protection-and-integration (accessed on 7 July 2022).

[126] Interview with European Commission representatives, Belgium, 14 April 2021; Interview with an international organisation representative, Belgium, 7 April 2021; Interview with a NGO representative, Belgium, 12 April 2021.

[127] See further (Manks et al. 2022).

[128] See for instance, Growing Jobs: Sponsor Offers Refugees Greenhouse Jobs: https://www.rstp.ca/en/resources/videos/growing-jobs-sponsor-offers-refugees-greenhouse-jobs/ (accessed on 7 July 2022).

[129] Interview with a NGO representative, Belgium, 10 November 2020. On humanitarian corridors, see further (Ricci 2020).

beneficiaries of community sponsorship usually obtain a refugee or humanitarian status (European Commission 2018, pp. 135–36).

Germany has been piloting the community sponsorship programme 'NEST—New Start in a Team' since 2019,[130] where up to 500 refugees annually are admitted under the same legal conditions as refugees resettled under the national resettlement programme, with selection, screening and the granting of legal status undertaken by UNHCR and national authorities (Endres de Oliveira 2020).[131] Sweden is currently preparing for a community sponsorship pilot as part of its existing resettlement system.[132] As already stressed by other authors, community sponsorship in its two main forms usually operates within existing legal systems and does not require 'significant, dedicated legislative infrastructure' (Bond and Kwadrans 2019, p. 95; Ricci 2020). Therefore, its legal feasibility is less of a challenge compared to its political feasibility (Tan 2021, p. 6), which is discussed in Section 4.

Most of the interviewees in Sweden were aware of Canada's community sponsorship initiative, which was considered good practice and a good model for the Swedish context.[133] Some of them even stated that such 'sponsorships' were already happening on a small-scale on the basis of existing labour migration legislation, where friends or family of people in need of protection in Iraq and Syria were establishing a job 'that is there not only to fill a gap on the market but also to assist persons.'[134] Yet, since people were often hiring refugees in order to help them (or to exploit them as discussed above), this led to labour migration into jobs where there was no real demand, which was seen as great problem of the current labour migration model in Sweden.[135] In Germany, the main criticism was related to the few admissions this model allowed and the fact that the German government was announcing certain resettlement capacity and then including some of the quotas under the NEST programme, thus reducing the overall available resettlement places.[136]

As evident from this section, policy models that can provide a workable solution in one country would not necessarily be applicable in other national contexts. Therefore, it is important that national coalitions aiming to design such pathways engage in pilots to test the feasibility of potential models.[137] Apart from that, it is hard to see how both models discussed can live up to the GCR's commitments that such pathways 'are made available on a more systematic, organized, sustainable and gender-responsive basis.'[138] As mentioned above, the Western Balkans Regulation model relies heavily on the availability of networks and has so far worked only for countries with geographic proximity. The community sponsorship, on the other hand, provides for a limited admission only and raises scalability and additionality issues. It is of paramount importance to not compromise the additionality of such pathways when designing and implementing them, as this risks turning them into a substitute for the traditional ways of admitting refugees (Hashimoto 2021, p. 27).

130 https://www.neustartimteam.de/ (accessed on 7 July 2022).

131 See further Anordnung des Bundesministeriums des Innern, für Bau und Heimat zur Aufnahme besonders schutzbedürftiger Flüchtlinge unterschiedlicher Staatsangehörigkeit oder staatenloser Flüchtlinge aus Ägypten, Äthiopien, Jordanien und aus dem Libanon aus dem Pilotprojekt Neustart im Team (NesT) im Resettlementverfahren gemäß § 23 Absatz 4 des Aufenthaltsgesetzes vom 15.04.2019, §1–2.

132 Interview with an international organisation representative, Sweden, 18 February 2021.

133 Interview with a state official, Sweden, 19 February 2021; Interview with a representative of a regional authority, Sweden, 2 March 2021; Interview with a state official, Sweden, 26 February 2021.

134 Interview with a state official, Sweden, 19 February 2021; Interview with an academic, Sweden, 5 February 2021.

135 Interview with a state official, Sweden, 19 February 2021; Interview with an academic, Sweden, 5 February 2021.

136 Interview with an academic, Germany, 12 May 2021. On this, see further (Pohlmann and Schwiertz 2020, p. 5; Endres de Oliveira 2020, p. 215).

137 See also UNHCR 2019b, p. 23.

138 GCR, para 94.

4. Political Feasibility of Facilitating Work-Based Complementary Pathways for People in Need of Protection

By building on the findings pertaining to the legal feasibility of developing work-based complementary pathways for refugees, this section moves on to examine existing political constrains. In so doing, it analyses the empirical data collected as part of the study to identify the factors that influence political willingness to engage in such pathways on the basis of general labour migration law provisions and the other policy models discussed above.

All stakeholders interviewed in both Germany and Sweden stated that there were no political plans indicating that such approach would be adopted. One of the reasons in Germany was that this idea was still rather unknown among key stakeholders, including political actors and policy makers. According to one interviewee, only a few academics, UNHCR and several state officials from the ministries who engaged with the Global Compacts were aware of it.[139] Therefore, it had mainly been discussed at expert meetings so far, such as the ones organised by the European Commission.[140]

Unlike Germany, this policy idea was part of a Swedish government inquiry on migration in 2017.[141] It highlighted that labour immigration systems could serve as legal entry pathways for individuals seeking protection but no concrete action was proposed in this regard (Parusel 2020, p. 18). This statement was interpreted as indicating interest on behalf of Sweden to act only in case of an EU wide initiative, where other Member States showed more solidarity, as 'Sweden cannot carry this burden'.[142] The inquiry committee eventually recommended that Sweden should continue to support resettlement as this was considered 'to reduce the number of asylum seekers and have more orderly processes of helping refugees',[143] and work with other countries to incentivise them to increase their resettlement quotas.[144]

A substantial reason for the lack of political will to initiate work-based complementary pathways for people in need of protection is the reluctance in both countries to (further) blend asylum and labour migration regimes—a move which is considered politically controversial—and has been associated mainly with 'lane switching' measures.[145] In Sweden, dovetailing asylum-related issues with labour migration is perceived as eroding the right to asylum.[146] Therefore, the main rule concerning asylum seekers was that they should not, either during the asylum process or after a rejected asylum applications, be able to apply for a residence and work permit from within Sweden, and that this option should be applied only in exceptional cases, where there were solid humanitarian reasons.[147] This was also among the reasons why Sweden did not consider labour market integration prospects when selecting refugees for resettlement.[148] Furthermore, the political climate in Sweden signalled a pending turn to a more restrictive approach to labour migration aiming to introduce more control through tougher requirements, limit 'abuse' of the labour system

[139] Interview with an expert, Germany, 23 October 2020.
[140] Interview with a state official, Germany, 19 October 2020.
[141] Utredningen om lagliga asylvägar 2017, pp. 74–80.
[142] Interview with an international organisation representative, Sweden, 18 February 2021.
[143] Interview with an academic, Sweden, 25 February 2021.
[144] Interview with a state official, Sweden, 26 February 2021.
[145] This term is widely understood as policies allowing those asylum seekers whose claims were unsuccessful to stay in the country if they had managed to secure a gainful employment or a vocational training in the case of Germany. See further (Reyhani and Golmohammadi 2021, pp. 13–15).
[146] Interview with a think-thank representative, Sweden, 7 April 2021. For an early reference to this stance, see the final report of a government inquiry on labour immigration, published in 2006, Arbetskraftsinvandring till Sverige – förslag och konsekvenser, SOU 2006:87, p. 208. See further (Calleman 2015). The author wishes to thank Bernd Parusel for pointing her to this reference.
[147] Arbetskraftsinvandring till Sverige—förslag och konsekvenser, SOU 2006:87, p. 208.
[148] Interview with an academic, Sweden, 25 February 2021.

by asylum seekers and take away from asylum seekers the possibility to change track to labour migration statuses.[149]

In a similar way, in the German context, there is a longstanding tradition of maintaining a clear distinction between refugees and labour migrants reflected in the legal framework and fuelled by the 'ideological position of actors'.[150] It is based on the idea that these are different pillars and they should be kept separate,[151] especially when it comes to transitioning from an asylum procedure to a labour migrant status.[152] According to an interviewee, Germany had to be able to admit the 'wanted' and limit the 'unwanted' migrants by avoiding pull factors through the establishment of more rights for asylum seekers.[153] Despite the period of liberalisation in the last two decades concerning access to the labour market and integration of asylum seekers, including those with unsuccessful claims, more restrictions were introduced as a result of the so-called 'refugee crisis'[154] and the surge of applicants from the Western Balkans.[155] Even though the introduced Western Balkan Regulation was considered a success in Germany as demonstrated above, one of the experts interviewed stressed that this regulation was also an illustration of merging migration and asylum rules 'which belong in different boxes'.[156] To use this model as a complementary pathway model required a significant dogmatic shift, since the division between migration and asylum regulations was one of the cornerstones of German migration policies, but it was not impossible.[157]

Some of the interviewees in Germany and Sweden expressed the same resistance towards linking labour migration and community sponsorship, stemming from the institutionalised separation of humanitarian and labour migration issues. A Swedish representative of an employers' organisation stated that this model did not solve the problem arising in cases where such employees were to be fired, namely that they would either become dependent on welfare benefits or apply for asylum.[158] Yet, this view underestimates the potential of this initiative to mitigate such risks through its flexible design options and the bedrock commitment of local citizens providing integration support across a range of areas, including employment. Therefore, an interviewed Swedish state official considered that organised community sponsorship 'works very well with the liberal individual perspective, where persons would like to be able to support a person who they feel can be assisted into Swedish society' and this was seen as more feasible in the current political climate, which was 'not very supportive to refugees in larger groups'.[159]

In Germany, a similar initiative has little chances of success as detailed below.[160] One of the interviewed state officials highlighted that people who could come through labour migration should not take the places of refugees whose only chance was to be transferred through community sponsorship.[161] Furthermore, the German government did not want to apply any additional selection criteria, such as educational background, as a requirement

[149] Interview with an academic, Sweden, 25 February 2021. See further the new inquiry tasked to reintroduce labour market tests and limit the possibility for lane switching. New directives for a new inquiry, Dir 2022:90 En behovsprövad arbetskraftsinvandring: https://www.regeringen.se/49f2d3/contentassets/81013162c8184995a0fe14327bbfad2a/en-behovsprovad-arbetskraftsinvandring-dir.-2022-90.pdf (accessed on 5 October 2022).

[150] Interview with an expert, Germany, 23 October 2020.

[151] Interview with an expert, Germany, 23 October 2020; Interview with state official, Germany, 22 January 2021.

[152] Interview with a state official, Germany, 19 October 2020.

[153] Interview with an expert, Germany, 23 October 2020.

[154] Interview with an expert, Germany, 23 October 2020.

[155] Interview with an expert, Germany, 23 October 2020; Interview with a state official, Germany, 19 October 2020. Refer for instance to Article 10 (3) of the Residence Act. In addition, the lane switching has also been limited through temporal restrictions.

[156] Interview with an expert, Germany, 20 October 2020.

[157] Interview with an expert, Germany, 20 October 2020.

[158] Interview with an employers' organisation representative, Sweden, 24 February 2021.

[159] Interview with a state official, Sweden, 19 February 2021.

[160] Interview with an academic, Germany, 12 May 2021.

[161] Interview with a state official, Germany, 22 January 2021.

for people to be selected and transferred through the existing NEST programme.[162] Yet, in practice the NEST programme was criticised by NGOs for not being as open as standard resettlement programmes and for 'constantly introducing state-interest to humanitarian access'.[163] This has also been stressed by other authors demonstrating that post-2015 humanitarian admission to Germany features more and more selection categories, such as 'integration capacity' and ties 'beneficial to integration' alongside nationality-based and geographically confined criteria (Welfens 2021).[164]

Other factors contributing to the lack of political support for complementary measures in Germany were the Covid 19 pandemic and the relatively recent experience with organised resettlement and community sponsorship. Even though Germany had been engaging in humanitarian admission programmes since the 1970s, the country had established resettlement programmes only in 2014[165] and since then had continued to scale up these programmes.[166] The only other new programme, introduced in 2019, was the NEST programme discussed above. Therefore, due to the pandemic and the limited possibilities for resettlement, the efforts of the administration were mainly targeted at keeping 'those structures alive'.[167] An interviewee shared that fears of economic recession and the need for economic recovery after the pandemic also limited openness to experiment with new political ideas.[168] Furthermore, Germany had implemented a significant reform on the basis of the new Skilled Immigration Act, which entered into force in 2020 during the Covid 19 pandemic. Therefore, when it came to labour migration, some of the interviewees stressed that the focus was on the implementation of the new law and no further changes were foreseen.[169]

Another reason for the limited opportunities to introduce additional pathways for protection in Sweden was the fact that the country had attracted many refugees in the last five years.[170] Politicians were hesitant to introduce new schemes also due to the generous social benefit system, where everyone who was 'settled' could access 'a lot of welfare benefits'.[171] Some of the stakeholders interviewed also stressed that it was logical to first look for employees among the refugees who were already in the country and then open new complementary pathways.[172]

To sum up, the analysis of the data collected suggests that the current political climate in both countries is not conducive to the introduction of any new measures facilitating work-based complementary pathways. Some of the political constraints stem from temporary

[162] Interview with a state official, Germany, 22 January 2021; Interview with an academic, Germany, 12 May 2021. Such approach could also give rise to non-discrimination and equal treatment concerns. See further (Tan 2020).

[163] Interview with an academic, Germany, 12 May 2021.

[164] See further Anordnung des Bundesministeriums des Innern und für Heimat für das Resettlement-Verfahren 2022 gemäß § 23 Abs. 4 des Aufenthaltsgesetzes (AufenthG) zur Aufnahme besonders schutzbedürftiger Flüchtlinge unterschiedlicher Staatsangehörigkeit oder staatenloser Flüchtlinge aus Ägypten, Jordanien, Kenia und Libanon sowie über den UNHCR Evakuierungsmechanismus in Niger (aus Libyen) vom 24.03.2022, §2 (c) and (d). Such model comes closer to the Australian refugee sponsorship which has been characterised as 'market-driven outsourcing and privatization of Australia's refugee resettlement priorities and commitments.' See further (Hirsch et al. 2019).

[165] The resettlement programme had a pilot phase between 2012 and 2014. For further details, see https://www.bamf.de/EN/Themen/AsylFluechtlingsschutz/ResettlementRelocation/Resettlement/resettlement-node.html (accessed on 7 July 2022).

[166] Interview with a state official, Germany, 22 January 2021.

[167] Interview with a state official, Germany, 22 January 2021.

[168] Interview with an expert, Germany, 23 October 2020.

[169] Interview with a state official, Germany, 19 October 2020; Interview with an expert, Germany, 23 October 2020. It needs to be stressed, however, that at the time of this writing, the new German government intends to revise the Skilled Immigration Act in order to liberalise the regime for skilled immigration further. Plans include introduction of a point-based migration path, making the Western Balkans Regulation into a permanent scheme, and lowering the barriers for recognition of foreign qualifications. See further: https://www.bundesregierung.de/resource/blob/974430/1990812/04221173eef9a6720059cc353d759a2b/2021-12-10-koav2021-data.pdf?download=1 p. 33. (accessed on 22 November 2022).

[170] Interview with a state official, Sweden, 2 March 2021.

[171] Interview with a state official, Sweden, 2 March 2021.

[172] Interview with an employers' organisation representative, Germany, 14 May 2021.

factors such as the Covid 19 pandemic and recent or pending immigration law reforms. However, a central obstacle when it comes to the political feasibility of such complementary pathways seems to be the separation created between migrants and refugees (Carling 2015; Atak and Crépeau 2021) which translates into separate policy domains.[173] Even though on the surface the reluctance to blend these two domains is currently associated with the experience of both countries with the so-called 'lane switching', its roots can be traced back to the origins of the current international refugee regime.

When individual states recognised the first refugees as a specific group,[174] they decided not to return them to states where they would be persecuted and to offer them legal protection on the basis of domestic and bilateral extradition law (Barnett 2002; Haddad 2003; Orchard 2014). It is from these decisions that normative obligations towards refugees gradually developed over the next two centuries, culminating in the anchoring of refugee protection in international law and, eventually, the establishment of UNHCR to foster multilateral cooperation, and provide protection and assistance (Orchard 2014, pp. 240–41). Yet, it was not until the adoption of the 1951 Refugee Convention,[175] which codified the protection from refoulement,[176] that the separation between 'humanitarian' and 'economic drivers of migration' was institutionalised for the first time (Long 2013, p. 16). Before that, what mattered more was the need of protection of specific nationalities outside of their country of origin rather than the distinction between refugees and migrants (Long 2013, p. 7).

Despite the rise of the 'deterrence paradigm' (Gammeltoft-Hansen and Hathaway 2015)—enacted through legal and physical measures preventing refugees from accessing the asylum state territory as a way for developed countries to control migration—these international refugee law obligations are so deeply engraved in states' practices and internalised by actors, that attempts to challenge or alter them occur only rarely (Orchard 2014, p. 250; Gammeltoft-Hansen and Tan 2017, p. 32). Furthermore, countries are bound to continue to cooperate on refugee protection as without it, refugees become 'a destabilizing force within international society' (Orchard 2014, p. 251). As Gammeltoft-Hansen and Hathaway stress, withdrawal from the Refugee Convention is not in the developed states' interest as it is the reason why the less developed countries, hosting the bulk of the refugee population, 'act in ways that provide a critical support to the developed world's migration control project' (Gammeltoft-Hansen and Hathaway 2015, p. 240).[177]

In line with this, the official rhetoric of politicians and policy makers has been to speak against the conflation of refugees and economic migrants, as a way of 'protecting' the refugee category (Mourad and Norman 2020, p. 696). This separation has been supported by both refugee advocates, such as NGOs and UNHCR,[178] and state actors aiming to admit only the 'neediest' as a way to control migration (Long 2013, p. 22). Yet, in practice these distinctions are blurred both in policy realms and in border crossing motivations (Hamlin 2021). At policy level, this is done through 'policy conversion' amongst others (Streeck and Thelen 2005), where state parties to the Refugee Convention and international organisations 'have actively transformed the refugee regime in a way that erodes the distinctiveness of the category it purports to be built upon' (Mourad and Norman 2020, p. 688). For instance, as discussed above, many Member States cherry-pick refugees through the resettlement programmes by assessing applicants' 'integration potential', including their

[173] See further (Zetter 2007).

[174] It is widely considered that these were the Huguenots fleeing from France as a result of Louis XIV's 1685 revocation of the Edict of Nantes.

[175] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[176] On the links between non-refoulement and the right to seek asylum, see (Hathaway 2005, p. 301; Gil-Bazo 2015).

[177] For further reasons why refugee law matters for developed countries, see (Hathaway 2007; Gammeltoft-Hansen 2014).

[178] See for instance (Hamlin 2021, pp. 70–92).

educational qualifications and work experience, thus conflating humanitarian admission with immigration channels (Westerby 2020; Mourad and Norman 2020; Welfens 2021).

Furthermore, even though the 'migrant/refugee binary' dominated the negotiations and the adoption of the New York Declaration and two separate Global Compacts (Hamlin 2021, p. 77), they were intended to converge as 'migrants are often future asylum-seekers and unrecognised refugees' (Guild et al. 2022, pp. 3–4). This distinction is further blurred in the International Migration Review Forum's progress declaration.[179] Yet, some authors have also criticized the blurring prompted by the Compacts claiming that self-reliance and labour mobility opportunities for refugees promote them as 'economic benefit' to the states that can potentially host them (Mourad and Norman 2019).[180]

As stressed above, these migration movements are also difficult to distinguish in the empirical reality (Castles 2003, p. 17; Ramji-Nogales 2017; Motomura 2020) and are clearly intertwined from the perspective of people in need of protection (BenEzer and Zetter 2015; Squire et al. 2017; Bivand Erdal and Oeppen 2018, pp. 987–93). Existing literature and the data collected as part of this research demonstrate that many refugees would be interested to use available labour migration channels as a way to find a solution to their displacement rather than to go through the asylum system (Long 2013, p. 22; Long 2015, p. 3; Long and Rosengaertner 2016, p. 7; Crépeau 2018, p. 655; Atak and Crépeau 2021, p. 141). Furthermore, many 'do not like the stigma of being an asylum-seeker',[181] associated with the vulnerability that refugee status brings (Hamlin 2021, p. 7).

As it is beyond the scope of this paper to argue whether 'refugees' and 'migrants' should remain as distinct categories, it is imperative to stress that actors' diverging positions surrounding the 'migrant/refugee binary' have implications for the political feasibility to facilitate work-based complementary pathways. Undoubtedly, the refugee regime has been transformed under the pressure exerted by containment and deterrence policies, and the introduction of new measures, such as for instance complementary pathways, and refugee finance instruments have further changed the 'spectrum of refugeehood'.[182] This does not mean, however, that one should disregard the potential of labour migration to provide 'pragmatic and accessible solutions' in protracted situations for those refugees who are not eligible for the limited resettlement places and are left without any other alternatives to their exile (Long 2013, p. 23; see further (Long 2015) and (Long and Rosengaertner 2016)). Yet, instead of tacitly inserting labour migration elements into humanitarian admission, leading for instance to cherry-picking in resettlement, the GCR now commits states to develop such measures for refugees in an open and transparent way in the form of complementary pathways and by observing 'appropriate protection safeguards.'[183]

5. Conclusions

This article examined the legal and political constraints posed by the existing provisions of Sweden and Germany's immigration laws, as well as specific policy instruments such as the Western Balkan Regulation and community sponsorship to serve as an admission ground for people in need of protection, and the key issues that need to be addressed to allow the soft law commitments related to labour migration pathways contained in the Compacts to be embedded in national legal systems.

A closer look at the legal feasibility of developing a work-based complementary pathways approach reveals legal and non-legal barriers related to entry requirements that can be insurmountable for people in need of protection, along with lack of sufficient

[179] See for instance para 59 refering to the availability of legal pathways, incluidng for migrants in vulnerable situations and para 61 comitting amongst others to 'ensuring that migrants do not become liable to criminal prosecution for the fact of having been the object of smuggling', which is also applicable to refugees.

[180] On that see also (Long 2013, p. 8).

[181] Interview with a lawyer, Germany, 10 November 2020. See further (Vankova 2022, p. 104) and (Arendt [1943] 1996).

[182] On the latter, see (Davitti 2021) and (Davitti and Vankova Forthcoming).

[183] GCR, para 94.

interest among key stakeholders such as employers to engage in such initiatives, as well as concerns related to the security of status of potential beneficiaries of such measures. When designing work-based complementary pathways for refugees, challenges stemming from both admission conditions and precarious migration statuses need to be addressed equally, which requires the participation of the ILO as an equal partner in the governance of refugee work (Gordon 2021, p. 250) and its involvement in the Global Task Force on Refugee Labour Mobility.

Work-based admission for refugees motivated by labor market rationale will ultimately depend on its feasibility for institutions and stakeholders implementing that approach: states will need to facilitate mobility through visa procedures, create incentives for employers to become engaged in such pathways, and support financially (at least initially) NGOs and international organizations which are aiming to bring potential beneficiaries and employers together. Furthermore, while legal barriers to access require flexibility in the application of admission conditions or amendments across different types of legislation (e.g., not only immigration but also recognition of qualification rules), non-legal barriers, such as identification of potential candidates and their matching with employers, require awareness-raising and advocacy measures. As the successful pilots' experience shows, building national coalitions and investing into sector specific pilots[184] can create proof of concept indicating the most suitable approach at a national level and potentially ensuring long-term support.[185]

The analysis also demonstrates that instruments like the Western Balkan Regulation and de facto work-related refugee sponsorship that could serve as a policy model in one country are not necessarily applicable to other contexts. Therefore, when it comes to the development of work-based complementary pathways, 'context-specific solutions' rather than a 'one-size-fit-all' approach are more likely to work (Fratzke et al. 2021, p. 9). Nevertheless, one of the greatest challenges with such pathways remains scalability and their availability 'on a more systematic, organized, sustainable and gender-responsive basis',[186] which would allow refugees to choose independently the pathways that best suit their different needs—based on existing immigration legislation or humanitarian channels. As an UNHCR report stresses, complementary pathways are currently limited in scale but require quite resource intensive casework models (Fratzke et al. 2021, p. 9). For instance, the largest work-based pilot is the Canadian one, which provides for up to 500 applicant places.[187] Such scale could hardly be considered to 'complement' resettlement. Another important consideration is not to compromise the additionality of such pathways when designing and implementing them.

Finally, there is a need for political will in order to facilitate such pathways. Yet, the data analysed suggest that the current political climate in both countries studied is not conducive for introducing work-based complementary pathways. As this article demonstrated, some of the political constrains stem from temporary factors such as the Covid 19 pandemic and recent or pending reforms, others require a significant shift in traditional thinking about migration and asylum as separate domains that do not interact with each other. Whereas abandoning the distinction between refugees and migrants is not necessary, this article advocates to focus on the potential of labour migration to serve as a pragmatic and accessible approach for people in need of protection faced with protracted situations. The GCR provides a basis for such approach by committing states to develop complementary pathways for refugees in an open and a transparent way and by observing their international obligations, instead of continuing to tacitly insert labour migration

184 Among the priorities of 2019 UNHCR's Three-Year Strategy on Resettlement and Complementary Pathways, Goal 2: Enabling actions, p. 23.

185 Canada's Economic Mobility Pathways Pilot is a case in point: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/economic-classes/economic-mobility-pilot.html (accessed on 7 July 2022).

186 GCR, para 94.

187 https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/economic-mobility-pathways-pilot/immigrate.html (accessed on 7 July 2022).

elements into humanitarian admission. The launch of the Global Task Force and the interest in complementary pathways shown by other international organisations,[188] are expected to support the political feasibility of work-based complementary pathways by increasing awareness and available expertise for their development.

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India and Refugee Law: Gauging India's Position on Afghan Refugees

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Abstract: The turbulent transition of power from the Ghani administration to the Taliban regime has not only signalled a death knell to the fundamentals of representative democracy, but it has also provided fertile ground for the large-scale exodus of refugees into neighbouring nations. In view of this, a scrutiny of the Indian state's response to the influx of Afghan refugees is warranted. India is not a signatory to the 1951 Refugee Convention, nor to the 1967 Protocol, and, in the absence of any concrete national refugee law and policy, Afghans who are seeking refugee status are processed on a haphazard case-by-case basis. In chalking out a future course of action, this paper aims to analyse India's response to the possible Afghan refugee inflow in the aftermath of the Taliban takeover and in light of India's recent endorsement of the Global Compact on Refugees (GCR). Against the backdrop of the limited mandate of the UNHCR and the lack of "political will" from the successive governments, we contend that the Supreme and High Courts of India have been instrumental in construing a tentative shield of protection for persons already in the country, which is working out of a judicial form of the endorsement of the *non-refoulment principle*, in the absence of legislative and executive commitments, and the preferential "acts of kindness" strategy, which discriminates amongst different refugee groups as per origin or religious belief. Moreover, it is argued that the GCR has made few inroads into the overall paradigm as to how refugees are perceived in India. The research concludes that India must enact legislation on refugees for any constructive engagement beyond archaic quick-fix solutions.

Keywords: Afghanistan; India; refugees; non-refoulment; refugee convention; UNHCR

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1. Introduction

The tumultuous transition of power from the Ghani government to the Taliban regime has brought home an unfathomable plight to the Afghans (Sajjad 2021), especially women, who will be at the receiving end of the extreme and draconian interpretation of the Sharia Law (Barr 2021), and the Shia Hazarite Muslims (Barr 2021) who will face persecution on religious grounds, as well as the individuals who worked under the aegis of and supported the military establishments, activities, plans, and operations of the United States and the NATO allies. The fear of persecution on all the dramatis personae is propelled by religious, ethnic, and political proclivities, as well as gender. Because of this well-founded fear of persecution on a wide array of grounds, a substantial number of Afghans are fleeing Afghanistan. Migration to "neighbouring" Asian countries is a logical consequence of the West failing to amicably cultivate an accommodating position towards the migration that has been fueled by the current crisis and the large movements driven by the 2015 Syrian war. The Taliban capture of Kabul has created a situation wherein there is a high likelihood of Afghan refugees flowing into India.

The influx of Afghan refugees into India has also been an occurrence in the past (i.e., during the Soviet invasion of Afghanistan). In this context, this paper undertakes futuristic research on the treatment of Afghan refugees that are flowing from Afghanistan into India; in doing so, the paper also provides a comprehensive study on India's refugee policy.

2. Afghanistan: A History Rife with Conflict and War

The nation of Afghanistan has had a long history of war and internal conflict, the causative factors of which have been foreign occupiers, invaders, and internal warring factions. The first to invade and conquer the land was Darius of Babylonia in the year 500 B.C., who was followed by Alexander the Great of Macedonia in 329 B.C. What followed was the violent conquest of the land by Mahmud Ghazni, who was an eleventh-century conqueror (Anglo-Afghan Wars British-Afghani History 2021). A series of conflicts began during the 19th century when Britain wanted to annex Afghanistan in order to protect its Indian empire from Russia, which resulted in the British Afghan wars in 1838–1842, 1878–1880, and 1919–1921 (Anglo-Afghan Wars British-Afghani History 2021).

Post the first world war, the British were already drained of resources and were compromised, and they had negotiated a peace treaty with the then Amir of Afghanistan, which resulted in the recognition of Afghan independence by the British (Imy 2019). Consequently, in the aftermath of the 1919–1921 battle, Afghanistan became an independent nation (Anglo-Afghan Wars British-Afghani History 2021). To ensure that Afghanistan caught up with the rest of the world, Amanullah Khan declared himself the monarch of Afghanistan and initiated a regime of wide-sweeping reforms (Amānullāh Khan Ruler of Afghanistan 2021). Unsatisfied and discontented with many of his modernisation policies, local religious sects took up arms against his administration, which led to another onslaught of violence in the country (Shahrani 2005). In the year, 1973, a military coup was orchestrated, and Khan overthrew the monarch. Khan's party, the People's Democratic Party, assumed power, and he was named president. In this setting, the Republic of Afghanistan was established with good relations with the Soviet Union.

In 1978, however, Khan was killed in a communist coup, and the Afghan communist party took charge of the nation, backed by the Soviet Union. The communist government found very little favour among the masses, and it managed to be a repository of their faith and support by instilling fear through the infliction of casualties (Ruiz 2001). To escape this "political persecution", Afghans, in the thousands, started emigrating to the nearby lands of Pakistan and Iran (Noor 2021). What also followed was the beginning of a feeling of dissatisfaction amoung the local conservative religious sects with the introduced reforms and, thus, they formed a guerrilla movement or, the "Mujahideens", which was assembled and trained to topple the soviet-backed government (Latynski and Wimbush 1998).

Taking stock of the fragile spot that the communist government in Afghanistan was in, and pursuant to the Brezhnev doctrine, the Soviet Union invaded Afghanistan on 24 December 1979 (Soviet Invasion of Afghanistan 1979). In light of this invasion and the consequential battle between the US-backed Mujahideens and the Soviet Union, to escape collateral damage, the mass exodus of Afghan nationals began, and the Afghans started fleeing to neighbouring countries and other parts of the world (Safri 2011).

In the year, 1992, the Soviet Union withdrew, and, in the year, 1995, (Rubinstein 1988) the Taliban, on the promises of ensuring peace, security, and stability in the region, gathered the support of the public and rose to power. Once back in power, the Taliban started persecuting the Shia minorities and imposed draconian interpretations of the Sharia Law on women. Fearing these changes, many Afghan nationals, again, decided to emigrate out of Afghanistan (Motlagh 2021).

Post 2001, America and other NATO allies invaded Afghanistan in order to battle terrorism and to weed out the Mujahideen groups that were supporting and sheltering Bin Laden, including the Taliban (The U.S. War in Afghanistan 2021). However, again, to save themselves from the collateral damage, Afghan nationals fled Afghanistan.

Afghanistan is experiencing an exodus along similar lines amidst the tumultuous transition from the Ghani government to the Taliban regime. The change has brought home an unfathomable plight to the Afghans (Sajjad 2021). especially women who, again, will be at the receiving end of the extreme and draconian interpretation of the Sharia Law (Barr 2021). and the Shia Hazarite Muslims (Hazara Shias Flee Afghanistan Fearing Taliban Persecution 2021). who will face persecution on religious grounds, as well as the

individuals who worked under the aegis of and supported the military establishments, activities, plans, and operations of the United States and the NATO allies. Because of this well-founded fear of persecution on a wide array of grounds, Afghans are fleeing Afghanistan in substantial numbers.

Nations across the globe have opened their borders to accept the inflow of Afghans who are desperately fleeing their country. A few of those nations are the United States, Germany, Italy, France, the United Kingdom, Pakistan, Iran, and India, among many others (Anglo-Afghan Wars British-Afghani History 2021). However, it is pertinent to note that European nations, after having faced the refugee crisis in 2015, have not been as amenable to the influx of refugees as they were in the 1980s and the 1990s. On taking a total stock of all the Afghan refugees worldwide from the 1980s to the 2020s, the maximum number of refugees have been accommodated by Pakistan, followed by Iran. India and the United States stand at the 12th and 22nd positions, respectively (Refugee Data Finder 2021).

3. India and Refugee Protection

A Glance at the Situation and Protection of Refugees in India

At the very outset, it must be noted that India is neither a signatory to the 1951 Refugee Convention, nor to the 1967 Protocol, despite unabating attempts on the part of the UNHCR to request India to sign the instruments (Janmyr 2021). What complicates matters further is that, in addition to India not being a signatory to either of the two instruments, not only does it not have domestic legislation to deal with the granting of refugee status to forced migrants, the term, "refugee", has not been defined in any domestic legislation of the land. However, it is pertinent to note that, even if India is not a party to any of the international instruments, apropos the granting of refugee protection and asylum, it has actively contributed to the development and endorsement of the Global Compact on Refugees (GCR), which the United Nations officially endorsed on the 17 December 2018. The affirmation of the GCR by India in light of the legislative vacuum demonstrates her willingness to usher in a uniform, fairer, and stronger course of action and procedure to accommodate and deal with large refugee movements and, consequently, to respect the principle of "burden sharing" (Xavier and Rai 2020).

Given these shortcomings, in granting refugee status to forced migrants, or in preventing their forceful deportation or refoulement, the judiciary, the executive, and the legislature have employed different—and at times contradictory—courses of action, which will be elaborated in the following sections.

Coming to the specifics of the nationalities of the refugees in India, as per the available statistics (UNHCR Factsheet 2021). on the numbers and nationalities of all the refugees that are spread across India, it is evinced that nationals of Myanmar, Sri Lanka, Tibet, Pakistan, and Afghanistan have been accommodated in refugee camps spread across the country (UNHCR Factsheet 2021). As far as the Afghan refugees are concerned, their migration in order to flee war and persecution had been in the offing right from the 1970s to the 1990s (Refugee Data Finder 2021). On the very specifics of the numbers, in the period of the Soviet invasion, from the 1970s to the 1990s, India experienced an influx of about 60,000 Afghan refugees. However, as per the latest data, as of 31st March 2021, according to the UNHCR, the number of Afghan refugees in India stands at 15,217 (UNHCR 2021).

Moreover, in the refugee camps that are spread across the country, not all of the forced migrants have been accorded the status of a refugee. Granting a forced migrant the status of a refugee, or recognising a forced migrant as a refugee, becomes relevant because, by being labelled by the executive wing of the government, an LTV (long-term visa) is granted to the refugee, which enables the person to take up private employment or to enroll in an educational institution (Refugee Data Finder 2021). Procedurally, it is the executive wing of the government (FRRO Notification 2017). that is responsible for the granting or certifying of the refugee status. In the interest of clarity, it is pertinent to note that, in the current scheme of things, e-visas, or emergency visas, are being granted rapidly in order to enable the entry of Afghan refugees into India (India Launches New Category of Online

Visa for Afghanistan 2021). A humanitarian-motivated e-visa, in and of itself, is not an LTV that has the same benefits that usually accompany it. Once the refugee is in India, in order to join an educational institution or take up private employment, an application for an LTV is to be made to the Foreigners Registration Office (FRO), and, on approval by the Ministry of Home Affairs (MHA), the LTV will be granted to the Afghan refugee (FRRO Notification 2017).

4. Attitudes towards Refugees

4.1. The Indian Executive Branch of Government

Prior to delving into the attitudes of the executive, it is to be noted that India does not have a fixed, concrete, and uniform policy vis-à-vis refugees and their concerns purporting to the determination of their refugee status, nor does it have clarity on the concept of *non-refoulement* and its availability as a right or the amount of financial assistance that is required by a refugee (Samaddar 2003). Instead, the executive has given itself a wide set of powers for deciding to whom to give protection or favourable treatment, or to whom to allow entry, as well as for deciding who are not to be allowed, or who should be deported (Jalais 2005).

Additionally, the decisions by the Indian executive on whether a group of asylum seekers that belong to a particular nationality should be granted the status of refugees or not, and whether, therefore, they should be accorded the corresponding rights and privileges, are premised on national proclivities in the fields of international politics or relations. On the basis of this, the granting of preferential treatment to one sect, and the neglect of the others, is what is commonly called, "calculated kindness", or "strategic ambiguity" (Chimni 2003).

As far as the recognition of forced migrants as refugees is concerned, Tibetans have been the largest group among the beneficiaries of the refugee certification procedure that is followed by the executive. The Afghan sect continues to remain the smallest. Even among the Afghan community, members from the Sikh and Hindu communities have been integrated into the Indian society at a much more rapid pace than others in the Afghan community (Noor 2021). For such anomalies, the executive has provided no explanations or justifications.

In terms of the responses by the Indian executive, the Indian government advanced that, in the absence of any municipal legislation to deal with refugees, the Ministry of Home Affairs (MHA), in 2011, issue a standard operating procedure. As per this procedure, the foreigner who claims to be a refugee on the well-founded fear of persecution on the grounds of race, religion, sex, ethnicity, nationality, etc., can be recommended by the state government or by the union territory administrations to the MHA for the granting of an LTV[1]. Once an LTV has been granted, the refugee is entitled to employment Lok Sabha, or to join any educational institution,[2] or can even take up Indian Citizenship under the Indian Citizenship Act, 1955.

With regard to the current Afghan refugee crisis, only the executive has stepped in and made provisions for addressing the plights and concerns of Afghan nationals who are fleeing Afghanistan. In the aftermath of the Taliban takeover, the Ministry of External Affairs (MEA) rolled out the scheme of granting emergency visas under the category of e-visas, or electronic visas, to Afghan nationals. The validity of the e-visa is for a mere six months (Ministry of Home Affairs 2021). However, the granting or sanctioning of the humanitarian-motivated e-visa does not axiomatically extend to the beneficiaries of the e-visas those benefits which the LTV visa grants to refugees. On the specifics of the humanitarian-motivated e-visa, or electronic visa scheme, this initiative was rolled out in the year, 2014, along the lines of the Indian government's flagship movement: "digital India". The humanitarian-motivated e-visa scheme makes it very convenient for interested

[1] Lok Sabha, Un-starred Question No. 739, Answered on 15 July 2014.
[2] Lok Sabha, Un-starred Question No. 7538, Answered on 22 May 2012.

travellers to apply for the visa online and to spare a visit to the embassies. The move was aimed at easing the access to the country of foreign nationals in order to promote tourism and investment. Until 2021, humanitarian-motivated e-visas were only granted for tourism, business, conferencing, and medical purposes (Indian Visa Online 2021). however, post 2021, in the aftermath of the Taliban takeover, a new category under the e-visas, called the "e-emergency visa", was introduced solely on "humanitarian grounds" in order to enable the Afghans to rapidly escape (India Issued 200 e-Emergency Visas to Afghan Nationals 2021). the torment of the Taliban and seek refuge in India.

The forced migrants will have to apply for the same visa and forward it to the state government in order to claim such benefits. Only after evaluating the application on the basis of the MHA's standard operating procedure will the applicant be accorded the benefits and the long-term visa (LTV) that is granted to the forced migrants.

In this context of discussing the specific concerns of Afghan refugees, the role of the UNHCR in India assumes prime importance. The organisation often aids the Indian executive in verifying the relevant documents of the forced migrants in order to better equip the government with the ability to grant refugee status to forced migrants. It is to be noted that even the UNHCR itself holds the prerogative of suo moto labelling the forced migrants as refugees and providing them with financial and legal assistance. The mandate of the UNHCR extends to the refugees who are not nationals of Sri Lanka, Tibet, Pakistan, and Bangladesh. Most of the refugees who are recognised and registered with the UNHCR happen to be Afghan refugees (Chimni 2003). The UNHCR is scaling up its capacity in terms of registration and assistance in order to accommodate the Afghan refugees in India. However, this mandate of the UNHCR vis-à-vis India is only to the extent of humanitarian operations, and it has not been granted formal status by the Government of India (A Pocket Guide to Refugees 2008).

Global Compact on Refugees

India voted in favour of the GCR on 17 December 2018; however, it is equally important to state that the GCR is a non-binding instrument and it came in the aftermath of the states closing their borders. Moreover, the GCR adopts a multistakeholder approach that is focused on a charity-based approach, rather than on a rights-based one. Given that the GCR has an inherent contradiction, it is unclear whether it is a political or a non-political instrument (Field and Burra 2020). As Professor Srinivas Burra opines, "...it (GCR) asserts that it is entirely non-political in nature, including in its implementation, and is in line with the purposes and principles of the Charter of the United Nations. The non-political nature of the GCR is contradicted when the Compact later states that it represents the political will and ambition of the international community as a whole for strengthened cooperation and solidarity with refugees and affected host countries" (Field and Burra 2020). Although, on a positive note, the GCR views the private investment as a key factor to the integration of the refugee into the mainstream society, it presents a challenge in that the laws in India require it to be moulded accordingly. In the context of India, the GCR does not provide any insight into the access to protection; this is one of the most critical priorities.

Moreover, the involvement of multistakeholders in the GCR could mean and imply that humanitarian organisations work alongside a state (India) to safeguard the refugees; this can create an apprehension of discrimination with regard to various social factors, as no humanitarian organisation operates on the principle of "neutrality". Therefore, it is clear that, despite the high ideal that the GCR preaches, it lacks teeth on multiple fronts, and it is dependent on the mercy of the states at the end of the day. Despite these shortcomings, the GCR certainly discourages the preferential treatment of refugees from one country over another; hence, India's strategy of calculated kindness towards some nationals over others could not stand the test of time (Global Compact on Refugees 2018). Moreover, India, being an Executive Member of the UNHCR, has an inherent moral obligation to India to safeguard the refugees.

4.2. The Indian Legislature

Eminent scholar and jurist par excellence, Professor B.S. Chimni, rightly pontificates that the influx of refugees into India is not an occurrence of the current times, but has been in place from time immemorial (Chimni 2000). The first in the series of influxes was in the year 1959, when the Dalai Lama and his fellow followers fled Tibet to avoid political and religious persecution as China began to propagate its influence on the region that we know as "Tibet" (Kaufman 2009). However, during this period, it was also evident that, as rightly put by jurist, Upendra Baxi, " . . . the human rights plights of immigrants and refugees continue to tell chilling stories about states' lethal sovereignties." (Baxi 2016).

The second in the series was experienced during the Indo-Pakistan war of 1965, when the minority communities in East Pakistan fled the nation in fear of facing persecution by the Pakistan military. It is also pertinent to note that, during this period, and specifically from 1964 to 1968, the Chakmas, in large numbers, migrated to India from the Chittagong hills (Das Gupta 1986, p. 1665). The third and the largest wave of refugee influxes was during the year, 1971. During the Bangladesh liberation war, India experienced a massive influx of nationals from erstwhile East Pakistan, coupled with the influx of the Chakmas, again, from the Chittagong hill tracts (Das Gupta 1986).

India is neither a party to the 1951 Refugee Convention, nor to the 1967 Protocol, despite such repetitive influxes. To shed light on the reasons for this would be to capture the following points: During the deluge of incoming refugees in the year of 1971, India was not provided with any aid or commitment from the Western world and was left to fend for herself. This reason reads in conjunction with the fact that India views the Refugee Convention and the Protocol as Eurocentric or Western-oriented, as it does not showcase any sensitivity towards the concerns of these developing countries on the point of the refugee influx[3], and it has only bolstered its resolve to hold its ground and to not sign the Convention. In addition to the named concern, the relevant others are national security considerations and burgeoning populations, and the problems and issues that are involved with the access to limited and constrained resources, and the changes or disturbances in the current schemes of demographics throughout the northeastern region (De Sarkar 2015). Although it is not a signatory to the major refugee Conventions, India has, considering its fixed capabilities, always tried its best to accommodate refugees and to address their concerns, and the Indian government has extensively carried this out (Noor 2021).

The document, which is the constitution of India,[4] embodies a wide array of fundamental rights in Part III that are available to all persons, irrespective of nationality, which logically extrapolates to them being applicable to refugees as well. Such fundamental rights include the right to be guaranteed equality before the law[5]; the right of protection with respect to conviction for offences[6]; the right to life and personal liberty[7]; the right of protection from arrest and detention in certain cases[8]; and the right to freedom of religion[9]

The most vital article in addressing the plight of the refugees, according to Professor Chimni, is Article 21 of the Constitution of India. According to the learned scholar, "it can be argued that Article 21 encompasses the principle of *non-refoulment* which requires that the State shall not expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular "social group or political opinion" (Chimni 1994).

Apart from the constitution, on the specifics of statutory laws and legislation, there is no specific legislation that defines the term "refuge", or that deals with the concerns of the refugees. However, their entries, stays, and exits are regulated by the legislation that

[3] Lok Sabha, Un-starred Question No. 3693, Answered on 13 December 2000.
[4] The Constitution of India, 1950.
[5] Article 14, The Constitution of India.
[6] Article 20, The Constitution of India, 1950, Art.20.
[7] Article 2, The Constitution of India, 1950, Art.21.
[8] Article 22, The Constitution of India, 1950, Art.22.
[9] Article 25–28, The Constitution of India, 1950, Art.25–28.

pertains to foreigners in India. Chronologically, the very first one to be in place was Section 3(1) of the Passport (Entry into India) Act (1920)[10], on the basis of which any foreigner not possessing a valid passport can be imprisoned or fined, or both, vide Section 3(3). The said act also empowers the Central Government to make orders to have any person removed from the territory of India for the violation of any of the sections or rules under the said act.

Additionally, according to the Registration of Foreigners Act (1939)[11], and rules that were restructured in 1992, any foreigner (which is defined as a person who is not a citizen of India vide Section 2(a) of the said act) entering and staying in India for more than 180 days should mandatorily register themselves with the Foreigners Registration Office, and the failure to do so could result in imprisonment or a fine, or both, according to Section 5 of the said act. It is also to be noted that another legislation that is employed when dealing with refugees is the Foreigners Act (1946)[12]. As per this act, the Central Government has been empowered, under Section 3, to make rules and to order the prohibition, restriction, and regulation of the entry, stay, or departure of any foreigner or class of foreigners in India. In pursuit of the same section, the government enacted the Foreign Order (1948).[13] Clauses 3(2)(a), 4(a), 5, 7, 8, 9, 10, and 11 of the code form an entire code in themselves that deals with foreigners. These clauses, in toto, regulate the entry, stay, travel, access to public places or prohibited places, restrictions on movement and employment, and other restrictions that may be imposed in the public interest.

Apart from the existing framework of laws, the response of the Indian Parliament has constantly been that there is no compelling need for a novel specific refugee law to be enacted, and that the existing framework of laws is adequate to deal with the concerns of refugees.[14] In light of this contention, in the 14th Lok Sabha session (the lower house of our bicameral legislature), the recommendations of the National Human Rights Commission in calling for a specific framework to deal with the concerns of refugees was expressly rejected.[15]

However, in 2015, three Bills were introduced in the Lok Sabha to deal with and address the concerns of the refugees, and they were: the Asylum Bill (2015),[16] by Dr. Shashi Tharoor (Member of Parliament); the National Asylum Bill (2015),[17] by Feroz Varun Gandhi (Member of Parliament); and the Protection of Refugees and Asylum Seekers Bill (2015),[18] by Rabindra Kumar Jena (Member of Parliament).

The Asylum Bill of 2015 is introduced by Dr. Tharoor in its preamble, who pontificates that the aim and the object of the said bill are to consolidate, streamline, and harmonise the various standards and procedures that are applicable to refugees and asylum seekers in the territory of India.[19] The bill defines who a refugee is under Section 4 and Section 30, and it lays down the two determining criteria under Sections 4(a) and 4(b). Once the status of a refugee is accorded to the asylum seeker, non-refoulement, as a matter of right, is available

[10] The Passport (Entry into India) Act (1920). Available at https://www.mha.gov.in/sites/default/files/PptEntryAct1920_0.pdf (accessed on 1 April 2022).

[11] The Registration of Foreigners Act (1939). Available at https://www.mha.gov.in/sites/default/files/The_Registration_of_Foreigners_Act_1939.pdf (accessed on 29 March 2022).

[12] The Foreigners Act (1946). Available at https://legislative.gov.in/sites/default/files/A1946-31.pdf (accessed on 29 March 2022).

[13] The Foreign Order (1948). Available at https://upload.indiacode.nic.in/showfile?actid=AC_CEN_5_23_00048_194631_1523947455673&type=order&filename=The%20Foreigners%20Order%201948.pdf (accessed on 29 March 2022).

[14] Rajya Sabha, Starred Question No. 2533, Answered on 16 August 2000.

[15] Lok Sabha, Un-starred Question No. 277, Answered on 21 February 2006.

[16] The Asylum Bill, No. 334 of 2015 (India), Introduced in Lok Sabha by Dr. Shashi Tharoor, MP.

[17] The National Asylum Bill, No. 341 of 2015 (India), Introduced in Lok Sabha by Feroze Varun Gandhi, MP.

[18] The Protection of Refugees and Asylum Seekers Bill, No. 290 of 2015 (India), Introduced in Lok Sabha by Rabindra Kumar Jena, MP, Available at http://164.100.47.4/billstexts/lsbilltexts/asintroduced/3024ls.pdf (accessed on 10 November 2021).

[19] The Protection of Refugees and Asylum Seekers Bill, No. 290 of 2015 (India), Introduced in Lok Sabha by Rabindra Kumar Jena, MP, Available at http://164.100.47.4/billstexts/lsbilltexts/asintroduced/3024ls.pdf (accessed on 10 November 2021) at Preamble.

to that person or refugee.[20] Additionally, the bill makes available to asylum seekers, as well as refugees, inter alia access to employment[21], healthcare[22], education[23], and freedom from discrimination.[24]

On the other hand, The National Asylum Bill of 2015 endeavours solely to provide rules and regulations for granting citizenship to refugees and asylum seekers.[25] The definition of, "refugee", in the said bill is akin to the definition that is employed in the 1951 Refugee Convention, but the catch is that it excludes any person who does not possess a nationality.[26]

Meanwhile, the Protection of Refugees and Asylum Seekers Bill (2015) endeavours to establish an appropriate and uniform legal framework to deal with matters that pertain to forced migration, the determination of the refugee status, and protection from refoulement. All these objects gather support from the bill's commitment to uphold international human rights.[27]

Whatever has been captured so far is the response of the parliament towards the concerns and plight of the refugees in general. If the position specifically on Afghan refugees is to be taken into account, the Indian Parliament has, time and again, acknowledged that, on the very basis of the traditional policy of the "kindness strategy", all Afghan Nationals coming to India who are in possession of valid passports and other documents are allowed to stay in India unhindered and, subject to the fulfilment of certain conditions, are entitled to obtain visa extensions every six months.[28]

4.3. The Indian Judiciary: Enforcing the Customary Law of Non-Refoulement

As mentioned in the preceding sections, there is no specific or municipal legislation to deal with the rights of refugees. Because of this shortcoming, the courts of the land have read the essence of refugee rights into the text of Articles 14[29] and 21 of the Constitution of India[30], which applies to foreigners equally as well. Additionally, a combined reading of Articles 51(c) and 253 of the Indian constitution vouches for the harmonious construction between the domestic laws of the land and international law.

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[20] The Protection of Refugees and Asylum Seekers Bill, No. 290 of 2015 (India), Introduced in Lok Sabha by Rabindra Kumar Jena, MP, Available at http://164.100.47.4/billstexts/lsbilltexts/asintroduced/3024ls.pdf (accessed on 10 November 2021), Section 8.

[21] The Protection of Refugees and Asylum Seekers Bill, No. 290 of 2015 (India), Introduced in Lok Sabha by Rabindra Kumar Jena, MP, Available at http://164.100.47.4/billstexts/lsbilltexts/asintroduced/3024ls.pdf (accessed on 10 November 2021), Section 35(1)(h) and Section 36(1)(b).

[22] The Protection of Refugees and Asylum Seekers Bill, No. 290 of 2015 (India), Introduced in Lok Sabha by Rabindra Kumar Jena, MP, Available at http://164.100.47.4/billstexts/lsbilltexts/asintroduced/3024ls.pdf (accessed on 10 November 2021), Section 35(1)(i) and Section 36(1)(c).

[23] The Protection of Refugees and Asylum Seekers Bill, No. 290 of 2015 (India), Introduced in Lok Sabha by Rabindra Kumar Jena, MP, Available at http://164.100.47.4/billstexts/lsbilltexts/asintroduced/3024ls.pdf (accessed on 10 November 2021), Section 35(1)(j) and Section 36(1)(d).

[24] The Protection of Refugees and Asylum Seekers Bill, No. 290 of 2015 (India), Introduced in Lok Sabha by Rabindra Kumar Jena, MP, Available at http://164.100.47.4/billstexts/lsbilltexts/asintroduced/3024ls.pdf (accessed on 10 November 2021), Section 35(1)(e) and Section 36(1)(e).

[25] The Protection of Refugees and Asylum Seekers Bill, No. 290 of 2015 (India), Introduced in Lok Sabha by Rabindra Kumar Jena, MP, Available at http://164.100.47.4/billstexts/lsbilltexts/asintroduced/3024ls.pdf (accessed on 10 November 2021), preamble.

[26] The Protection of Refugees and Asylum Seekers Bill, No. 290 of 2015 (India), Introduced in Lok Sabha by Rabindra Kumar Jena, MP, Available at http://164.100.47.4/billstexts/lsbilltexts/asintroduced/3024ls.pdf (accessed on 10 November 2021), Section 2(d).

[27] The Protection of Refugees and Asylum Seekers Bill, No. 290 of 2015 (India), Introduced in Lok Sabha by Rabindra Kumar Jena, MP, Available at http://164.100.47.4/billstexts/lsbilltexts/asintroduced/3024ls.pdf (accessed on 10 November 2021), preamble.

[28] Lok Sabha, Un-starred Question No. 5433, Answered on 29 August 2001.

[29] Article 14. Equality before law—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

[30] Article 21 Protection of life and personal liberty—No person shall be deprived of his life or personal liberty except according to procedure established by law.

The Supreme Court of India has always been proactive and sensitive in addressing the concerns of refugees. In the cases of *Khudiram Chakma*[31] and the *NHRC* case,[32] it expressly opined, in light of Article 14 of the Universal Declaration of Human Rights (UDHR) (1948)[33], and Article 13 of the International Covenant on Civil and Political Rights (ICCPR), that it is the "duty" of the Indian state to accord protection to refugees. In the former and latter cases, the Supreme Court held that the forceful deportation or refoulement of the Chakma refugees amounted to a violation of Article 21 of the Indian constitution. The NHRC case here holds key relevance because it furthers, or bolsters, the stand of the court in the *Khudiram* case, which is that refugees are equipped with the protection of Fundamental Rights, and, more specifically, Articles 14 and 21 in the former case. The NHRC has been actively involved in the protection and promotion of the interests of refugees in India. The NHRC has made the work on refugees its top priority and it has been taking stock of the wellbeing of refugees since 1994. It has pushed local state governments to improve their living conditions in the camps, and it has passed recommendations to the Indian government to sign and ratify the 1951 Convention and the 1967 Protocol. Additionally, the NHRC has also been actively involved in recommending that the Central Government establishes or formulates a uniform law that deals with the concerns of refugees and their grant of asylum (Dutt Tiwari 2020).

The Supreme Court, furthermore, in the case of *Committee for Citizenship Rights for Chakmas v. State*,[34] recognised the rights and entitlements of refugees to ask for citizenship, and the court also insisted that the government grant citizenship to the refugees from the Chakma community.[35]

On the very specifics of the role that is played by the High Courts, in the cases of *Gurunathan v. Govt of India*[36] and *A.C Mohd. Siddique v. Govt of India*[37], the High Court of Madras expressed its "unwillingness" to allow Sri Lankan refugees to be forced to return to Sri Lanka. One can argue that, by doing so, the court upheld the customary international law of *non-refoulement.* The High Court of Manipur expressly opined, in the case of *Nandita Haskar* v. *State of Manipur*[38], that the principle of *non-refoulement* is encompassed by Article 21, which is available to refugees as well, and that, therefore, it cannot be derogated from. The impact of the *Nandita Haskar* case is that, when the principle of *non-refoulement* is read into the fundamental right that is contained in Article 21, any government order, notification, ordinance, or legislation that pushes for the forceful deportation of refugees to their country of origin, or that pushes for their refoulement, will be contrary to the Article 21 protection that is available to refugees and, therefore, on the grounds of Article 13, it will be declared null and void.

In the very specific case of Afghan refugees, it is pertinent and relevant to note that the Supreme Court, in the case of *Maiwands Trust for Afghan Freedom*,[39] categorically ruled out, or outlawed, the forceful deportation or refoulement of *Afghan* refugees. On the point of *non-refoulment*, it should also be noted that the principle *of non-refoulment* has been read into Article 21. This jurisprudence is finally evinced by the case of *Luis De Raedt v. Union of India*.[40]

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31 *Khudiram Chakma v. State of Arunachal Pradesh, (1994) Supp (1) SCC 615.*

32 *National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742.* Available at https://www.refworld.org/cases,IND_SC,3f4b8de54.html (accessed on 16 October 2021).

33 Universal Declaration of Human Rights, 1948. Available at https://www.un.org/en/about-us/universal-declaration-of-human-rights (accessed on 1 April 2022).

34 WP (Civil) No. 510 of 2007, http://www.indiaenvironmentportal.org.in/files/Chakma%20and%20Hajong%20Tribals%20Arunachal.pdf (accessed on 23 October 2021).

35 WP (Civil) No. 510 of 2007, http://www.indiaenvironmentportal.org.in/files/Chakma%20and%20Hajong%20Tribals%20Arunachal.pdf (accessed on 23 October 2021) at Para 16.

36 W.P. No. 6708 and 7916 of 1992.

37 Mr. Gurcharan Singh Sahney and others. v. Mr.Harpreet Singh Chabbra and others. (1998) 47 DRJ 74 (DB). Available at https://indiankanoon.org/doc/95458039/ (accessed on 25 October 2021).

38 W.P. No. 6 of 2021.

39 *Mailwand's Trust of Afghan Human Freedom v.* State of Punjab, WP (CRL) No 125 and 126 of 1986.

40 (1991) 3 SCC 544.

The Supreme Court, as well as the High Courts, are at the forefront of upholding the customary law of *non-refoulment*, even when the Indian government has, time and again, argued that it is under no obligation to grant asylum to refugees, as it is not a signatory to the 1961 Refugee Convention, nor to the 1967 Protocol, and it has denied the binding customary nature of *non-refoulment* by relying on the national security exception (UNHCR Note on the Principle of Non-Refoulement 1997).

Lastly, the authors submit that even a cursory glance at the preceding lines makes one conclude that the High Courts and the Supreme Court have always acted in conformity with the principle of *non-refoulment*, and have enforced it, even if the legislature or the executive wings of the government have not paid it heed.

5. Conclusions

In this article, we have highlighted the differing courses of action that have been adopted by the executive, the legislature, and the judiciary in dealing with the rights and concerns of the refugees in India. On the basis of these trends, if the specific case of the Afghan refugees is considered, the authors submit that, unless and until any of the three pending refugee and Asylum Bill of 2015 are passed by both houses of the parliament and are made laws, and unless and until there is a paradigm shift in the material change in the standard operating procedure that has been adopted by the executive, the expected treatment of the Afghan refugees will be on a case-by-case basis for the granting of humanitarian-motivated e-visas.

Additionally, upon the expiration of six months, or of the humanitarian-motivated e-visa, as per the traditional policy of "friendship" that is acknowledged by the Indian parliament, the refugees will be deported. However, to claim the status of refugee and obtain an LTV from the executive, the application is forwarded to the MHA, which will only grant the LTV by following the standard operating procedure that is circulated by the MHA itself. As per this procedure, numerous documents must be verified in order to ascertain the forced migrant's identity so that asylum is not granted to a forced migrant with criminal antecedents. Moreover, in the *Nandita Haskar case*[41], the Supreme Court elaborated on the role of the UNHCR in conferring refugee status to asylum seekers from Afghanistan and Myanmar; accordingly, the UNHCR, in consultation with the government, can declare an Afghan forced migrant as a refugee, and can provide financial and legal assistance so that the individual can obtain an LTV from the government and can take up either employment or join an educational institution.

Even if India accords the status of refugees to the Afghan forced migrants, as it is not a signatory to the 1951 and 1967 instruments, and as it relies on the exception of national security to the customary law doctrine of *non-refoulement*, nothing is stopping the Indian government from pushing for forced deportation and for the refoulement of Afghan refugees; however, this is where the courts of the land should (and have, in earlier cases) step up. Additionally, India voted to back the GCR, and being a member of the Executive Committee of the UNHCR, it has the moral obligation to accommodate the concerns of the refugees; however, as pointed out by Professor Srinivas Burra, " . . . the GCR is non-binding and ambiguous in its nature and obligations. In the Indian context, access to protection remains an important task in the absence of clear legal and policy frameworks" (Field and Burra 2020). Moreover, the effectiveness of the GCR can only be gauged on the basis of its incorporation into the municipal laws of the state. In sum, this leads us back to the argument that the UNHCR, through the identification or registration of Afghan refugees in India, is instrumental in ensuring that India's kindness strategy is not applied in a preferential manner that favours nationals who are taking refuge from one

[41] Nandita Haskar v. State of Manipur. Available at https://www.livelaw.in/pdf_upload/myanmarese-citizens-maniour-hc-392792.pdf (accessed on 23 December 2021). Para 17; Douglas McDonald-Norman, DEPRIVED OF LIFE:Rohingya asylum seekers and the limits of constitutional protections in India (2021), Indian Law Review.

country over those who are taking refuge from another. However, this has to be read with caution, as the mandate of the UNHCR vis-à-vis India is limited.

In this sense, the UNHCR, alongside the Indian High Courts and Supreme Court, are filling the legislative lacunae concerning registration, which includes obtaining LTVs for refugees who are applying for refugee status in India. Whether the courts or the UNHCR will prompt the Indian legislature to adopt a statute on refugee registration, the asylum application procedure, and adequate protection, is still an open question.

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