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OF HUMAN RIGHTS AND HUMANITARIAN LAW

WHAT IS A COMPACT?

**Migrants' Rights and State Responsibilities Regarding
the Design of the UN Global Compact for Safe, Orderly
and Regular Migration**

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PREFACE

On 19 September 2016, in response to the large movements of refugees and migrants around the world, the UN General Assembly held its first ever summit dedicated to this topic. The outcome was the New York Declaration for Refugees and Migrants, which not only reaffirms the importance of existing legal instruments to protect refugees and migrants, but also foresees two new global Compacts; one on refugees, and one of safe, orderly and regular migration. Both compacts are scheduled to be adopted by the General Assembly in the summer of 2018. The United Nations High Commissioner for Refugees (UNHCR) is responsible for the negotiation of the Compact on Refugees. The Compact for Safe, Orderly and Regular Migration is primarily in the hands of the UN Special Representative for International Migration², assisted by the International Organisation for Migration (IOM), which became a UN related organisation in July of 2016.³

While both these organisations have expressed much enthusiasm for the prospects of these new agreements in responding to the current challenges surrounding migration and refugee protection⁴, the final content and resultant impact of each compact are as of yet uncertain. More fundamentally, there is little clarity on exactly what kind of international agreement a compact is, and where it sits in relation to existing instruments of international law and international relations. The term appears to have arrived fairly recently in international and regional discussions as an increasingly popular political tool with restricted legal content.

The objective of this working paper is to examine what a compact is, how it relates to other international instruments, and what, if any, normative implications follow from such an instrument. The working paper secondly analyses the likely impact of the Compact for Safe, Orderly and Regular Migration on human rights of migrants by examining the role of related UN compacts, the negotiation process for the Global Compact on Migration so far, as well as the political context in relation to other agreements in this area. Our concern is that inter-state agreements which concern rights of individuals (in this case migrants) must take forms which complement existing international legal obligations of states. These new forms of agreement are welcome if their content raises standards of treatment of migrants above the existing floor of rights contained in international conventions. They are a threat, however, to the UN human rights conventions if they, either intentionally or unintentionally, appear to lower existing standards of human rights.

² Currently Louise Arbour <https://www.un.org/press/en/2017/sga1712.doc.htm>

³ Elspeth Guild, Stefanie Grant and Kees Groenendijk, 'IOM and the UN: Unfinished Business', Queen Mary School of Law Legal Studies Research Paper No. 255/2017, 6 March 2017.

⁴ See for instance, Volker Türk, 'A Minor Miracle: A New Global Compact on Refugees', Address to the Kaldor Centre for International Refugee Law, University of New South Wales, Sydney, 18 November 2016, <http://www.unhcr.org/admin/dipstatements/583404887/minor-miracle-new-global-compact-refugees.html>

The UN's Global Compact for Safe, Orderly and Regular Migration⁵ is not the first foray of the UN into international law and policy making on migration. In 1990 the UN opened for ratification the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁶ which currently has 51 parties and 15 signatories, though a number of powerful states which consider themselves destination countries for migrants have shunned the convention⁷. In 2000, two migration related protocols⁸ were attached to the UN Convention against Transnational Organised Crime, one regarding the suppression of migrant smuggling, the other trafficking in human beings. These two protocols brought a transnational crime law dimension to migrations.⁹ While it is sometimes suggested that since 2000 the international community can only agree on repressive measures in respect of migration, the successful conclusion of the ILO's convention concerning decent conditions for domestic workers in 2011 belied this assessment.¹⁰ This convention, while addressing generally the issue of working conditions on domestic workers, includes provisions directed at the protection of migrants who are also domestic workers, a group which has been the subject of much international concern.¹¹ The international community does not necessarily appear to have lost its appetite for binding international commitments regarding migrants and their rights.

On the policy side, in 2005 the UN published the report of a Global Commission on International Migration (GCIM).¹² The result of a Global Commission on Migration was to establish a new forum for civil society dialogue, the Global Forum for Migration and Development (GFMD). The GCIM report also jumpstarted the process of rooting migration more deeply into the UN by creating the Office of the Special Representative to the Secretary General of the UN – currently charged with negotiating the Global Compact for Safe, Orderly and Regular Migration. On an ad-hoc basis at first, the UN High Level Dialogue on Migration and Development (HLD) was first held in 2006 resulting in a report as well.¹³

⁵ Elspeth Guild and Stephanie Grant, 'Migration Governance in the UN: What is the Global Compact and What does it mean?', Legal Studies Research Paper No. 252/2017, Queen Mary University of London.

⁶ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, available at: <http://www.refworld.org/docid/3ae6b3980.html> [accessed 7 August 2017]

⁷ Ryszard Cholewinski, Paul FA Guchteneire and Antoine Pécoud, eds. *Migration and human rights: the United Nations convention on migrant workers' rights*, Cambridge University Press, 2009.

⁸ UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at: <http://www.refworld.org/docid/479dee062.html> [accessed 7 August 2017] ; UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at: <http://www.refworld.org/docid/4720706c0.html> [accessed 7 August 2017]

⁹ François Crépeau, 'The fight against migrant smuggling: Migration containment over refugee protection'(2003).

¹⁰ International Labour Organization (ILO), *Convention Concerning Decent Work for Domestic Workers*, 16 June 2011, PRNo.15A, available at: <http://www.refworld.org/docid/4e0d784e2.html> [accessed 7 August 2017]

¹¹ Bridget Anderson, 'A very private business: exploring the demand for migrant domestic workers', 14(3) *European Journal of Women's Studies* (2007) 247-264.

¹² http://www.un.org/esa/population/meetings/fourthcoord2005/P09_GCIM.pdf accessed 28 February 2017

¹³ http://www.un.org/esa/population/meetings/HLD2013/documents/Consolidated_Global_%20Report_from_Regional_Consultations.pdf accessed 28 February 2017.

These HLDs are now held on a regular basis, 2008, 2013, 2016 and one is planned for 2018. There are many UN and non UN bodies¹⁴ and agencies which engage in migration related activities which meet regularly under the aegis of the Global Migration Group which is led by a UN agency on a rotating basis, in 2017 by United Nations University.¹⁵ But the outputs are generally in the form of reports, recommendations or common understandings below the level of binding norms.

Between the hard law commitments of the conventions and the 'soft' instruments of reports and recommendations falls the form of a compact. In this working paper, we will examine what the importance of this new form is and why it has become prevalent in this field.

¹⁴ See, e.g. The World Bank.

¹⁵ <http://www.globalmigrationgroup.org/> accessed 28 February 2017.

SECTION 1:

The Normative Impact of the Global Compact on Safe, Orderly and Regular Migration

Thomas Gammeltoft Hansen

Among the two compacts currently being negotiated, the Global Compact on Migration arguably holds both the largest potential and is likely to face the biggest challenges. Global governance in regard to migration is notoriously fragmented and incoherent.¹⁶ This applies to international law as well. There is no instrument similar to the 1951 Convention Relating to Refugees guiding the broader field of migration.¹⁷ As a result, international migration law relies, on the one hand, on international labour law and general human rights law and, on the other hand, the growing network of bilateral and regional agreement in regard to different aspects of migration management, governing in particular readmission, border control and labour migration quotas. A new UN agreement on migration, with the support of origin, transit and receiving countries alike, thus has the potential to fill an important normative vacuum.

The question, however, remains to what extent the envisioned Global Compact on Migration will establish such a normative framework. At face value, the answer seems to be no. The September 2016 New York Declaration commits states only to adopting non-binding principles on the treatment of migrants in vulnerable situations.¹⁸ The ‘compact’ as a choice of instrument further seems to place emphasis on political and practical cooperation as opposed to legal commitments.¹⁹ Indeed, the term ‘compact’ occupies a peculiar space in international relations, somewhere in between politics and law. While compacts may contain detailed guidelines and standards, they are rarely presented as binding instruments in themselves and tend to place emphasis on more technical and procedural aspects of ‘good governance’. Indeed, the non-binding character of the compact seems to have been a precondition for broader state support.²⁰

Upon closer inspection, however, the Global Compact for Migration may well come to have a considerable normative impact on the field of international migration law, despite its non-binding status. The central argument forwarded in the present working paper is that given its broad scope and fragmented state of international migration law, the Global Compact for Migration is bound to become an important soft law instrument, whether the

¹⁶ Alexander Betts (ed.), *Global Migration Governance* (Oxford: Oxford University Press, 2011).

¹⁷ The possible exception being in the field of labour migration. In 1990 the UN signed the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which entered into force in 2003. So far, however, this instrument has only been ratified by 49 states. These primarily count countries of origin, with some notable exceptions, e.g. Turkey and Mexico, who are both major destination states. Several ILO conventions focus on protecting specific aspects of labour migration, including Number 97 (1949) and 143 (1975).

¹⁸ UN Doc. A/RES/71/1, para 52.

¹⁹ See further section 2.

²⁰ See further Section 2.

²¹ A soft law instrument is here understood as referring to any instrument with normative content that by its form and provenance provides support sufficient to establish the minimum threshold of traction for at least some of the norms contained therein to be regarded as soft law. The emphasis is thus on the substantive norms as opposed to the formal status of the instrument itself. See John Cerone, ‘A Taxonomy of Soft Law’ in: Stephanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), *The Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).

drafting states intend it to or not.²¹ The compact may play this role in several ways. First, even within a more governance-oriented framework, the Global Compact for Migration is likely to include a number of more *technical and standard-setting norms* in relation to both overall cooperation and the implementation framework. While formally not considered binding, other areas of international law highlight that such norms may nonetheless be hugely important in governing state behaviour.²²

Second, the compact may come to have a *norm-filling role*²³ by setting out common ‘principles, commitments and understandings’²⁴ in regard to existing rules and their interpretation in established areas of international law. Annex II of the New York Declaration notes:

We will cooperate internationally to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants, regardless of migration status. We underline the need to ensure respect for the dignity of migrants and the protection of their rights under applicable international law, including the principle of non-discrimination under international law.²⁵

Given the continued gaps and interpretative uncertainties in this area, how and to what extent the final compact references existing international human rights law (as well as other areas of international law such as the law of the sea and international labour law) are thus important. The Global Compact for Migration represents a major opportunity to ensure continued state support for international law, clarify the inter-operation between different regimes and to integrate and build on the large corpus of existing standards and principles developed over the last decades.²⁶

Third and most tentatively, the Global Compact on Migration may end up setting out substantively new norms in regard to international migration that may eventually pave the way for binding international law in the form of either custom or treaty. As the Secretary General’s Special Representative for International Migration Peter Sutherland notes:

The global compact on migration could bundle agreed norms and principles into a global framework agreement with both binding and non-binding elements and identify areas in which States may work together towards the conclusion of new international norms and treaties.²⁷

²² One such example is the standards and recommended practice developed by the ICAO Council annexed to the 1944 Chicago Convention on International Civil Aviation, governing among other things the responsibilities of airlines in regard to inadmissible passengers (Annex 9).

²³ Thomas Gammeltoft-Hansen, John Cerone and Stephanie Lagoutte, ‘*Tracing the Roles of Soft Law in Human Rights*’, in Stephanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), *The Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).

²⁴ UN General Assembly, Modalities for the intergovernmental negotiations of the global compact for safe, orderly and regular migration, UN Doc. A/Res/71/280, 1

²⁵ UN Doc. A/RES/71/1, Annex II, para 5.

²⁶ Elspeth Guild and Stephanie Grant, ‘Migration Governance in the UN: What is the Global Compact and What does it mean?’, Legal Studies Research Paper No. 252/2017, Queen Mary University of London.

²⁷ UN Doc. A/71/28, para 87

As mentioned above, the political appetite for developing substantively new norms as part of the compact process is arguably small. At the same time, however, there is an obvious need for further norm development in this area.

More generally, the Global Compact on Migration may be argued to play into a wider trend towards what some have called the 'softification' of international governance.²⁸ While international law and legal agreements arguably still structure much, if not most, international cooperation, an increasing part of the normative standards the last decades have taken the form of non-binding agreements and other instruments short of positive international law. The trend towards increasing use of soft law is particularly pronounced in the area of human rights. While relatively few human rights treaties have been adopted at the UN level in the last two decades, the number of declarations, resolutions, conclusions and principles has grown almost exponentially.²⁹ This new realm of soft law can be seen to shape and impact upon the content of international law in multiple ways: from being a first step in a norm-making process, to providing detailed rules and more technical standards required for the interpretation and the implementation of existing rules of positive law. At the same time, the increasing use of soft law instruments raises concerns about the overall development and coherence of international law and the possible dilution of individual human rights.

This development raises several questions in terms of the possible normative impact of the Global Compact for Migration. In some areas of human rights law, soft law has come to fill a void in the absence of treaty law, exerting a significant degree of normative force notwithstanding its non-binding character. Should the Compact theoretically succeed in setting out substantively new norms, this is a possible prospect, given the lack of hard law instruments in this area.

It should be underscored, however, that in whatever way(s) the Compact for Global Migration may come to exercise normative influence, there is no guarantee that it will necessarily improve the human rights protection of migrants. Within liberal human rights theory there is often an implicit assumption that soft law plays a progressive role, raising protection standards, and that soft law will eventually solidify or lead to 'norm cascade'.³⁰ This builds on the idea that the existence of non-binding³¹ norms and the consensus that emerges as states begin to comply with them appears to stimulate the development of legally-binding norms. As documented elsewhere, however, these assumptions are far from always true.³²

²⁸ See e.g. Karsten Nowroot, 'Aiding and Abetting in Theorising the Increasing Softification of the International Normative Order: A Darker Legacy of Jessup's Transnational Law?', Paper presented at the 2016 Signature Conference of the Transnational Law Institute, King's College, London, July 2016. See further section 4.

²⁹ Thomas Gammeltoft-Hansen, John Cerone and Stephanie Lagoutte, 'Tracing the Roles of Soft Law in Human Rights', in Stephanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), *The Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).

³⁰ M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change', *International Organization* vol. 52 (1998): 887-917.

³¹ Dina Shelton, 'Commentary and Conclusions' (on human rights and soft-law), in Dina Shelton, ed., *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000), pp. 449-463 at 461.

³² Stephanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), *The Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).

First, in some areas today soft law constitutes a primary reference point, and yet there seem to be no immediate prospects for codification or crystallisation of soft law into hard law. Soft law may be a preferred means by states in order to respond more quickly, with less paucity and more flexibility. Yet, it can also be used to block or delay the subsequent development of hard law instruments, and states may prefer the sometimes contradictory language of soft law instruments in order to retain political manoeuvring room. To the extent that this remains the case, soft law may equally reduce the legal quality of the protection they otherwise could afford individuals in international human rights law.

Second, the normative impact of the Compact for Global Migration ultimately depends on the subsequent acceptance by states of any normative statement therein not simply reflecting existing international law. In other words, the eventual Compact becomes a soft law instrument only once it acquires a degree of traction. While adoption of the Compact by the UN General Assembly may be seen as an important step in this regard, the provenance of a soft law instrument such as the Compact does not in and of itself imbue any norms contained therein with a particular normative force.³³ Conversely, the Compact does not preclude the later adoption of new norms or treaties on different issues, as the Sutherland report makes clear.

Third, and perhaps most important in the present context, soft law instruments have today also become the battleground for interpretive struggles. In some cases, state-led soft law processes are clearly used as a strategy for parties actively seeking to backtrack or hedge against dynamic developments in the interpretation of international human rights law.³⁴ In this light, the degree to which the final text of the compact comes to reflect existing principles and understandings of international law is extremely important, and concerns have been raised that the latest draft does not sufficiently reflect the substantial developments in standard setting over the last two decades.³⁵ Vice versa, as a hybrid instrument focusing more on governance aspects, the compact may potentially come to serve as an 'umbrella' for a range of different non-binding standards, recommendations, best practices etc. addressed both to state and non-state actors.

In sum, what the Global Compact on Migration will mean for the future development of international migration law is still unclear. Even if few expect the final text to set out new primary norms of international law, the compact nonetheless has the potential to substantially impact the protection of migrants by pulling together and reaffirming the disparate binding legal commitments governing international migration and duly reflecting interpretive developments within e.g. international human rights law, the law on search and rescue and international labour law. As the subsequent sections highlight, however, this is far from the only role played by UN and regional compacts. Nor is the political context particularly conducive to such an undertaking.

³³ John Cerone, 'A Taxonomy of Soft Law' in Stephanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), *The Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).

³⁴ Thomas Gammeltoft-Hansen, John Cerone and Stephanie Lagoutte, 'Tracing the Roles of Soft Law in Human Rights', in Stephanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), *The Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).

³⁵ Elspeth Guild and Stephanie Grant, 'Migration Governance in the UN: What is the Global Compact and What does it mean?', *Legal Studies Research Paper No. 252/2017*, Queen Mary University of London, p. 16.

SECTION 2:

What are the Forms of UN International Agreements/Understandings and What is Their Legal Effect?

Isobel Roele

This section addresses the question ‘What is a compact?’ by comparing the term with other terms for agreements used by the UN. Its principal conclusion is that the Global Compact for Safe, Orderly and Regular Migration (Global Compact for Migration) is a political rather than a legal instrument, but that its purposes go beyond awareness-raising and virtue-casting and are likely to have indirect, and possibly deleterious, effects. The compact is intended to serve as a common framework for the ‘good governance’ of migration that will both guarantee minimum standards for migrants and facilitate international cooperation on migration challenges.³⁶ Although unlikely to contain any binding legal obligations, its ‘principles, commitments and understandings’³⁷ are intended to structure future action on migration and it is likely to be a major influence on the interpretation of existing legal instruments and the creation of new ones. They do this not as legal norms arising from political discourse, but as technical norms garnered from expert knowledge and institutional experience.

The political aspect of the Global Compact for Migration is less about process than form. It is intended as a means of signalling global commitment to dealing with migration. Unlike legal obligations, political commitments are not legally enforceable. Indeed, this seems to have been a condition of states’ participation in and support of the Global Compact for Migration. Nevertheless, legal enforcement is not the only route to implementation and the Global Compact for Migration comes with a host of non-legal implementation mechanisms. These ‘design elements’³⁸ form an implementation framework³⁹ that use non-binding norms based on technical and professional know-how to find the optimal mode of implementation. This sort of norm can be characterised as a hybrid norm, poised between the legal, the political and the technical. The engine of implementation, as it were, is not the threat of coercive enforcement but the difficulty of refusing offers of cooperation and assistance to make good on one’s promise. The UN has used such hybrid instruments with great frequency since the Millennium, particularly in the field of economic and social development and the term ‘compact’ captures precisely this interplay between commitment and technique.

What's in a Name?

We should be chary of reading too much into the phrase ‘global compact’. In UN negotiations, words are often chosen because of what they do not signify as much as for what they mean. It may be that states have chosen the term ‘compact’ precisely because it is little used and, therefore, does not bear the baggage of preconception.

³⁶ This is clear from the 2017 report of the UN Special Representative for Migration, Peter Sutherland, UN Doc. A/71/28, para. 41

³⁷ UN General Assembly, Modalities for the intergovernmental negotiations of the global compact for safe, orderly and regular migration, UN Doc. A/Res/71/280, 1

³⁸ Andrew T. Guzman, ‘The Design of International Agreements’ 16(4) *European Journal of International Law* (2005) 579–612

³⁹ UN General Assembly, Modalities for the intergovernmental negotiations of the global compact for safe, orderly and regular migration, UN Doc. A/Res/71/280, para. 2

A preliminary point to make, given that the UN has six official languages and that many more are spoken in its 193 member states, is that ‘global compact’ is only the English term. Among the official languages, the French and Spanish renderings of ‘global compact’ are ‘*pacte mondiale*’ and ‘*pacto mundial*’, respectively. Although not an official language of the UN, the text was also available in German which has the instrument as ‘*globalen Paktes*’. We might ask, then, why the phrase was rendered ‘global compact’ rather than ‘global pact’. The UN is not a stranger to the word ‘Pact’, which has been used on a number of occasions – including in the context of transnational organized crime in which the ‘Paris Pact’ was drafted to combat illicit flows from Afghanistan in May 2003. This ‘pact’ was a political commitment rather than a set of binding legal obligations.⁴⁰ Another, better known ‘Paris Pact’ is properly known as the ‘Paris Agreement’ in English and the ‘*Accord de Paris*’ in French. Much in the news, the reason this climate change instrument is often referred to as the ‘Paris Pact’ in the media is perhaps only that it alliterates. The International Labour Organization’s Global Jobs Pact of 2009 is described as a policy document, intended ‘to provide an internationally agreed basis for policy-making’ on unemployment.⁴¹

It is not clear why the English translation is ‘global compact’ rather than ‘global pact’. It may be that the wording is a deliberate allusion to Kofi Annan’s UN Global Compact, launched in 2005.⁴² This was an attempt to put networked governance theory into practice, bringing stakeholders (companies, academics, local networks) together. Its mandate is to “promote responsible business practices and UN values among the global business community and the UN System”.⁴³ It is a public-private initiative and multi-stakeholder venture.⁴⁴ It may be that using the word ‘compact’ rather than ‘pact’ signals an intention to bring this sort of networked governance to bear on migration. Perhaps the French and Spanish translations (*pacte mondiale* and *pacto mundial*) signify this intention. Certainly, the envisaged role of ‘stakeholders’ in the compact suggests as much. Indeed, it seems that a non-UN inter-governmental entity – the Global Forum on Migration and Development – already takes such an approach.⁴⁵ Its website boasts policy tools, a ‘platform for partnerships’ and other ‘networking’ devices,⁴⁶ and primarily involves the sharing of best practices – a technique shared by the Global Compact for Migration process.⁴⁷ This approach amounts to a sort of legerdemain whereby legitimating properties such as inclusiveness and plurality become conduits for technicality rather than political contestation.

UN General Assembly Instruments

Understanding the status of UNGA resolutions is important in ascertaining the legal effect of the Global Compact for Migration. The UN General Assembly (UNGA) acts through

⁴⁰ https://www.paris-pact.net/upload/static/paris_statement.pdf

⁴¹ http://www.ilo.org/ilc/ILCSessions/98thSession/texts/WCMS_115076/lang--en/index.htm

⁴² See in general Ernst-Ulrich Petersman, ‘Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration’ 13(3) *EJIL* (2000) 621-650.

⁴³ UN Doc. A/RES/70/224, Towards global partnerships: a principle-based approach to enhanced cooperation between the United Nations and all relevant partners

⁴⁴ <https://www.unglobalcompact.org/about/governance>

⁴⁵ This organization was the initiative of former UN Special Representative for Migration, Sir Peter Sutherland.

⁴⁶ <https://gfmfd.org/ppp>

⁴⁷ The use of this technique is widespread in the UN. See, for instance, the UN Security Council’s Counter-terrorism Committee which uses best practices to implement resolution 1373 (2001). See generally, Roele, “Disciplinary Power in the UN Counter-Terrorism Committee” 19(1) *Journal of Conflict and Security Law* (2014) 49-84.

resolutions. Unlike those of the Security Council,⁴⁸ its resolutions are not generally binding on UN member states, and it has no authority or independent means to coercively enforce them.⁴⁹ UN member states are only obliged to ‘accept and carry out the decisions of the Security Council’ and not the UNGA.⁵⁰ Having said that, the International Court of Justice has accepted that an Assembly resolution can have legal effect. For instance, the Court recognized that Assembly resolutions concerning budgetary matters can have binding effect because the Charter uses the mandatory phrase ‘expenses of the Organization shall be borne by the Members as apportioned by the General Assembly’.⁵¹ Nevertheless, the resolutions are generally seen as having only indirect law-making effect in the form of customary norms, either as evidence of *opinio iuris* or as constituting relevant state practice.⁵² Just because something is agreed by the UNGA in a resolution does not, then, make it legally binding.

However, not all UNGA resolutions are created equal. Procedural resolutions can be distinguished from substantive ones, for instance. Then again, resolutions passed without a vote – by consensus – can be distinguished from ‘important questions’ for which a 2/3 majority is required.⁵³ If resolutions are the maids-of-all-work of the General Assembly, it is vital to be able to distinguish the most from the least important. This is where the resolution as a vehicle for adopting or endorsing another instrument comes into its own. One of many international conventions the Assembly has adopted, the UN Convention on Transnational Organized Crime (UNTOC) in 2000,⁵⁴ serves to explain the purpose of adoption. Urging states to become parties is only one reason the Assembly adopts conventions; another is that, as is the case with UNTOC, the Convention forms part of the UN architecture – in this case to be administered by the UN Office for Drugs and Crime. The Assembly cannot, of course, bypass the need for states to sign a treaty for it to become binding on them. It can, however, help to imbricate the treaty into UN efforts.

Another form of instrument the UNGA often incorporates into its resolutions is the declaration. On the face of it, there is no reason that the substance of the declaration could not simply be transposed into the text of the resolution. However, it seems that reminding readers of the circumstances in which a declaration was made – as in the case of the New York Declaration of September 2016 - can be a potent tool to raise its profile. Another good example of this is the 2005 World Summit Outcome Document.⁵⁵ Although many high level dialogues are had in the UN, it is rare to get heads of state and government together as occurred in 2005, and adopting the outcome document as a text in its own right seemed to reflect the ‘once-in-a-generation’ feeling of the moment.

⁴⁸ When taken under Chapter VII. See Articles 25 and 48(1) of the UN Charter.

⁴⁹ S.M. Schwebel, ‘The Effect of Resolutions of the UN General Assembly on Customary International Law’ 73 *ASIL Proc.* (1973) 301.

⁵⁰ UN Charter, Article 25.

⁵¹ UN Charter, Article 17(2). See generally *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) Advisory Opinion of 20 July 1962*, ICJ Reports 1962, 151.

⁵² Rosalyn Higgins, ‘The United Nations and Law-Making: The Political Organs’ 64 *ASIL Proc.* (1970) 39.

⁵³ UN Charter, Article 18(2).

⁵⁴ UN Doc. A/Res/55/25.

⁵⁵ UN Doc. A/RES/60/1

In still other cases, the Assembly incorporates another instrument into its canon with the purpose of giving plenary endorsement to prolonged, complex process. A good example of this is the 2030 Agenda for Sustainable Development.⁵⁶ The process of creating this document, though it is far more complex and sprawling, is comparable to that of the Global Compact for Migration. The Agenda is the same sort of ‘bundling’ instrument as the Global Compact for Migration.⁵⁷ Its process also involves multiple actors, is a cross-cutting issue, and is tinged with emergency and urgency and has made an enormous effort to include a multiplicity of stakeholders.

A Hybrid Instrument

There is a mismatch between the aspirations of the UN Special Representative for Migration and the stomach for action among UN member states. Although Sutherland hopes that the Global Compact on Migration may eventually pave the way for ‘new international norms and treaties’,⁵⁸ there is a marked absence of legal language in the UNGA documents agreed by UN member states. Instead, their language is very much – as already suggested – the language of policy frameworks and political commitments. It seems likely that a condition for the acceptability of the Global Compact for Migration project among the UN membership is that it is not legally binding. The paltry number of signatories to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which was negotiated under the aegis of the UN and adopted by the UNGA in 1990, is a case in point.⁵⁹ As Sutherland himself points out, there is entrenched disagreement among the UN membership about what safe, orderly and regular migration looks like.⁶⁰

Indeed, although migration has been on the UN radar since the mid-2000s when the Secretary General of the time, Kofi Annan, encouraged the UNGA to hold a High Level Dialogue on the matter,⁶¹ little progress was made between this moment, which established the agenda item ‘international migration and development’ and September 2016 and the New York Declaration in the intervening years. It appears to be that the crisis caused by the Syrian civil war is acting as a catalyst for action.

Had the UNGA intended to create a binding legal framework for future action, they would have agreed to negotiate a convention on migration or on one of the various aspects of migration singled out for action. Although migration is presented as a ‘multidimensional’

⁵⁶ UN Doc. A/RES/70/1

⁵⁷ Section 3.

⁵⁸ UN Doc. A/71/28, para 87, op cit, Section I.

⁵⁹ UN Doc A/RES/45/158 (1990). The Convention has just 51 parties, none from the Global North.

⁶⁰ As UN Special Representative on Migration, Peter Sutherland wrote in his report UN Doc. A/71/28, ‘States tend to have quite different conceptions of what “well-managed migration” means in practice. Some would like it to mean more migration; others, no migration at all. Nonetheless, all interpretations must stay true to the spirit of the 2030 Agenda’ (para. 11)

⁶¹ This culminated in a resolution on International migration and development, UN Doc. A/Res/61/208

and ‘cross-cutting’ issue, there is nothing inherent in this that would prevent a treaty being concluded. Existing examples include UNTOC and the Refugee Convention of 1951, which is administered by the UNHCR. Both instruments are framework treaties and have yielded subsequent protocols which are also legally binding.

Nevertheless, it is possible that the Global Compact for Migration could be a policy framework which might subsequently accommodate multilateral legal instruments. It is also possible that the norms in the Global Compact for Migration could be elevated to the status of positive international law in the form of customary international law. When international law norms are aspirational rather than positive obligations accompanied by enforcement measures, they form part of the *lex ferenda*. These so-called ‘soft law’ norms are thought to contain what the law *ought to be* rather than what the law is. They are political commitments that are often dismissed as ‘zombie policy’. Given that the way norms come into existence in public international law – through state consent – widespread acceptance of aspirational norms can be evidence of state practice constitutive of a customary international law.⁶²

The Special Representative intends the Global Compact for Migration to represent ‘soft law’.⁶³ However, in my opinion it would not do so as *lex ferenda* but as a form of technical norm that achieves implementation not through ‘hard’ enforcement mechanisms, but ‘soft’ implementation in the form of development assistance. Although not law in the sense of positive legal norms enforceable in international courts and tribunals, a Global Compact for Migration full of technical standards, commitments and principles could lead to domestic legislation, bilateral treaties, regional agreements and international instruments that contain binding legal norms. It is also likely that as well as stretching forwards towards future legal obligations, the Global Compact for Migration will stretch backwards in time to the interpretation of existing legal instruments. The Compact thus acts as a sort of hub for the coordination and association of myriad activities and initiatives. At its most rudimentary, this is what is suggested by the etymology of ‘compact’; the coming together of pacts.

Expertise and Experience

‘Compact’ also suggests a coming-together of actors. I have already mentioned this as regards the partnership model of the UN Global Compact. In the case of the Global Compact for Migration, this coming together is less of an inclusive political idea than a broad-knowledge-based technical one. Plural participation is valued not because it gives voice to conflicting perspectives, but because it adds detail and depth to a single understanding of migration. The UNGA envisages that a raft of non-state actors from specialized agencies and civil society will play a key role in the Global Compact for Migration process. These actors are described as ‘relevant stakeholders’ and this description seems to refer both to the fact that they are invested in the outcome (e.g. diaspora communities and migrant organizations) and that they have relevant experience and expertise (civil society organizations, academic institutions). In many cases, stakeholders are both affected *and* expert. The modalities resolution particularly emphasizes the importance of expertise and experience in crafting the document when it refers to the importance of ‘best practices’, as this suggests that the norms in the Global Compact for Migration will be concrete how-to

⁶² ICJ Statute, art. 38(1)(b)

⁶³ UN Doc. A/71/28, para. 86

guidance and not abstract ‘what if’ aspirations. This is further suggested by the ‘technical and policy expertise’ role of the IOM in servicing the negotiations, and by the use of ‘expert panels’ in the first phase of the drafting process. The process only becomes political in the sense of intergovernmental negotiation in the third phase. Member states will discuss a draft that has been crafted on the basis of technical ‘inputs’.

There is a case for saying that the importance of stakeholders other than governments in the process of creating the Global Compact for Migration means that, even though it will not form part of binding international law, the Global Compact for Migration will nevertheless be a very potent instrument. If it is outside international law, the policy framework can contain agreements between non-state actors and technical guidelines developed by and addressed to those directly involved in migration. It may be, then, that the Compact forms an umbrella for a plethora of regulations, recommendations, standards and practices, guidelines, codes of conduct and accords. These sorts of documents are typically produced by specialized agencies and contain technical norms. For instance, the International Civil Aviation Organization’s Standards and Practices, the World Health Organization’s Regulations and the Financial Action Task Force’s Recommendations. The idea that the UN would provide a big tent to draw together and, ideally, harmonize disparate efforts in a long-term and multi-agency effort is entirely commensurate with its post-Millennium policy of building partnerships to perform its functions, rather than keeping them all in-house. In this, there is a parallel with – amongst others – the Global Plan of Action to Combat the Trafficking of Persons and the UN Global Counter-Terrorism Strategy. Both of these very different initiatives are designed to consolidate existing efforts within the UN and to build links with external agencies working towards the same ends. While this helps the UN ‘deliver as one’, it also waters down specific initiatives because each prong of the common effort must compromise in order to work together in harmony.

Conclusion

The inclusive nature of the Global Compact for Migration process is, on the face of it, a positive move towards inclusion and a plurality of voices. However, there is a tendency that the eventual document will have a lowest-common-denominator effect on human rights standards for migrants. For one, the higher the number of points of view to accommodate, the looser the norms become. For another, the fact that human rights organizations become one voice among many inevitably has the effect of diluting human rights norms and marginalizing human rights as a body of law. The worst case scenario is that wishy-washy human rights standards are included in the Global Compact for Migration as a fig-leaf for states to legitimate their current practices.

⁶⁴ UN General Assembly, Modalities for the intergovernmental negotiations of the global compact for safe, orderly and regular migration, UN Doc. A/Res/71/280, para. 6.

⁶⁵ UN General Assembly, Modalities for the intergovernmental negotiations of the global compact for safe, orderly and regular migration, UN Doc. A/Res/71/280, para. 7.

⁶⁶ UN General Assembly, Modalities for the intergovernmental negotiations of the global compact for safe, orderly and regular migration, UN Doc. A/Res/71/280, para. 11.

SECTION 3:

The Global Migration Compact and the Limits of 'Package Deals' for Migration Law and Policy

Marion Panizzon

This section infers from several negotiating techniques used towards drafting a Global Migration Compact with a focus on the issue-linkage, also known as the packaging approach, what the final outcome might be. Engaging in a comparative assessment with competing use of “compacts” by international donors and the EU towards Jordan, we argue that “packaging” is of limited use in a field framed by individual rights and the universal claim of protection. Linkages are at similar loss, in this field, fraught with weak reciprocity among states. The EU concept of “compacts” seemingly sides with its pre-crisis partnership logic propagated in policy instruments such as the Global Approach to Migration and Mobility (GAMM) but at the same time bypasses the participatory rationale of EU neighbourhood policy action plans and reveals a top-down approach instead. The universality of human rights protection implies non-negotiable commitments which cannot be watered down by reciprocal deals. If human rights are taken seriously, the Global Migration Compact could incentivize separate, but interlinked treaties on specific aspects of migration, including return and labor market access quotas, standards on readmission procedures according to the “mini-multilateralism” paradigm, rather than act as a platform to launch a single, multilateral treaty on migration.

Compacts as Packages? Theorizing 'Issue-Linkage' in Migration

Issue-linkage often used identically with the “packaging approach”, is not quite a theory but rather a “machinery” or a “mechanism” advanced by legal theorists⁶⁸ and political scientists⁶⁹ as a vehicle to incentive states to cooperate internationally on foreign policy areas for which global consensus remains out of reach, often because a reciprocal trade-off is difficult to reach.⁷⁰ In the realm of international law, issue-linkage acts as a trust-building treaty-negotiating technique or a “bargaining tactic” that ensures that agreements are negotiated and parties remain in the agreements.⁷¹

Issue-linkage to other policy categories, or put differently “embedding” into a related, but more mature regulatory area, is one recipe to create the bargaining space for gathering global alliance, before addressing, in a subsequent step, the hot topic.⁷² In international

⁶⁸ Sabino Cassese, *Research Handbook on Global Administrative Law*. Edward Elgar Publishing, 2016.

⁶⁹ Betts, Alexander, *Global Migration Governance*, ed. Oxford University Press (2011); John Gerard Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' 36(2) *International Organization* (1982) 379-415.

⁷⁰ Betts 2011.

⁷¹ Paul Poast, 'Issue linkage and international cooperation: An empirical investigation'. 30(3) *Conflict Management and Peace Science* (2013) 286-303.

⁷² Around issue-linkage a wide literature exists on how trade agreements have often gone “beyond their traditional subject matter of liberalizing market access in goods, services or intellectual property rights” (Milewicz et al. 2016:2). Its motives are for powerful partner to impose conditions and for preventing a race-to-the bottom over the “non-trade issue” (NTI).

⁷³ James, F. Hollifield, 'Migration and the 'New' International order: the missing regime', in Bimal Ghosh, ed. *Managing Migration, Time for a New International Regime*, Oxford University Press, 2000, 75-109.

migration law and policy, issue-linkage is applied to overcome the “missing regime”⁷³ and other collective action challenges, including a fragmented⁷⁴ “piecemeal” law.⁷⁵ Whereas issue-linkage is not free of risk, including exacerbating power asymmetries, which leads to a blurring of rights and policy overlaps which are subsequently difficult to “disentangle”⁷⁶, it can, if effectively tailored and holistically managed – be advanced as one selling point of the Jordan Compact.⁷⁷ Issue-linkage has the further advantage of being accessible to most disciplines – law, political science and economics – so that a packaging solution will even be more poly-valent.

The downside of linkage is how it creates overly complex governance structures and incoherent outcomes⁷⁸ for blurring of rights and asymmetric bilateral deals driven by conditionality rather than reciprocity.⁷⁹ Packaging builds trust, creates incentives to compromise, but can also blur lines, in particular for rights protection. With migrants “encountering” courts as in *Hirsi Jamaa and Others v Italy*, no. 27765/09 ECHR 2012 and *Khlaifia and Others v Italy*, no. 16483/12 ECHR 2017,⁸⁰ it becomes more difficult for governments to strike deals on their expense (Turkey-EU statement; Italy-Libya bilateral agreements). Packaging visa to readmission or linking trade preferences to refugee employment becomes more difficult if rights are to be protected.⁸¹

Linkage in migration was used pre-crisis by countries including Switzerland to propagate a “whole-of-government” approach towards immigration policy formulation and Swiss migration partnerships towards third countries. Similarly, EU Mobility Partnerships, the Common Migration and Mobility Agendas and most recently the EU partnership priorities and compacts make use of it. Compacts by definition imply linkage or packaging; they figure as the ultimate form of linkage in international, regional and national migration law and policy. How have large movements of refugees and migrants provided new impulse for issue linkage and how linkage evolved, moving away from the migration-development-nexus of early days?

Unlike trade, investment or health, which are policy categories displaying the kind of ‘global public goods’, quality that incentivizes international cooperation, for migration, with the

⁷⁴ Vincent Chetail, ‘Sources of International Migration Law’, in Brian Opeskin, Richard Perruchoud, Jillyanne Redpath-Cross, eds., *International Migration Law*, Cambridge University Press, 2012 56-90.

⁷⁵ Opeskin, Brian, Richard Perruchoud and Jillyanne Redpath-Cross, ‘Conceptualizing International Migration Law’ in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds.), *Foundations of International Migration Law*, Cambridge University Press 2012, 1-16.

⁷⁶ Alexander Betts and Paul Collier, ‘Jordan’s refugee experiment: a new model for helping the displaced in Jordan’, *Foreign Affairs* (2016).

⁷⁷ Boswell, forthcoming.

⁷⁸ Betts 2011.

⁷⁹ Andrew Geddes 2009. ‘Migration as Foreign Policy? The External Dimension of EU Action on Migration and Asylum’, SIEPS.

⁸⁰ Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law*, Cambridge University Press 2016.

⁸¹ François Crépeau, ‘Thematic report on bilateral and multilateral trade agreements and their impact on the human rights of migrants’, UN Doc. A/HRC/32/40) 4 May 2016.

⁸² Rahel Kunz, Sandra Lavenex and Marion Panizzon, ‘Multilayered Governance: The Promise of Partnership’, Routledge 2011.

⁸³ Joel Trachtman, *The International Law of Economic Migration: Toward the Fourth Freedom*, Kalamazoo W.E. Upjohn Institute for Employment Research, 2009.

exception of few areas with free rider problems, including asylum and refugee protection, the same is not true.⁸³ Packaging to non-migration policy categories, which is what “compacts” imply, is thus chosen to construct reciprocity in an area where there is often none.⁸⁴ The EU-Jordan compact, to that effect, links goods trade to refugee employment as a solution for compensating Jordan’s crisis-ridden economy from some of the costs of the Syrian refugee intake. Behind the scenes, the “trade-refugee-deal” of the compact, however, also figures as a way to keep these refugees from reaching their country of choice – Europe. In this sense, issue-linkage in refugee policy comes at the cost of the human right to leave. Conversely, the trade-refugee labour linkage of the Jordan Compact creates livelihoods. It seems that profiling linkages – at least for refugee and migrants – is a highly controversial policy choice.⁸⁵

‘One-Size-Fits-All’ Versus ‘Mini-Multilateralism’: Why (Un)Pack a Compact?

The Global Compacts are an intermediate step in a negotiating process which could lead to the adoption of multilateral treaties. From negotiating techniques we can infer the final outcome and its meaning for migrant rights, multi-stakeholder participation, and other good governance questions. Issue-linkage and packaging solutions are negotiating techniques which ultimately aim at a multilateral solution, a one-size-fits-all approach or package deal mirroring a reciprocal give and take. Within the process of negotiating the Global Compact for Migration, a central question is how much policy space there should be for customizing policy solutions towards safe, regular and orderly migration and thus to “unpack”.⁸⁶ This dichotomy between a one-size for all and tailor-made solutions, the later which enable pick-and-choose, opt-outs and opt-ins, is well-known from EU external dimensions of migration law. The Sutherland Report endorses “mini-multilateralism”, defined as collecting best practices around a specific issue area, which are in a second step, tested as pilots among a group of like-minded states, before multilateral support and, ideally, consensus is sought.

The coming into being of the UN Global Compacts follows a top-down process, initiated by two country co-facilitators, in this case, Mexico (Ambassador José Juan Gomez Camacho) and Switzerland (Ambassador Jürg Lauber). This choice pre-determines an outcome which is driven by state preferences, sectoral and actor-specific interests. Although the drafters of the pre-negotiations reports, the co-facilitators and the UN administrative support team, claim this is a state-led, UN-assisted discourse which will require a General Assembly vote of approval, the fact that initiation and guidance is provided by the co-facilitators, that key strategic documents, such as the Sutherland Report or the Modalities document⁸⁷ and certain thematic meeting reports, are prepared by a group of individuals around the Special Representative of the Secretary General, point more towards a “global” governance

⁸⁴ Section 1.

⁸⁵ Pro-linkage: <http://www.atlanticcouncil.org/blogs/syriasource/challenges-and-successes-of-jordan-s-work-permit-program-for-syrian-refugees-after-one-year>; contra <https://www.hrw.org/news/2016/11/30/submission-lebanon-eu-partnership-priorities-and-eu-lebanon-compact>.

⁸⁶ GMG Input to the Secretary General’s Issue Brief, Theme No. 3 International cooperation and governance of migration in all its dimensions including at borders, on transit, entry, return, readmission, integration and reintegration, May 2017.

⁸⁷ A Modalities document was circulated on 22 December 2016: <http://www.un.org/pga/71/wp-content/uploads/sites/40/2015/08/modalities-for-global-migration.pdf>.

process taking place outside the precepts of formal inter-governmentalism. The UN Global Compact for Migration process shares as discussed, some similarities with the multiple rounds of negotiations, which eventually transformed the GATT 1947 into the WTO, but it does not directly compare to these.⁸⁸ On the other hand, the UN Global Compact for Migration opens to non-state participation, since during the 12 thematic meetings held in 2017, as well as the stakeholder meetings held during the pre-drafting stage, non-state organizations, including academia, may have a voice by accrediting with the UN. Nonetheless, a multi-stakeholder participation is kept formally out of the negotiation process, ensuring that the inclusion of migrants' voices are a myth rather than a reality.⁸⁹

To what extent does the UN Global Compact profile a packaging approach and where are the limits? Firstly, it is clear that issue-linkage as a flexibility strategy encourages cross thematic fertilization among migration (and refugee) policy. This is important for a field like migration, where compromise is difficult to achieve as divides between perceived sending, host and transit communities run deep and "unwanted" migration becomes a highly politicized category. The NY Declaration itself links short-term humanitarian relief and emergency interventions with medium-term protection needs and long-term livelihood strategies.

The Sutherland Report, however, notes that compacts ought to lead to "the conclusion of new, issue-specific treaties",⁹⁰ which means even more fragmentation and less coherence, unless an umbrella treaty would provide a framework. The Sutherland Report's emphasis on "issue-specific" means that the Special Representative of the Secretary General and the General Migration Group are opposed to "packaging solutions" and "cross-sectoral bargaining", as was undertaken by developing with industrialized countries during the Uruguay Round of multilateral trade negotiations, to build up the necessary reciprocity for negotiating the so-called "single undertaking" of the WTO Marrakech agreement. In that case, packaging solutions acted as an umbrella to the grand bargain between intellectual property, trade in services and goods, including with the Global South. Instead, the negotiating technique chosen for the Global Migration Compact is "mini-multilateralism", defined as seeking a common denominator around a single issue, such as "vulnerable situations; abusive recruitment processes; or international transfers of funds and benefits".⁹¹ These single issues are then discussed among interested States before multilateralizing towards all UN Member States in the form of a self-contained treaty or agreement on each specific

⁸⁸ Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51(4) *International Organization* 1997 513–53.

⁸⁹ François Crépeau, Bern Talk, 23 June 2017, http://www.unibe.ch/aktuell/uniaktuell/das_online_magazin_der_universitaet_bern/uniaktuell_ab_2015/rubriken/universitaet/un_sonderberichterstatter_fordert_eine_stimme_fuer_migrantinnen_und_migranten/index_ger.html

⁹⁰ Report of the Special Representative of the Secretary-General on Migration, (Sutherland Report) Sutherland Report, UN Doc. A/71/728 of 28 December 2016.

⁹¹ Report of the Special Representative of the Secretary-General on Migration, (Sutherland Report) Sutherland Report, UN Doc. A/71/728 of 28 December 2016.

issue. In what in essence amounts to a three-step process, as the Sutherland Report indicates, the function of a compact is one of a stepping stone: “The global compact could bundle agreed norms and principles into a global framework agreement with both binding and non-binding elements and identify areas in which States seek to work towards the conclusion of new international norms and treaties.”⁹² Its work is clearly to not go beyond co-facilitating a state-led process of identification of issue areas suitable for multilateralism, as was repeatedly stated in the “procedural note for the third informal thematic session” on international cooperation and governance of migration in all its dimensions including at borders, on transit, entry, return, readmission, integration and reintegration.⁹³

Similarly, the EU Partnership Framework proposes “coherent and tailored” partnerships or “country packages” to resolve the delivery gap haunting EU readmission agreements. The EU Common Agendas for Migration and Mobility,⁹⁴ Compacts and Partnerships, are all tools to “informalize” and thus lessen the legal density pressuring sending countries into disliked and eventually unenforced readmission agreements. The EU approach, which Switzerland for example has been replicating with its “Migration partnerships”, is a sequential one, providing for the conclusion of non-binding frameworks or sub-ministerial inter-agency technical cooperation first, before negotiating a fully-fledged EU readmission agreement.⁹⁵

The sequencing strategy inherent in EU migration policy and issue-specific customization inherent in it, are key flexibility tools which can advance prospects of enforcement and increase the likelihood of voluntary returns. On the downside, informalization risks watering down *non-refoulement* guarantees and other rights. The Global Compacts seem to pursue a similar strategy of sequencing the process, with a first informal phase of thematic meetings and multi-stakeholder meetings each summarized by “notes” from the office of the Special Representative of the Secretary General Louise Arbour, complemented by a Zero-Draft drafted by the co-facilitators, upon which states engage in a second phase of negotiations.

The Global Compact for Migration posits the following advantages in “flexibility”:

- Acknowledgement that not all of migration policy features “hard” law agreements and treaties;
- Allowing competing “ethos” (voluntarism, humanitarianism and managerialism) to be co-joined and lessen pressure on states to multilateralize;
- Bottom-up approaches like regional consultative processes co-exist alongside co-facilitated process of the Global Compact for Migration;
- Migration flows are usually “mixed” and this diversity needs to play out in policy solutions;
- Validation of the local and subnational layers of migration law-making;
- Acknowledgement that categorization into host, home, transit countries may run counter to fair-distribution of benefits regarding migration;

⁹² Report of the Special Representative of the Secretary-General on Migration (Sutherland Report) UN Doc. A/71/728 of 28 December 2016.

⁹³ <http://www.un.org/pga/71/wp-content/uploads/sites/40/2015/08/Global-Compact-6-June-2017.pdf>.

⁹⁴ See https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en.

⁹⁵ EU Partnership Framework, 7 June 2016, COM (2016) 385 final, pp. 6-7.

Legal Density of Compacts– ‘Between a Rock and a Hard Place’⁹⁶

A distinctive trait of Compacts is their “hybridity” in terms of legal density, as discussed by Isobel Roele in the section above. Compacts strike a middle ground between the hard law of a multilateral treaty or bilateral agreement and the soft law of declarations, recommendations, best practices, and understandings.⁹⁷ The hybridity of compacts extends beyond their legal density or choice of negotiating technique. Ambivalence also concerns the governance modality of Compacts: less constraining than an agreement, but a step beyond the softer understandings, recommendations, guidelines or other labels for best practices, which characterize pre-New York millennial migration outputs at the global level, including the GCIM Commission’s common understandings (2015), the outputs of the UN HLDs on migration and development since 2009, the Berne Initiative’s International Agenda on Migration Management (IAMM), but also point 10.7 of the Sustainable Development Agenda 2030.

Indeed, the pre-negotiation process of the Global Compact for Migration so far, seems to combine multi-stakeholder with thematic informal meetings, held at alternating UN headquarters, from Geneva or New York to Vienna. Both the multi-stakeholder and thematic meetings aim to collect best practices on various issue areas of migration to feed into a Zero Draft, with the goal to multi-lateralize those issues over which consensus can be achieved by concluding issue-specific treaties. However, the process is open-ended in terms of the conclusion of the global framework agreement to serve as an umbrella or to what extent certain areas will remain soft law.⁹⁸

Compacts contain a further “hybrid” moment, in the sense of an “intertemporal” component. The series of “informal multi-stakeholder and thematic meetings” leading to the Compact is only the intermediate goal. The more ultimate one is to obtain a cluster of issue-specific multilateral treaties, and, in an even longer-term horizon, a “global framework agreement” to hold these thematic treaties together.⁹⁹ It is no coincidence that the Sutherland Report’s key architect, Sir Peter Sutherland, had something similar in mind to the WTO Marrakech agreement he helped to conceive back in 1994, as the last Secretary General of General Agreement on Trade and Tariffs (GATT) and first Director General of what became the World Trade Organisation agreement (WTO), the so-called WTO constitution, spanning over the GATT 1947, the GATS¹⁰⁰ and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement and giving birth to the WTO as an international organization. Yet, at this stage it remains unclear to what extent such a “global migration framework agreement” would be monitoring authority and holding powers of judicial review.

⁹⁶ An idiom used to describe the challenge of a dilemma: two solutions are in sight, but neither is desirable or feasible; it inspired the Rolling Stones to a song, and Petros Mavroidis to an article on the role of remedies in the WTO Remedies in the WTO legal system: between a rock and a hard place; (11(4) EJIL (2000) 763-813), which is highly contested, since they are neither foreseen by the WTO treaties nor prospectively useful as a trade sanction. In the end, effectiveness, as the way out of dilemma, including of “package deals” is about power of persuasion.

⁹⁷ See Section 1.

⁹⁸ Guild and Grant 2017 12-15.

⁹⁹ Report of the Special Representative of the Secretary-General on Migration (Sutherland Report), UN Doc. A/71/728 of 28 December 2016 ; para. 87.

¹⁰⁰ General Agreement on Trade in Services (GATS).

As a governance tool, the Global Compact for Migration aspires clearly to fulfilling “good” governance rationales, including accountability, participation of civil society organisations, migrants and non-governmental organisations, and rights-based policies, alongside multi-layered governance aspirations, including to increase the intersectionality among socio-spatial layers to improve, by implementing subsidiarity, the efficiency, burden-sharing and solidarity among governmental actors at global, regional and local levels.¹⁰¹ Governance thus aims to increase the coherence among actors,¹⁰² but also the coordination among themes and thus aspires to similar package deals, as the EU Partnership Framework propagates between irregular and regular migration through a mix of “positive and negative” incentives.¹⁰³ Unlike “partnership approaches”, the UN Global Migration Compact strives for an even more comprehensive bundling, profiling for the first time in this explicit and unambiguous manner, human rights, vulnerability protection.

Out of an attempt to “manage” the refugee “crisis”, several regional and international compacts have emerged.¹⁰⁴ Among these, the EU-Jordan Compact of 2016 features a high diversity of linkages, spanning from refugee employment for visa facilitation, labour, trade, development and even investment. The EU commitments, however, were preceded by an international donor conference. The following section dissects how “linkage” has worked in these compacts and to what migration and refugee was linked to and at whose expense.

The International Compact for Jordan: A Multi-stakeholder Package

At the Syrian donor conference in London in 2016, key EU Member States affected by the large flows of refugees and migrants – Germany, Norway and the UK, together with Kuwait and Qatar – and non-state actors, including the EU, the World Bank and other multilateral donors, came up with international “commitments” for a “compact” with Jordan. The Conference held a second round of pledging on 5 April 2017 in Brussels.¹⁰⁵ It was at this conference that the concept, which had been developed by two academics, Alex Betts and Paul Collyer, was applied in practice.¹⁰⁶ The Compact “compensates” two frontline transit countries, Jordan and Lebanon, for keeping Syrian refugees in the region, which is perceived as the more humane and at the same time less resource-intensive solution. The international compact is an unprecedented “package deal” – actor-wise and in terms of the policy mix involved.¹⁰⁷ For the first time, refugees living in formal camps are to be given employment, at the expense of exercising their right to leave any country (Art. 13(2) Universal Declaration of Human Rights) and to freely move to their country of asylum of their choice. In return, host communities in Lebanon and Jordan are compensated for the cost of hosting foreign populations – albeit the 9 billion euros raised at the London event are limited to Syrian refugees – in their volatile and fragile economies. Behind the compact was

¹⁰¹ Global Migration Group (GMG) Input to the Secretary-General's Issue Brief Theme #3: International cooperation and governance of migration in all its dimensions including at borders, on transit, entry, return, readmission, integration and reintegration, May 2017.

¹⁰² Defined as including state and civil society but not migrants themselves.

¹⁰³ Céline Bauloz, ‘The EU Migration Partnership Framework: an External Solution to the Crisis?’, 31 January 2017, EU Immigration and Asylum Law Blog.

¹⁰⁴ Etienne Piguet, ‘The “Migration Crisis” in Europe: An Interpretation, NCCR on the Move’, Blogpost 22 June 2017, <http://blog.nccr-onthemove.ch/the-migration-crisis-in-europe-an-interpretation/?lang=de>.

¹⁰⁵ The 4 February 2016 London donor conference is officially called “Supporting Syria and the Region” http://data.consilium.europa.eu/doc/document/ST-12384-2016-ADD-1/en/pdf_s.12

¹⁰⁶ Paul Collier and Alex Betts, ‘Why Denying Refugees the Right to Work is a Catastrophic Error’, 22 March 2017, <https://www.theguardian.com/world/2017/mar/22/why-denying-refugees-the-right-to-work-is-a-catastrophic-error>.

the idea that stepping up Middle Eastern countries' export potential by relaxing their rules of origin with a view to boost exports of goods manufactured there with at least 25% refugee labour into the EU could be lined up with the EU interests in enforcing the externalization of EU borders. This is the objective of the EU regarding Jordan and Lebanon. Implementation would occur via secondary measures adopted by the EU-Association Councils.

The Compacts in EU External Migration Policy: Rivalry with Partnerships?

In EU policy, Jean-Claude Trichet, former EU Central Bank president, had coined the term “compact” for the first time, as another label for the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 2 March 2012; also referred to as TSCG or Fiscal Stability Treaty. Under that “compact”, signatory EU Member States were urged to balance their national budgets with the convergence criteria, i.e. be in line with or feature a surplus according to an EU definition.¹⁰⁸ The EU Migration Compacts are a very similar tool, also responding to crisis but falling short of culminating in a durable, long-term, legally binding solution. Instead, the Jordan Compact offers time-limited trade preferences and access to fiscal aid until 2018; the one with Lebanon until 2020.

In 2015, the Valletta Summit and the ensuing EU Agenda 2015 and 2017 Framework Partnership endorsed a “multi-policy” dimension. The EU Compacts, officially labelled the Partnership Priorities to which a Compact is annexed to, pursue this policy.¹⁰⁹ The Partnership Framework on migration with third countries under the European Agenda on Migration perceives compacts as a follow-up to the Common Agendas on Migration and Mobility (CAMP) according to which the EU can sign compacts with third countries, which can also be precursors to more fully-fledged and legally binding readmission agreements later.¹¹⁰ EU Compacts build on pre-existing EU-Association agreements, but fall short of modifying them, since modification would involve the EU Parliament and take too much time. Compacts are conceived as “crisis” intervention mechanisms to compensate host communities for a large and sudden intake of refugees. They have notably relieved the economies of Jordan and Lebanon of some of the costs of hosting Syrian refugees by granting more favourable export opportunities for merchandise produced by 25% refugee labour, but have left out Iraqi and Palestinian or refugees from the Horn of Africa from the deal.¹¹¹ The compact modifies Jordan's eligibility status under its EU Association Agreement from the General System of Preferences Plus (GSP+) to an “Everything-but-Arms” status according to WTO rules. However, the EU-Association Council refrained from modifying the text of the Association Agreement because the compact is considered a time-limited deal only.¹¹² The EU Compact

¹⁰⁷ Katharina Lenner, ‘The politics of pledging: reflections on the London donors conference for Syria’, Migration Policy Center Policy Brief 2016/3, Florence : European University Institute.

¹⁰⁸ The Czech Republic, Croatia, the UK opted out; Romania, Bulgaria and Denmark opted in.

¹⁰⁹ Communication from the Commission to the European Parliament, The European Council, The Council and the European Investment Bank Partnership Framework with third countries under the European Agenda on Migration, 7 June 2016, COM(2016) 385 final.

¹¹⁰ EU Commission, Annex to the Joint Proposal for a Council Decision on the Union Position within the Association Council set up by the EU-Mediterranean Association Agreement establishing an association between the EU, its Member States and Jordan with regard to the EU-Jordan Partnership Priorities and Annexed Compact of 20 September 2016, <http://data.consilium.europa.eu/doc/document/ST-12384-2016-ADD-1/en/pdf>

¹¹¹ Marion Panizzon, ‘Trade and Migration Linkage Re-invented: The EU-Jordan Compact and Refugee Employment’, in Sergio Carrera, Elspeth Guild and Marco Stefan, *The EU External Dimension of Migration Policy*, TRANSMIC and CEPS (forthcoming).

for Jordan mirrors the international compact for Jordan agreed to at the London donor conference. Rather than “subcontracting” to international organizations (including IOM and UNHCR),¹¹³ the EU is inversely aligning its policy priorities in Jordan, in particular to the international commitments agreed upon in London, in a process of “inverse diffusion”. As the EU Commission notes, Compacts are “fluid processes” from which a “formal” international agreement can “flow”.¹¹⁴ In the case of Jordan such a finalization is yet to be seen. Similarly, the Sutherland Report notes that the Global Migration Compact is a precursor to “new, issue-specific” treaties” and that the process “can help support States to move from informal processes to the conclusion of formal treaties”. Partnerships (Swiss, French, EU) in return, are yearly reviewed by a committee, which can add or remove elements to the deal (e.g. anti-trafficking programs, labour market access quotas, professions where economic needs tests are eliminated or relaxed) but without the expectation that someday there will be a spill-over into an agreement or treaty. As important discursive elements of an intensifying North-South dialogue among host-sending communities, EU partnerships are platforms to follow-up on ENP action plans.¹¹⁵ Conversely, the EU Association Council for Jordan announced that the EU-Jordan Compact and the EU Partnership Priorities to which they are annexed to replace ENP action plans. Whereas the EU Mobility-partnerships emerge bottom-up among host country, interested EU member states and the EU Commission,¹¹⁶ the Compacts seem to overturn, the participatory legitimacy of the EU Mobility partnerships, by excluding the EU Commission or the EU Parliament as parties to the compacts, and expressly bypassing the logic of related EU migration instruments, including the ENP Action Plans, which they “replace”.

¹¹² Annex to a Joint Proposal for a Council Decision on the Union Position within the Association Council set up by the Euro-Mediterranean Agreement of 20 September 2016: <http://data.consilium.europa.eu/doc/document/ST-12384-2016-ADD-1/en/pdf>

¹¹³ Sandra Lavenex ‘Multilevelling EU external governance: the role of international organizations in the diffusion of EU migration policies’ 42(4) *Journal of Ethnic and Migration Studies* 554-570.

¹¹⁴ Factsheet on Partnership Framework on Migration, available at: https://eeas.europa.eu/sites/eeas/files/factsheet_ec_format_migration_partnership_framework_update_2.pdf

¹¹⁵ EU Commission, Annex to a Joint Proposal for a Council Decision on the EU Partnership Priorities for Jordan, JOIN 2016 41 final, 19 September 2016 http://eur-lex.europa.eu/resource.html?uri=cellar:a9fac374-7e47-11e6-b076-01aa75ed71a1.0001.02/DOC_2&format=PDF

¹¹⁶ Natasja Reslow, ‘Deciding on EU External Migration Policy, The Member States and the Mobility Partnerships’, 34(3) *Journal of European Integration* (2015) 223-239; Sergio Carrera et al., ‘External migration policies, A preliminary mapping of the instruments, the actors and their priorities’, Brussels, 2016.

Conclusion

Not all definitions of compacts mean the same thing. Nor are all type of “compacts” – global, regional or international – meant to be “package deals”, negotiated to obtain a “one-size-fits-all” common denominator among host, sending and transit countries. Text analysis combined with semi-structured expert interviews of the UN informal thematic meetings reveal that what is labelled a “compact” in UN discourse differs widely from what the EU considers to be a “compact”. Yet, there is multi-leveilling between the EU Jordan Compact and the commitments by the international community at the “Protecting Syria and the Region” Paris (2016) and Brussels (2017) conferences for Jordan. All “compacts” seem rooted in “ad hocism” to resolve the “migration crisis”. Whereas the Global Compact for Migration is a by-product of UN facilitated, state-led process, the international Jordan compact is the product of multi-stakeholder participation, while the EU Jordan compact builds on a rich history of pre-existing EU association agreements, European Neighbourhood Policy Action Plans, and Mobility partnerships which it sidesteps or modifies.

Secondly, the UN Global Compact process is opposed to packaging solutions and clearly refrains from straightjacketing states into one-size-fits-all solution. If at all, the UN Compacts seem more likely to stand as an intermediate step within a negotiating process labelled “mini-multilateralism”, which eventually leads like-minded states to adopt a series of area-specific treaties. Eventually, the UN Global Compact could lead to a “global framework agreement” monitoring with both binding and non-binding the various issue-specific treaties. Regardless of differences in negotiating techniques, EU and Global compacts propose “in-between” solutions – modifying ex post action plans, dialogues, agreements, facilitating an ex ante binding agreement, and providing an intermediate legal solution.

In conclusion, the packaging approach might have worked to enhance the mutual supportiveness of trade in goods and services with investment, intellectual property rights and environmental protection. Yet, as a “tit-for-tat” paradigm, linkage ultimately fails where individual rights protection is at stake, as in migration or where reciprocity is weak, as between migrant sending, receiving states.

SECTION 4:

The Migration Partnership Framework and the EU-Turkey Deal: Lessons for the Global Compact on Migration Process? *

Violeta Moreno-Lax

The EU has been experimenting in recent years with ‘softified’, inter-governmental non-treaty formulas in its relations with the wider world in several domains, particularly with regards to migration and border management, which have had the effect (in practice) of divesting migrants of key fundamental rights, despite their positivisation in legally-binding instruments (including, not least, the European Convention on Human Rights). *The Migration Partnership Framework* (MPF), put forward by the European Commission in June 2016,¹¹⁷ and the so-called EU-Turkey ‘deal’, concluded in March 2016,¹¹⁸ are cases in point. They provide illuminating examples of what such processes may lead to – not only for pre-existing inter-state commitments, but most importantly also in terms of the related erosion of migrants’ legal protections they have entailed. The turns and bumps encountered on the road offer valuable lessons to be learnt, indicating the way (and paths to be avoided) in the negotiations shaping the future content of the *Global Compact for Migration* at the UN level

The MPF as New EU External Relations Template

As already noted in the preceding sections, the MPF has been wholeheartedly embraced by the European Council as the new template for EU external relations.¹¹⁹ The document comes to *de facto* replace and modernise earlier strategies guiding interaction with third countries, including the *Global Approach to Migration and Mobility* (GAMM).¹²⁰ But, in comparison, the MPF exchanges the more participatory, bottom-up approach governing EU Mobility Partnerships¹²¹ with a top-down, classic conditionality-prone drive that also excludes EU democratic oversight.¹²²

The proclaimed objectives of the MPF are similar to those pursued by the past GAMM framework. At face value, they both concentrate on strengthening links with non-EU partners to better manage (or contain unwanted) migration. Short-term actions are presumably targeted at saving lives and rescuing migrants at sea and in the desert; at dismantling

* This section is partly based on V. Moreno-Lax and M. Giuffrè, ‘The Raise of Consensual Containment: From ‘Contactless Control’ to ‘Contactless Responsibility’ for Forced Migration Flows’, S. Juss (ed.), *Research Handbook on International Refugee Law* (Edward Elgar, forthcoming). An advance copy is available at: <http://ssrn.com/abstract=3009331>.

¹¹⁷ Establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 final, 7 June 2016.

¹¹⁸ EU-Turkey Statement, 18 Mar. 2017, available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

¹¹⁹ European Council Conclusions, 28 June 2016, at: http://www.consilium.europa.eu/press-releases-pdf/2016/6/47244643506_en.pdf.

¹²⁰ The Global Approach to Migration and Mobility, COM(2011) 743 final, 18 Nov. 2011.

¹²¹ Natasja Reslow, ‘Deciding on EU External Migration Policy: The Member States and the Mobility Partnerships’ (2015) 34 *Journal of European Integration* 223.

¹²² Sergio Carrera, R. Radescu and Natasja Reslow, *EU External Migration Policies: A Preliminary Mapping of the Instruments, the Actors and their Priorities*, EURA-NET Project Report (Brussels, 2015).

traffickers and smugglers' rings; increasing returns of irregulars and overstayers; and, in theory, also (like the *Global Compact on Migration*) at opening up legal pathways to countries of destination. In the long-term, the declared main ambition is to tackle the root causes of irregular migration to the EU by delivering development support to partner countries. And on the ground, both also focus (disproportionately) on combatting 'illegal migration', rather than adopting a more balanced, 'triple win', comprehensive approach.

The key difference between the two is the plainness with which the 'stick-and-carrot' approach to negotiations is put on the table by the MPF¹²³ – perhaps emboldened by the 'crisis' climate prevailing since 2015. While the GAMM used the language of 'partnership' in a conciliatory, diplomatic way – echoing the text of Article 78 of the Treaty on the Functioning of the EU (TFEU) and Article 21 of the Treaty on the EU (TEU), the MPF is much more straightforward in acknowledging its bases in 'effective incentives and adequate conditionality', subjecting any eventual 'partnership' between the EU and third countries explicitly to 'cooperation on readmission and return [as] a key test'.¹²⁴ The EU and its Member States also make development cooperation openly subordinate to third countries' effective implementation of exit controls, so as to prevent departures and halt new arrivals onto EU territory. *The Malta Declaration*, building on the MPF, makes this abundantly clear with regard to the external aspects of migration policy and the Central-Mediterranean route.¹²⁵

It is agreed that both the Malta Declaration and the MPF take inspiration from the EU-Turkey 'deal' (or 'Statement' as is officially referred to),¹²⁶ which aimed to reinvigorate – and simultaneously also 'softify' – the implementation of reciprocal (hard law) commitments ensuing from the EU-Turkey Readmission Treaty of 2014,¹²⁷ sidelining participation (and control by) the European Parliament and the European Commission. A focus on the content and effects of the deal's application in practice is therefore justified as emblematic of this 'new turn' towards the informalisation (and re-inter-governmentalisation) of international relations, witnessed also on the global scene that preceding sections have highlighted.

The EU-Turkey Deal and the Informalisation of Legal Commitments

The EU-Turkey deal, reached on 18 March 2016, takes the form of a press 'Statement' intended not to produce (at least formally) any legally binding effects. The key was to make Turkey accept – as it was understood it *should*, under the normal working of the EU-Turkey

¹²³ Céline Bauloz, *The EU Migration Partnership Framework: an External Solution to the Crisis?*, (EU Immigration and Asylum Law Blog, 31 January 2017), available at: <<http://eumigrationlawblog.eu/the-eu-migration-partnership-framework-an-external-solution-to-the-crisis/>>

¹²⁴ Council of the EU, External aspects of migration - Monitoring results, 4 Jul 2016, at: <<http://data.consilium.europa.eu/doc/document/ST-10822-2016-INIT/en/pdf>>.

¹²⁵ Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 Feb. 2017, at: <<http://www.consilium.europa.eu/en/press/press-releases/2017/01/03-malta-declaration/>>.

¹²⁶ EU-Turkey Statement (n 120).

¹²⁷ Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, [2014] OJ L OJ L 134/3.

Readmission Agreement – the ‘rapid return of all migrants not in need of international protection crossing from Turkey to Greece and to take back all irregular migrants intercepted in Turkish waters’.¹²⁸ The text establishes that migrants arriving in Greece must be registered and their asylum applications processed in accordance with the EU Asylum Procedures Directive 2013/32/EU.¹²⁹ Furthermore, the Statement pledges that for every Syrian readmitted to Turkey from Greece, another Syrian will be resettled from Turkey to the EU, prioritizing those who may have not previously entered or attempted to enter the EU irregularly. Turkey also undertook to adopt any measures necessary to *prevent* new irregular arrivals on Greek islands and to cooperate with the EU to that effect. In return, EU Member States promised to accelerate the visa liberalization roadmap, to reinvigorate the EU accession process, and committed to transfer EUR 6 billion to Turkey under a dedicated Facility for Refugees.

A subsequent Joint Action Plan for the implementation of certain key provisions of the Statement was adopted with the objective of speeding up its application – at the expense of migrant rights. Indeed, the text insists on shortening processing times of asylum claims, ‘limiting appeal steps’, increasing safety, security and ‘detention capacities’ on the islands, accelerating relocation and returns, and sealing the Greek northern borders to avoid secondary movements.¹³⁰ If followed to the letter, Greece will be turned into a pre-removal/return processing hub for the entire EU, with the ‘hotspots’ on the islands serving as mass detention sites within the deal’s scheme, in disregard of basic fundamental rights guarantees.¹³¹

On its part, Turkey has taken back 1,798 persons from the Greek islands and halted the exit of most migrants since the conclusion of the deal – going from a daily average rate of 11,428 arrivals to just 52 – although only 6,254 Syrian refugees have been resettled under the ‘one for one’ formula foreseen in the Statement over the same period.¹³²

The presumption is that Turkey is a ‘safe third country’ for returns from Greece. However, Turkey maintains a geographical limitation to the 1951 Refugee Convention, thereby denying any possibility to request and receive protection *qua* Convention refugees to anyone holding the nationality of a non-European country. These persons can only obtain recognition as ‘conditional refugees’, on a temporary basis, under the Turkish Law on Foreigners and International Protection of 2014.¹³³ This is one principal reason why the Parliamentary Assembly of the Council of Europe,¹³⁴ as well as a host of NGOs and scholars,¹³⁵ have challenged the labelling of Turkey as a ‘safe third country’.¹³⁶ Whereas Turkey is currently hosting Syrian refugees in excess of the 2.9 million officially

¹²⁸ EU-Turkey Statement (n 120).

¹²⁹ 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 (recast) (‘APD’), [2013] OJ L 180/60.

¹³⁰ Fourth report on the Progress made in the implementation of the EU-Turkey Statement, COM(2016) 792 final, 8 Dec. 2016, Annex I.

¹³¹ Guild et al. *Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece*, PE 583.132 (European Parliament, 2017).

¹³² Sixth report on the Progress made in the implementation of the EU-Turkey Statement, COM(2017) 323 final, 13 Jun. 2017, p. 2, 5 and 9.

¹³³ *Law on Foreigners and International Protection*, Ministry of the Interior, Turkey, at: http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf.

registered,¹³⁷ it is also well known that migrants (whether ‘voluntary’ or ‘forced’) are routinely mistreated, including in pre-removal centres where they are arbitrarily detained to impede their departure (or flight) to Greece.¹³⁸

The situation in-country is equally problematic. In fact, reliable sources have reported that ‘Turkish border guards are shooting and beating Syrian asylum seekers trying to reach Turkey’,¹³⁹ The Turkish-Syrian border is closed and there are plans for a new border wall to prevent crossings.¹⁴⁰ Erdogan’s authorities have allegedly contributed to the degradation of the situation in Syria by bombing Kurdish militia, disregarding risks for civilians,¹⁴¹ making Turkey’s consideration as a ‘safe third country’ for forced migrants utterly unwarranted, given notorious risks of direct and indirect *refoulement*.

In fact, illegal mass returns to Syria have been reported to be on the rise since the conclusion of the EU-Turkey deal.¹⁴² Turkey has recently concluded 14 readmission agreements with countries of origin of migrants and asylum seekers, thereby multiplying the risk of forced repatriation in violation of human rights. Actually, Turkey is already returning people (whether formally or informally) back to Afghanistan, Iraq, Pakistan, and Syria, where they run a real risk of persecution and extreme danger to their lives.¹⁴³ Erdogan’s government is also restricting Turkish entry-visa requirements and negotiating further readmission treaties with several refugee-producing countries, as a means to implement commitments towards the EU according to the ‘deal’.

¹³⁴ Parliamentary Assembly of the Council of Europe (PACE), Resolution 2109 (2016) on ‘The situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016’, 20 Apr. 2016, at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22738&lang=en>.

¹³⁵ See, e.g., Vincent Chetail, ‘Will the EU-Turkey migrant deal work in practice?’, 29 Mar. 2016, at: http://graduateinstitute.ch/home/research/research-news.html/_news/research/2016/will-the-eu-turkey-migrant-deal; Favilli, ‘La cooperazione UE-Turchia per contenere il flusso dei migranti e richiedenti asilo: obiettivo riuscito?’ (2016) 10 *Diritti Umani e Diritto Internazionale* 405; Labayle and de Bruycker, ‘The EU-Turkey Agreement on migration and asylum: False pretences or a fool’s bargain?’, 1 Apr. 2016, at: <http://eumigrationlawblog.eu/the-eu-turkey-agreement-on-migration-and-asylum-false-pretences-or-a-fools-bargain/>; Roman and Peers, ‘The EU, Turkey and the Refugee Crisis: What could possibly go wrong?’, 5 Feb. 2016, at: <http://eulawanalysis.blogspot.co.uk/2016/02/the-eu-turkey-and-refugee-crisis-what.html>. See also, Amnesty International, ‘Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal’, 1 Apr. 2016, at: <https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>; Human Rights Watch (HRW), ‘Turkey: Border Guards Kill and Injure Asylum Seekers’, 10 May 2016, at: <https://www.hrw.org/news/2016/05/10/turkey-border-guards-kill-and-injure-asylum-seekers>.

¹³⁶ Pursuant to the Union’s own definition in the Asylum Procedures Directive (n 132), for a third country to be considered safe, the absence of *refoulement*/ill-treatment risks and, crucially, ‘the possibility...to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention’ is essential (Art. 38(1)(e) APD). Qualification of Turkey as ‘first country of asylum’ is unjustified as well, considering the situation of refugees there far from amounting to ‘sufficient protection...including benefiting from the principle of *non-refoulement*’ in substantive and procedural terms (Art. 35 APD).

¹³⁷ Syrian Regional Refugee Response, Inter-Agency Information Sharing Portal, 16 Feb. 2017, at: <https://data.unhcr.org/syrianrefugees/country.php?id=224>.

¹³⁸ See, ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. 30471/08, 22 Sept. 2009.

¹³⁹ HRW, ‘Turkey: Border Guards Kill and Injure Asylum Seekers’ (n 139).

¹⁴⁰ HRW, ‘UN: Press Turkey to Open Border’, 20 May 2016, at: <https://www.hrw.org/news/2016/05/20/un-press-turkey-open-border>; ‘Turkey’s new border wall to stop Syrian refugees’, Politico, 10 Oct. 2016, available at: <http://www.politico.eu/article/turkeys-new-border-wall-will-stop-syrian-refugees-immigration-istanbul/>.

¹⁴¹ ‘Turkey bombs Syrian Kurdish militia allied to U.S.-backed force’, Reuters, 20 Oct. 2016, at: <http://www.reuters.com/article/us-mideast-crisis-syria-kurds-idUSKCN12K0ER>.

¹⁴² Amnesty International, ‘Turkey: Illegal Mass Returns’ (n 139); and Amnesty International, *A blueprint for despair: Human rights impact of the EU-Turkey deal*, (Feb. 2017), available at: <http://www.statewatch.org/news/2017/feb/ai-eu-turkey-deal-briefing-blueprint-for%20disaster.pdf>.

All the above notwithstanding, in March 2017, the General Court of the CJEU disclaimed jurisdiction to hear and determine the actions of annulment brought by three asylum seekers against the EU-Turkey Statement.¹⁴⁴ In the respective Orders it served to the claimants, the General Court considered that the press release containing the Statement is solely attributable to the Heads of State or Government of the Member States of the EU, who met with the Turkish Prime Minister on 18 March 2016, and not to the European Council itself. So, in the absence of a (formal) act traceable back to any European institution, the Court considered not to have competence to adjudicate the case.

This hyper-formalistic reading of the Court leaves several key questions unanswered and leaves migrants and refugees at the mercy of whatever consequences the deal may lead to. In particular, it is unclear whether the EU Member States had the power, in the first place, to act (completely outside the EU framework) in a matter, which was already thoroughly regulated by the EU-Turkey Readmission Agreement. One may wonder whether the principle of pre-emption did not impede a subsequent parallel (if informal) regulation of the exact same subject matter by the Member States acting qua (independent) actors of international law, as the General Court appeared to imply. Also doubtful is the inference that Member States, acting qua autonomous sovereigns, had the capacity to commit ‘the EU’ to re-energising accession negotiations, promising visa facilitation, or creating a Refugee Facility out of the EU budget, if they were indeed acting in their autonomous international law competence.

But, beyond the discussion on the nature and legal character of the deal and its potential violation of EU treaty-making rules,¹⁴⁵ the most perilous development is the lack of any investigation by the Court of the material content and, especially, the effects of the measures adopted under the umbrella of the ‘deal’, purportedly to implement the EU-Turkey Readmission Treaty and tackle the ‘refugee crisis’. The impact of the joint endeavour by the EU and Turkey to halt arrivals onto Greek soil on the rights of migrants was completely ignored by the Luxembourg judges.¹⁴⁶ No regard was had to the *non-refoulement* protections, the right to asylum, the prohibition of collective expulsion, or the freedom to leave any country including one’s own inscribed in international and EU law.¹⁴⁷

Putting ‘Deals’ (and ‘Compacts’) to the Test: The Dilution of Hard-Law Commitments via Soft-Law Implementation

The lessons to extract from the MPF and its archetypical incarnation in the EU-Turkey deal

¹⁴³ See e.g., Siegfried, ‘What will happen to migrants returned to Turkey?’, *IRIN News*, 12 Apr. 2016, at: <<http://www.irinnews.org/analysis/2016/04/12/what-%E2%80%8Bwill%E2%80%8Bhappen-migrants-returned-turkey>>.

¹⁴⁴ Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v European Council* [2017] ECLI:EU:T:2017:128.

¹⁴⁵ Cf. Gloria Fernandez Arribas, ‘The EU-Turkey Statement, The Treaty Making Process and Competent Organs: Is the Statement and International Agreement?’ (2017) *European Papers – European Forum* 1 and references therein.

¹⁴⁶ Concurrently and extensively, see Sergio Carrera, Leonhard den Hertog and Marco Stefan, ‘It wasn’t me!’ *The Luxembourg Court Orders on the EU-Turkey Refugee Deal*, CEPS Policy Insights No 2017/15 April 2017.

¹⁴⁷ On the content and extent (including extraterritorial) of these protections, see extensively Violeta Moreno-Lax, *Accessing Asylum in Europe* (Oxford University Press, 2017), chs 8, 9 and 10.

may be an anti-climax to diplomatic negotiators taking part in the different rounds of conversations that will precede the adoption of the Global Compact for Migration. But they must be taken into account nonetheless.

The softification of hard-law commitments into low-regulation, second-range implementing documents that the EU strategy represents should ring alarm bells in Geneva, New York and elsewhere. The result of the EU-Turkey deal on the ground has been a fast dilution of legal obligations and concomitant responsibilities, leaving aside the damning bypassing of democratic scrutiny by the European Parliament through the short-circuiting of EU treaty-making rules, as enshrined in Article 218 TFEU. The solution reached by the one and only final arbiter of EU law (as per Article 19 TEU) is also discouraging on the whole. It feeds legal uncertainty and circumvents EU fundamental rights guarantees, thus heightening the risk of violations, dispossessing those concerned of the procedural and judicial protections inherent in legally-binding instruments, according to the rule of law.¹⁴⁸

If the Global Compact takes the same route, it is hard not to forecast a similar (disastrous) outcome, retrogressing to times prior to the UDHR. A return to ‘pure’, hegemonic forms of inter-governmentalism that ignore the posterior evolution of international law, especially after human rights were introduced in legally-binding form, would amount to the dismantling of the international system as we currently know it, leading to the (illegitimate) de-subjectivisation of the individual as an actor and holder of international entitlements. The voice, interests, and rights of migrants must be kept at the centre of any negotiations regarding international mobility, if the core principles of the international legal system are to be preserved¹⁵⁰

While recognising the difficulties attached to global migration management, ‘problems with [administering] migratory flows cannot justify recourse to practices which are not compatible with [State] obligations...’.¹⁵¹ States the world over do have a sovereign right to control entry into their territories and negotiate joint arrangements to administer orderly cross-border movements, but they ought to exercise that power within the limits imposed by international (refugee and human rights) law. Self-serving policies, possibly mistaking ‘orderly’ migration for the outright containment of unwanted flows, are incompatible with a good faith understanding of legal obligations vis-à-vis migrants and those in need of international protection. Negotiators in New York and Geneva should keep this in mind to avoid committing the mistakes of the EU-Turkey deal and MPF framework and uphold the promise of a humane, migrant-centred system as the basis of a Global Compact that respects dignity and fundamental rights.

¹⁴⁸ Art 2 TEU.

¹⁴⁹ On this point, see Violeta Moreno-Lax, ‘The EU Humanitarian Border and the Securitization of Human Rights: The “Rescue-through-Interdiction/Rescue-without-Protection Paradigm” (2017) *Journal of Common Market Studies* (forthcoming).

¹⁵⁰ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* [1970] ICJ Rep. 3.

¹⁵¹ ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. 27765/09, 23 Feb. 2012, para. 179.

¹⁵² ECtHR, *Abdulaziz, Cabales and Balkandali v. UK*, Appl. 9214/80, 9473/81 and 9474/81, 28 May 1985, para. 67: ‘...as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory’.

SECTION 5: Conclusions

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The question which we posed ourselves at the outset was what is a compact and what relationship do compacts have with international human rights law, in particular in regards to migrants. This question is of great importance in light of the UN's NY Declaration calling for two global compacts, one on refugees and the other for safe, orderly and regular migration. Does the form of the international community's proposed commitments to safe, orderly and regular migration, the Compact, affect states' human rights obligations to migrants? The objective of this working paper has not been to give a detailed overview of the hierarchy of norms within the UN system. Nor even has it be to pin down exactly what legal obligations the Compact may have but rather to examine what a Compact is capable of performing and how those functions intersect with human rights.

The NY Declaration makes more than 35 references to human rights and the importance of ensuring that they are fully respected. Paragraph 5 of the Declaration states "We reaffirm also the Universal Declaration of Human Rights and recall the core international human rights treaties. We reaffirm and will fully protect the human rights of all refugees and migrants, regardless of status; all are rights holders." There is no doubt that UN Member States in adopting the Declaration expressed their full commitment to upholding the international human rights standards to which they have signed up. So why are there any questions about the compatibility of Compacts and international human rights commitments regarding migrants? The problem becomes apparent in the analysis of the Compact form.

As Gammeltoft Hansen sets out in the first section, although the Compact is a soft law instrument it is bound to become an important one. It is likely to engage states through the inclusion of technical and standard setting norms – often difficult to test against human rights claims of individuals who become the end objects of those norms. While human rights obligations contained in binding agreements ratified by states will always take priority over soft law instruments, the issue becomes state behaviour. Where soft law instruments, in creating technical norms, open-ended language and sanction avenues of action for state authorities regarding migrants which are of dubious consistency with the human rights of those migrants, a slide away from delivery of human rights to migrants can well result. In practice, this is a problem which is often encountered in the field of expulsion where technical norms regarding the speed of expulsion make it no longer possible for migrants to mount an effective challenge to the legality of their expulsion.¹⁵³

Soft law instruments do not always lead to greater human rights protection. As Gammeltoft Hansen stresses, there is no guarantee that it will improve migrant protection. It is also quite

¹⁵³ François Crépeau and Jimenez Estibalitz, 'Foreigners and the right to justice in the aftermath of 9/11' (2004); François Crépeau, 'When Recourses Fail to Protect: Canadian Human Rights Obligations and the Remedies Offered to Foreigners against Immigration Decisions' 7(3) *European Journal of Migration and Law* (2005) 275.

possible, as a number of actors have indicated, that the Compact will be used as a basis for new hybrid instruments focusing on migration governance which are designed with references to human rights in their preambles but push states towards practices which are contrary to their human rights obligations on the basis that such practices are desirably in the eyes of their (more powerful) neighbours.

The term Compact itself is not without difficulties. As Roele points out, in different official language version of the NY Declaration different terms have been used which are not consistent with a Compact. In fact, it seems that Pact might be a better English term more consistent with the French and Spanish official texts. Nevertheless, the proposed Compact will undoubtedly be a hybrid instrument which will bundle together norms notwithstanding the lack of clarity which underlies the Compact regarding what is safe, orderly and regular migration in any event. It is possible, as Roele examines, that a soft law or hybrid instrument can influence the interpretation of hard law obligations. This can be both forward and backward looking – changing the way states apply their human rights obligations to migrants.

In the next two sections, Panizzon and Moreno-Lax examine other kinds of package deals and the human rights impacts which they have had. Panizzon explores the meaning of a packaging approach, bringing together diverse policy areas to seek to influence and impact on difficult policy areas. The issue-linkage of migration with other areas, such as development as planned for the Global Compact for Migration, can leverage international agreement but at a possible cost. A comparison with linkages in partnership approaches between the development of the WTO and the Compact for Migration is interesting. The difference in the subject matter however – from goods and services to people often in vulnerable situations – unravels the comparison. Looking at the examples of EU compacts with third states in the field of migration, the problems emerge. In particular the Compact for Jordan 2015 according to which trade preferences would be accorded to Jordan for goods produced with 25% refugee labour and substantial sums would be provided for development on condition that Syrian refugees living in camps in that country abandon their right to leave any country guaranteed by Article 13(4) Universal Declaration of Human Rights. But the human right belongs to every individual and cannot be bartered away by state authorities which are temporarily hosting the individual. Indeed, not even an individual can renounce his or her human rights, particularly not for economic gain. But what a compact of that kind can do is make it very difficult if not impossible for the individual to exercise his or her right or to get a remedy against its denial. By subsuming Syrian refugees into a body and agreeing with the host state where they are living that they should not be permitted to exercise their human rights in return for a benefit to the country, the individual nature of human rights is impaired. The outcomes are not neutral nor do they simply result in better migration governance. They actively harm migrants. This is even more apparent in the case of the EU compacts with Jordan and Lebanon where the trade-off for reduced tariffs for goods made by refugees benefiting Jordan and Lebanon is enhanced enforcement of EU hard border control objectives.

Moreno-Lax follows up this quandary by examining the EU Turkey Statement 2016 according to which Turkey agreed to take back all Syrian refugees arriving in Greece from their shores in return for resettlement of another Syrian from Turkey to the EU. Notwithstanding the existence of an EU Turkey Readmission Agreement the parties preferred a more informal measure not intended to produce any legally binding effects. So far, the strategy has paid

off as a legal challenge to the EU Turkey Deal (as it is called) was held inadmissible by the EU's Court of Justice because it was not in a binding form adopted in accordance with the EU Treaties. Evidence of substantial human rights abuses against Syrian refugees in Turkey and the lack of a remedy demonstrates just how pernicious soft law instruments can be in validating human rights non-compliant actions by states.

The message is clear, soft law and hybrid instruments do not necessarily result in better human rights protection. In the highly charged field of migration, this is particularly true. Powerful states where leaders have used anti-immigrant rhetoric in their political campaigning are fully capable of crafting convergence on migration governance policies which are highly questionable from a human rights perspective but equally desirable from the political perspective of some politicians. Reframing existing human rights obligations in ways which purport to diminish protection for migrants is not new. But it always puts strain on the legal and judicial authorities which apply the laws. When legislatures permit repressive acts to come into force on the basis that they are nonetheless consistent with human rights duties because they are founded on good practices set out in hybrid or soft law measures, human rights are the victims.

The Global Compact for Migration must not fall into this trap of purporting to signal international acceptance of practices which are human rights incompatible. The negotiations must not become mired down in questionable trade-offs regarding, in reality, the rights of citizens of poor or weak countries in the interests of migration governance policies by stronger or richer ones. Rich or powerful countries must not be able to buy their way out of reciprocity of migration governance policies which in effect will never be applied to their citizens but always to those of other states. Such failure of reciprocity leads inextricably to human rights violations as richer or more powerful states are relieved of the need to explain to their citizens why they are being treated so badly in a third country. Instead these states can focus on creating a so-called hostile environment for the citizens of weaker and poorer states who happen to be present on their territory. To be truly global the Compact needs to take as its starting point the genuine delivery of human rights to migrants wherever they are and it must ensure that they have access to justice to defend their rights.