

The Dynamic Relationship Between the Global Compact for Migration and Human Rights Law

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Contents

- I. Substantive significance of the GCM: its consonance with human rights law
 - II. Procedural and institutional significance of the GCM: institutionalizing soft law as a benchmark with potentially hard impact
 - III. Conclusions
- Funding information and acknowledgements

Abstract

Is the Global Compact for Safe, Orderly and Regular Migration (GCM or “the Compact”) essentially a human rights instrument that complements and strengthens existing obligations under international law, as some people argue? Or does it entail the risk that States use it as an excuse to bypass obligations following from human rights treaties, and to introduce further requirements for regular migration, in fact bringing more migrants in a situation of irregularity? Contributing to the ongoing debate, this paper explores the dynamic relationship between the GCM and human rights treaties in order to understand the extent to which the GCM has the potential to reinforce and/or to undermine the human rights protection of migrants. The examination adopts two angles: it first assesses the substance of the Compact, i.e., its Objectives, in relation to human rights law, and then examines the GCM as a process, i.e., its institutional and procedural dimension in light of its review mechanisms.

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Is the Global Compact for Safe, Orderly and Regular Migration (GCM or “the Compact”) essentially a human rights instrument that complements and strengthens existing obligations under international law, as some people argue?¹ Or does it entail the risk that States use it as an excuse to bypass obligations following from human rights treaties, and to introduce further requirements for regular migration, in fact bringing more migrants in a situation of irregularity?² Contributing to the ongoing debate, this paper explores the dynamic relationship between the GCM and human rights treaties in order to understand the extent to which the GCM has the potential to reinforce and/or to

undermine the human rights protection of migrants. The examination adopts two angles: it first assesses the substance of the Compact, i.e., its Objectives, in relation to human rights law (I.), and then examines the GCM as a process, i.e., its institutional and procedural dimension in light of its review mechanisms (II.).

I. Substantive significance of the GCM: its consonance with human rights law

The GCM’s non-binding nature is a typical feature of the regimes of global governance that have emerged in various branches of international law since the 1990s.³ In this regard, migration is a late-comer but not an outlier. Legally speaking, the soft-law nature of a legal document means that a breach of obligations (or rather, commitments) laid down in its provisions does not trigger the State’s responsibility according to the rules of international law, and that these provisions are not justiciable in domestic, regional, or international courts. Nevertheless, soft law may inform the construction of binding rules of international law on which they are based, and they provide an independent yardstick for reviewing compliance with the specific commitments voluntarily assumed.⁴

¹ This narrative has been repeated in a number of academic reflections on the GCM, see, e.g., *Michele K. Solomon/Suzanne Sheldon*, The Global Compact for Migration. From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly, and Regular Migration, in: *International Journal of Refugee Law (IJRL)* 30 (2018), pp. 584–590; *Madeline Garlick/Claire Inder*, Protection of Refugees and Migrants in the Era of the Global Compacts, in: *International Journal of Postcolonial Studies* 23 (2021), pp. 207–226.

² This critique has been raised with regard to the interplay between the GCM and the Global Compact on Refugees by *Cathryn Costello*, Refugees and (Other) Migrants. Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?, in: *IJRL* 30 (2018), pp. 647–649. With a view to the UN Migrant Worker Convention, see, e.g., *Alan Desmond*, A New Dawn for the Human Rights of International Migrants? Protection of Migrants’ Rights in Light of the UN’s SDGs and Global Compact for Migration, in: *International Journal of Law in Context* 16 (2020), pp. 222–238; and *Mariette Grange/Izabella Majcher*, Using Detention to Talk About the Elephant in the Room. The Global Compact for Migration and the Significance of its Neglect of the UN Migrant Worker Convention, in: *International Journal of Law in Context* 16 (2020), pp. 287–303. For a nuanced critique from a human rights perspective, see *Ryszard Cholewinski*, The Global Compact for Safe, Orderly and Regular Migration. What Now with Standards?, in: Paul Minderhoud et al. (ed.), *Caught In Between Borders. Citizens, Migrants and Humans*, 2019, pp. 315–325.

³ See *Nico Krisch/Benedict Kingsbury*, Introduction: Global Governance and Global Administrative Law in the International Legal Order, in: *EJIL* 17 (2006), pp. 1–13; *Matthias Goldmann*, Internationale öffentliche Gewalt. Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung, 2015; for further references, see below, section II.1.

⁴ For example, *Guild et al.* have noted that “the expression of political commitment by States

In the context of the present paper, we prefer not to engage with the first aspect, i.e., the GCM's potential of providing a repository of legal arguments favouring a particular interpretation of human rights treaties. We rather invite the readers to recognise the GCM for what it is: a document expressing the will of States to undertake certain substantive commitments and to take part in a process of reviewing compliance with them. How do these commitments relate to previous consent to be bound by human rights obligations in terms of substance?

1. The substantive provisions of the GCM: reading the GCM as a human rights document

The text of the Compact is characterised by three dimensions, or “axes”: human rights, management and development.⁵ While the GCM frequently mentions respect for, and the relevance of, migrants'

can have legal consequences”, pointing to the Compact's potential role in the interpretation of binding treaties, see *Elspeth Guild/Tugba Basaran/Kathryn Allinson*, *From Zero to Hero? An Analysis of the Human Rights Protections within the Global Compact for Safe, Orderly and Regular Migration (GCM)*, in: *International Migration* 57 (2019), pp. 43–59 (47). With regard to the Global Compact on Refugees (GCR), *Gammeltoft-Hansen* argues that the Compact may serve to interpret existing treaties, while also helping to establish the Compact's norms with States who are non-signatories to the 1951 Refugee Convention, as well as the private sector, international organisations and non-governmental organisations, see *Thomas Gammeltoft-Hansen*, *The Normative Impact of the Global Compact on Refugees*, in: *IJRL* 30 (2018), pp. 605–610 (607–608).

⁵ *Mustafa Aksakal/María Gabriela Trompetero*, *¿De lo global a lo local? El rol del Pacto Mundial en las políticas colombianas hacia la migración venezolana*, in: *Lucila Nejamkis et al. (ed.), (Re)pensando el vínculo entre migración y crisis Perspectivas desde América Latina y Europa*, 2022, pp. 83–111 (89).

human rights,⁶ it also repeatedly reaffirms respect for “the sovereign right of states to determine their national migration policy”,⁷ and the aim of contributing to sustainable development.⁸ A number of Objectives focus on effective migration management, the design of “demand driven [and] tailor-made [...] solutions”⁹ as well as data collection.¹⁰ Other elements of the Compact, in turn, are primarily concerned with the causes and consequences of migration both at the individual level¹¹ and at societal or national level.¹² As *Chetail* has astutely noted, “the Compact looks like a kaleidoscope” due to the “complex mix of multi-faceted elements that are constantly changing and create different patterns depending on the angle of the relevant issue and related objective.”¹³ In other words, while the three axes interlink and overlap, it is possible to make sense of the GCM through the lens of each of these dimensions. The following turns the “kaleidoscope” of the GCM to the human rights axis in order to see the image that emerges.

The first thing to note is that the references to human rights in the text of GCM

⁶ Most prominently: GCM, para. 11, 12, 15 and 17.

⁷ GCM, para. 7, 15 and 27.

⁸ The 2030 Agenda for Sustainable Development is explicitly mentioned as a pillar of the GCM in para. 2 of the Preamble. References to “sustainable development” appear in total 35 times throughout the text of the Compact. For a discussion, see *Desmond* (fn. 2).

⁹ GCM, para. 43.

¹⁰ GCM, Objectives 1–4, 9–12, 18 and 21.

¹¹ GCM, Objective 19.

¹² GCM, Objectives 2 and 20.

¹³ *Vincent Chetail*, *The Global Compact for Safe, Orderly and Regular Migration – a Kaleidoscope of International Law*, in: *International Journal of Law in Context* 16 (2020), pp. 253–268 (254).

take many different shapes:¹⁴ There is a multitude of generic references, either to the notion of human rights in general (subsection a) or to certain human rights instruments (b). In addition, a limited number of specific rights are explicitly mentioned (c), and others—though not explicitly named—are described in substance (d). Moreover, there are a number of references to human rights institutions or infrastructure in a broader sense (e). The following will briefly discuss each of these clusters in turn, to draw some general conclusions on the substance of the document.

a. Generic references to the notion of human rights

There are at least 29 references to “human rights” that could be qualified as generic. These include variants of the terms “to respect, protect and fulfil the human rights of all migrants”,¹⁵ entitlement to,¹⁶ respect for,¹⁷ or protection of human rights,¹⁸ as well as the insurance that migrants should not be denied their human rights.¹⁹ Moreover, the GCM contains several generic references to migrants exercising their human rights.²⁰ Yet another set of references calls for a human rights-based approach,²¹

¹⁴ Several authors have given various numbers. This is due to differences in assessments of what constitutes a reference to human rights.

¹⁵ GCM, Preamble 11; Preamble 12; Preamble 15, Guiding Principle (f); Objective 2, para. 18(h).

¹⁶ GCM, Preamble 4.

¹⁷ GCM, Preamble 15, Guiding principle (g); Objective 9, para. 25(c); Objective 11, para. 27.

¹⁸ GCM, Objective 2 para. 18(b); Objective 7, para. 23(b).

¹⁹ GCM, Objective 4, para. 20(f).

²⁰ GCM, Objective 4, para. 20; Objective 6, para. 22(h); Objective 15, para. 31.

²¹ GCM, Objective 7, para. 23(a).

-informed training²² and -based actions.²³ And finally, in some instances the GCM mentions variants of the terms “international human rights law”.²⁴

These generic references are mostly named in the context of a specific Objective or policy area, such as for example in Objective 9, which requires States to “ensur[e] that counter-smuggling measures are in full respect for human rights”.²⁵ While such constructions may appear somewhat weak in their lack of specificity, they do indicate the relevant provisions of human rights law that may be applicable in the instant case. The generic reference remains open to both the specifics of a given situation, which may call on different kinds of rights as the case may be, and to further developments in human rights law. While it may not always be clear what human rights law requires, and the scope of human rights protection is in flux, the repeated generic commitment to carry out the respective elements of migration policies in line with human rights obligations strongly speaks for an overall interpretation of the GCM in the light of and in accordance with applicable human rights law, as it applies to the given case or context.

b. Generic references to human rights treaties and soft-law instruments

A separate set of generic references to human rights comprises human rights treaties and other relevant instruments, including soft law. The GCM states in para-

²² GCM, Objective 12, para. 28(b)

²³ GCM, Objective 14, para. 30(d).

²⁴ GCM, Preamble 15, Guiding Principle (f); Objective 5, para. 21(a); Objective 6, para. 22(f); Objective 6, para. 22(g); Objective 7, para. 23; Objective 9, para. 25; Objective 11, para. 27(a); Objective 15, para. 31; Objective 17, para. 33; Objective 21, para. 37.

²⁵ See GCM, Objective 9, para. 25(c).

graph 2 of the Preamble that it rests on the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and “the other core international human rights treaties”.²⁶ In the same paragraph, the Compact further lists the Slavery Convention of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, as well as the International Labour Organization (ILO) conventions on promoting decent work and labour migration.²⁷ A noteworthy omission in this list of relevant treaties is the International Convention on the Rights of All Migrant Workers and their Families (ICRMW). It can arguably be subsumed under the general reference to “other core international human rights treaties”. Despite its relatively low ratification rates—the Convention has mostly been ratified by countries from the Global South²⁸— it has gained in importance over the last years. The reason for its increasing significance is that south-south migration itself has gained more relevance over the last decades, and is continuing to do so.²⁹ Under these conditions, the ICRMW and its interpretation by the Committee on the Rights of Migrant Workers (CMW) may gain in significance for the interpretation of migrants’ human rights more generally, and could thus also be of relevance to the GCM.

²⁶ GCM, Preamble 2.

²⁷ GCM, Preamble 2.

²⁸ See <https://indicators.ohchr.org> (last visited 21 December 2023). At the time of writing, 58 countries have ratified the ICRMW.

²⁹ See also *Alan Desmond*, From Complementarity to Convergence. The UN Global Compact for Migration and the UN Migrant Workers Convention, in: WCL/VRÜ 55 (2022), pp. 83-104 (91-92).

In the body of the Compact there are no further explicit references to human rights treaties, but a number of other soft-law instruments are referenced, among them the “ILO General Principles and Operational Guidelines for Fair Recruitment”, the “United Nations Guiding Principles on Business and Human Rights”, the “IOM International Recruitment Integrity System (IRIS)”,³⁰ the “Global Migration Group Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations”,³¹ and the “OHCHR Recommended Principles and Guidelines on Human Rights at International Borders”.³² Whereas it might be criticised that this is only a fraction of the relevant soft-law instruments, they are again mentioned in relation to specific Objectives in order to guide implementation on these particular issues.

c. Explicit references to specific human rights provisions

In addition to a generic commitment to act in line with human rights law, the GCM contains a series of explicit references to specific human rights provisions. At least 18 human rights are explicitly named in the Compact, some of them several times. These include civil and political rights, such as the right to life,³³ the right to liberty and security of person,³⁴ the right to a nationality,³⁵ the right to a legal identity,³⁶

³⁰ All in GCM, Objective 6, para. 22(l).

³¹ GCM, Objective 7, para. 23(l).

³² GCM, Objective 11, para. 27(g).

³³ GCM, Objective 8, para. 24(a).

³⁴ GCM, Objective 15, para. 31(b).

³⁵ GCM, Objective 4, para. 20(e).

³⁶ GCM, Objective 4, para. 20.

the right to family life,³⁷ the freedom of peaceful assembly and association,³⁸ the freedom of expression,³⁹ the freedom of the media,⁴⁰ the right to privacy,⁴¹ the procedural rights of legal assistance and the right to be heard⁴² and due process guarantees,⁴³ as well as the migration-specific prohibition of collective expulsion⁴⁴ and the right to return to one's own country.⁴⁵ Some economic and social rights are also mentioned, such as the right to just and favourable conditions of work,⁴⁶ the right to equal pay for work of equal value,⁴⁷ the right to safe access to basic services,⁴⁸ and the right to the highest attainable standard of physical and mental health.⁴⁹ As cross-cutting issue, the rights of the child also feature in the Compact.⁵⁰ Of all the rights that the Compact refers to, somewhat strikingly, the right to privacy is the one that is by far referenced the most,⁵¹

followed by, on par, the right to family life⁵² and due process guarantees.⁵³

While the list of explicitly mentioned rights and guarantees is clearly incomplete, and may seem somewhat haphazard,⁵⁴ several factors might help explain why the Compact appears to underline certain rights more than others. First, most of the explicit references occur in the context of Objectives that bear specific risks for the interests protected by the relevant rights. For example, Objective 1 addresses data collection on migratory movements, and in that context reminds States of migrants' right to privacy. Note that this is also where the "axes" of the GCM intersect and overlap—whereas several Objectives that are concerned with migration management relate to the collection of data, this is balanced by the protection of migrants' privacy as a central concern within the Compact. Second, other Objectives might touch upon such a wide range of different human rights provisions that the drafters of the Compact opted for a generic reference to human rights law rather than listing all potentially affected rights and guarantees. And finally, the rights that are specifically mentioned appear to be the ones that seemed the least controversial in context—one blatant omission, as others have noted,⁵⁵ is the non-refoulement

³⁷ GCM, Objective 5, para. 21 and 21(e); Objective 13, para. 29(h); Objective 21, para. 37(g).

³⁸ GCM, Objective 6, para. 22(i); Objective 16, para. 32(e).

³⁹ GCM, Objective 17, para. 33.

⁴⁰ GCM, Objective 17, para. 33(c).

⁴¹ GCM, Objective 1, para. 17 and 17(i); Objective 3, para. 19(b); Objective 4, para. 20(a) and 20(b); Objective 8 para. 24(d); Objective 11, para. 27(b); Objective 14, para. 30(e); Objective 15, para. 31(b); and Objective 21, para. 37(c).

⁴² GCM, Objective 7, para. 23(f).

⁴³ GCM, Objective 8, para. 24(a); Objective 11, para. 27(c); Objective 21, para. 37(e).

⁴⁴ GCM, Objective 8, para. 24(a).

⁴⁵ GCM, Objective 21, para. 37.

⁴⁶ GCM, Objective 6, para. 22(i).

⁴⁷ GCM, Objective 6, para. 22(i).

⁴⁸ GCM, Objective 15, para. 31(b).

⁴⁹ GCM, Objective 6, para. 22(i).

⁵⁰ GCM, Objective 7, para. 23; Objective 21, para. 37(a).

⁵¹ GCM, Objective 1, para. 17 and 17(i); Objective 3, para. 19(b); Objective 4, para. 20(a) and 20(b); Ob-

jective 8 para. 24(d); Objective 11, para. 27(b); Objective 14, para. 30(e); Objective 15, para. 31(b); and Objective 21, para. 37(c).

⁵² GCM, Objective 5, para. 21 and 21(e); Objective 13, para. 29(h); Objective 21, para. 37(g).

⁵³ GCM, Objective 8, para. 24(a); Objective 11, para. 27(c); Objective 21, para. 37(e).

⁵⁴ Notable omissions of relevant rights are for example the right to leave, and freedom of religion, see *Chetail* (fn. 13), pp. 255–256.

⁵⁵ See *Chetail*, *ibid.*, pp. 262–263, who criticises that this principle is acknowledged merely as an obstacle to removal and not as a ground of international protection on its own, and that the princi-

principle, which is not explicitly named, although it is captured in substance (see next section).

d. Implicit references to specific human rights provisions

In addition to explicit generic and specific references to human rights, there are also implicit references to specific human rights in the GCM, that is, the rights are not explicitly labelled but the text of the Objectives reads as a description of the substance of a particular right. Two Objectives stand out in that regard: Objective 13 on immigration detention and Objective 21 on return and readmission. While Objective 13 does not explicitly mention the right to liberty,⁵⁶ the commitment that is formulated under that Objective is a description of what the right to liberty requires with a view to migrants:

[States] commit to ensure that any detention in the context of international migration follows due process, is non-arbitrary, is based on law, necessity, proportionality and individual assessments, is carried out by authorized officials and is for the shortest possible period of time, irrespective of whether detention occurs at the moment of entry, in transit or in proceedings of return, and regardless of the type of place where the detention occurs. We further commit to prioritize non-custodial alternatives to detention that are in line with international law, and to take a human rights-based approach to any detention of migrants, using detention as a measure of last resort only.⁵⁷

ple of non-refoulement is only mentioned in the Objective of the Compact that is dedicated to return, but not in the other relevant Objectives related to pathways for regular migration, the vulnerability of migrants, and border management.

⁵⁶ The only explicit reference to this right occurs in a somewhat unexpected manner in the context of the places of basic service delivery in Objective 15.

⁵⁷ GCM, Objective 13, para. 29.

This description is very much in line with the obligations on States that arise from human rights law with a view to the detention of migrants.⁵⁸ Similarly, with a view to return, although Objective 21 does not mention the prohibition of refoulement by virtue of human rights law, the text states that States

... commit to facilitate and cooperate for safe and dignified return and to guarantee due process, individual assessment and effective remedy, by upholding the prohibition of collective expulsion and of returning migrants when there is a real and foreseeable risk of death, torture and other cruel, inhuman and degrading treatment or punishment, or other irreparable harm, in accordance with our obligations under international human rights law.⁵⁹

Notably, although it is preceded by the soft-law term “commitment”, the elements that are listed for both detention and return are in fact binding upon States as per human rights law.⁶⁰ The fact that the binding nature of these “commitments” appears to be downplayed in both these cases might have enabled the detailed list of requirements, clarifying the scope of obligations developed in international jurisprudence over time. Having this spelled out in an international soft-law instrument might in turn inform the interpretation and application of the relevant human rights norms under international human rights treaties.

⁵⁸ See Jürgen Bast/Frederik von Harbou/Janna Wesels, *Human Rights Challenges to European Migration Policy*. The REMAP Study, 2022, pp. 75-89.

⁵⁹ GCM, Objective 21, para. 37.

⁶⁰ On the human rights standard in respect of forced returns, including the principle of non-refoulement, see Bast et al. (fn. 58), in particular pp. 42-43, 124-128 and 185-190.

e. References to human rights infrastructure

Finally, a notable set of references to human rights in the GCM involves the human rights infrastructure—that is, the range of supervisory bodies, judicial institutions and civil society actors, contributing by different means to the effective protection of migrants’ individual rights.⁶¹ National human rights institutions are not only mentioned among the relevant stakeholders of the whole-of-society approach,⁶² but also specifically mentioned for the implementation of various Objectives⁶³ and the overall implementation of the GCM.⁶⁴ Moreover, the Compact makes reference to national policies and programmes to address the needs of migrants in situations of vulnerability⁶⁵ as well as national monitoring mechanisms on return.⁶⁶ The drafters of the Compact appear to have recognised human rights infrastructure as vital prerequisites for the protection of migrant rights to be effective.

2. Conclusions: practice-dependent complementarity

Although human rights law and migration law have long been thought of as separate legal fields in the past, the foundational nature of human rights for the emerging international migration law is now well established.⁶⁷ This state of legal development, i.e., the advance of human rights in

migration discourse, is clearly reflected in the Global Compact for Migration. The Compact is certainly not *only*, but, as the above analysis shows, clearly *also*, a human rights document. At the same time, much like human rights treaties, the GCM does not close its eyes to State interests but explicitly recognises these as legitimate concerns. In human rights law, many provisions explicitly recognise certain public interests, and the related regulatory powers of States, as permissible limitations on the scope of the relevant right. For example, Article 8 of the European Convention on Human Rights, which protects family and private life, foresees in paragraph 2 that public authorities can interfere with the exercise of this right for “the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals”. Similarly, the recognition of the State’s interests in controlling the entry and stay of migrants features prominently in the majority of the migration-related judgments of the European Court of Human Rights.⁶⁸

However, unlike human rights treaties, the GCM not only recognises the existence of legitimate public interests but goes a step further in adopting a cooperative approach to the exercise of States’ powers and, thereby, also to some degree subjecting these interests to international regulation. For example, Objective 1 of the GCM, which commits States to “[c]ollect and utilize accurate and disaggregated data as a basis for evidence-based poli-

⁶¹ On the concept, see *ibid.*, p. 243.

⁶² See GCM, Preamble 15, Guiding principle (j).

⁶³ GCM, Objective 2, para. 18(c); Objective 12, para. 28(c); Objective 15, para. 31(d); Objective 17, para. 33(d).

⁶⁴ GCM, para. 44.

⁶⁵ GCM, Objective 7, para. 23(l).

⁶⁶ GCM, Objective 21, para. 37(f).

⁶⁷ See, e.g., *Elspeth Guild et al.* (ed.), *Human Rights of Migrants in the 21st Century*, London 2017.

⁶⁸ See *Marie-Bénédicte Dembour*, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint*, 2015, pp. 1–6; and *Cathryn Costello*, *The Human Rights of Migrants and Refugees in European Law*, 2015, pp. 10–11.

cies”⁶⁹, then further specifies not only the types of necessary data (“disaggregated by sex, age, migration status and other characteristics relevant in national contexts”) but also the purposes for which it shall be used (namely, to foster “research, [guide] coherent and evidence-based policymaking and well-informed public discourse, and [allow] for effective monitoring and evaluation of the implementation of commitments over time”).

The mixed character of the GCM, with its core axes of management, development and rights, helps explain that the instrument may appear incomplete through the lens of any of these axes alone—an argument that can certainly be made from the perspective of human rights law with regard to specific rights. However, this does not mean that the Compact weakens other human rights guarantees as laid down elsewhere in international law. Quite the contrary: From a legal-doctrinal perspective, the analysis above clearly supports the view of a *complementary* function of the GCM in relation to human rights law. A *contrario* arguments, stating that because the Compact’s references to human rights law do not exhaustively cover existing human rights protection for migrants, or concerns about the lowering of standards by means of the GCM, do not appear to be justified. The strongest legal argument in that respect is the generic reference to the entirety of the treaties that form the “core” of international human rights law (see above, subsection b).

However, the significance of a legal document cannot be judged merely on the basis of the text of the document. The way in which the kaleidoscope turns, the question of which axis becomes dominant, is not determined at the level of the text it-

self but in its implementation. Much, therefore, depends on the design of the follow-up mechanisms in the GCM, and whether they are designed to be capable of facilitating a human rights-based reading of the Compact in practice.

II. Procedural and institutional significance of the GCM: institutionalizing soft law as a benchmark with potentially hard impact

The main element of the review mechanism foreseen in the GCM is an International Migration Review Forum (IMRF) taking place every four years, which “shall serve as the primary intergovernmental global platform for Member States to discuss and share progress on the implementation of all aspects of the Global Compact”.⁷⁰ In addition, biennial reports by the UN Secretary General (UNSG),⁷¹ and regional reviews are foreseen.⁷² The first IMRF was conducted in April 2022, with the projected “Progress Declaration” indeed being adopted, despite the breakdown of other fora of international cooperation in the wake of Russia’s aggression against Ukraine. With the first round of reviews now complete, we shall discuss the review mechanism’s effectiveness in achieving progress with regard to the implementation of the GCM’s standards and goals.

⁷⁰ GCM, para. 49.

⁷¹ GCM, para. 46.

⁷² GCM, para. 50.

⁶⁹ GCM, para. 17.

In a first step, we will draw from insights about the conditions of effectiveness of soft-law instruments in public international law more generally (section 1). We will then compare these conditions with the follow-up mechanisms provided for in the GCM and offer a preliminary assessment of its potential impact (2). Finally, we will make some suggestions on how to improve the GCM process moving forward, focusing in particular on the role of civil society actors and the cross-fertilization with the practice of human rights supervision (3).

1. Institutional conditions for making soft law effective

Pioneering research on the impact of soft law indicates the importance of proper institutionalization.⁷³ The gist of this line of research on the use of alternative instruments in international law⁷⁴ is that they can turn out to be powerful tools of governance if the context in which it is embedded allows it to produce communicative power.⁷⁵ More specifically, soft law may

be used as means to internationalise a policy issue in the first place by creating an international communicative structure on the issue, even if (and particularly when) States are reluctant to cease relevant decision-making powers to international institutions, or formally bind their hands by entering into treaty obligations.⁷⁶ Communicative power rests on the assumption that soft-law instruments create an ongoing discourse of justification around consented governance goals established by the respective instruments. Such discourse makes non-compliance politically or economically costly even in the absence of hard sanctions—which are sparse and often ineffective in public international law anyway. When identifying the conditions for justificatory constraints, we rely on research conducted on the exercise of International Public Authority (IPA). This research has identified criteria for assessing both the effectiveness and, hence, the need for legitimation, of the use of alternative instruments in global governance.⁷⁷ According to this approach, communicative power through soft law presupposes regularity, institutionalization, independence and legitimacy of the relevant follow-up mechanisms.

A first prerequisite for soft-law instruments to create communicative power is that there are regular follow-up mechanisms put in place to assess the degree of compliance with the expectations or commitments laid down in the relevant document.⁷⁸ Through regular loops of reporting on the current state of implementation and identifying potential shortcomings, a continuous dialogue can emerge. Once such dialogue is established, the re-

⁷³ *Matthias Goldmann*, We Need to Cut Off the Head of the King. Past, Present, and Future Approaches to International Soft Law, in: *Leiden Journal of International Law (LJIL)* 25 (2012), pp. 335–368. In the context of migration law, see *Vincent Chetail*, *International Migration Law*, 2019, pp. 293–339.

⁷⁴ *Armin von Bogdandy/Philipp Dann/Matthias Goldmann*, Developing the Publicness of Public International Law. Towards a Legal Framework for Global Governance Activities, in: *Id.* (ed.), *The Exercise of International Public Authority by International Institutions*, 2010, pp. 3–32; *Ingo Venzke*, *How Interpretation Makes International Law*, 2012.

⁷⁵ *Armin von Bogdandy/Matthias Goldmann*, Die Ausübung internationaler öffentlicher Gewalt durch Politikbewertung, in: *ZaöRV* 60 (2009), pp. 70–102; engl. version: *Id.*, The OECD's PISA Policy, in: *International Organizations Law Review* 5 (2009), pp. 241–298.

⁷⁶ Cf. *Chetail* (fn. 73), pp. 300 et seq.

⁷⁷ *von Bogdandy et al.* (fn. 74).

⁷⁸ *Ibid.*

spective soft-law standards provide the benchmark for reviewing and assessing policies in a given thematic field, irrespective of their legally non-binding nature. The repeated reference to the soft-law instrument reinforces its relevance as a legal framework that complements the sources of hard law, if any. It creates normative expectations (sometimes misleadingly referred to a “moral” in nature), the frustration of which requires justification, despite the absence of hard sanctions for non-compliance.

Mere reporting at the will of States, however, may not suffice to actually create such justificatory constraints. Mechanisms in which reporting takes place require a certain degree of institutionalization at the international level, i.e., an international institution or body that coordinates the process and also evaluates the reports. Soft-law instruments may only gain leverage as a benchmark for adapting public policies if the performance of States is “judged” by an external public authority that successfully claims to be independent in its assessment. The concrete modes of assessment may, however, vary depending on the specific context. While in policy areas where States have an intrinsic interest to become best performers, such as education, alternative instruments using outcome indicators and rankings based on scientific data have proven highly successful,⁷⁹ this may look different in other policy areas. Where a policy field is marked by significant power imbalances and intense contestation—as in respect of migrants’ rights—it is less evident what a “best practice” is and whether it is bene-

ficial to become a “best performer”.⁸⁰ In these contexts, identifying and naming concrete shortcomings in meeting agreed standards seem more important, as well as issuing specific recommendations as to how shortcomings might be remedied. Hence, an independent and objective review in order to ensure the legitimacy of the review process is all the more important.

Finally, legitimacy of institutionalised review processes also hinges upon participation of relevant stakeholders. The acceptance of the soft-law mechanisms by States can be increased through ownership, i.e., a strong role of States in self-reporting as well as selection of implementation measures.⁸¹ However, an exclusively State-driven review process has significant shortcomings. States may paint an all too rosy picture of their compliance with the commitments made, or cherry-pick areas where they perform particularly well while ignoring more critical policy tools. Therefore, soft law’s effectiveness can be achieved best if civil society actors are also involved either directly in the review process or by accompanying the review process with shadow reports and campaigning. Communicative power is ultimately based on a communicative environment in which a multitude of actors raise their voices and appropriate, interpret and specify a soft-law instrument.

These general insights on the conditions under which soft-law instruments may become powerful and effectively impact

⁷⁹ Cf. *Michael Riegner*, *Towards an International Institutional Law of Information*, in: *International Organizations Law Review* 12 (2015), pp. 50-80.

⁸⁰ See *Scott D. Watson/Corey Robinson*, *Knowledge Controversies of Global Migration Governance. Understanding the Controversy Surrounding the Global Compact*, in: *Catherine Dauvergne* (ed.), *Research Handbook on the Law and Politics of Migration*, 2021, pp. 323-339.

⁸¹ *von Bogdandy et al.* (fn. 74), pp. 93-94.

domestic policies, provide a helpful matrix to assess the follow-up mechanism put in place by the GCM in the next section.

2. Institutionalization and follow-up mechanisms in the GCM: a complex process with uncertain impact

At first glance, the institutional follow-up mechanism envisaged in the GCM promises to provide favourable conditions for the Compact to effectively impact domestic migration policies (subsection a). However, two critical features become apparent upon closer inspection of the early practice (b). The GCM's follow-up mechanism is almost exclusively State-led and bears a significant risk of cherry-picking from the various Objectives of the Compact. This and the institutionalization at UN level under the auspices of the International Organization for Migration (IOM) beg the question of how prominent the role of human rights will actually be in specifying the standards of assessment during the ongoing follow-up and review of the Compact.

a. Some favourable conditions for the GCM's impact on immigration policies

The GCM dedicates 15 out of its 54 paragraphs to issues of implementation, follow-up and review. This suggests that the drafters were well aware of the necessity of institutionalised mechanisms to ensure effective impact of the GCM on migration policies. The Compact emphasises that “we require concerted efforts at global, regional, national and local levels, including a coherent United Nations system” to effectively implement the GCM.⁸²

⁸² GCM, para. 40.

More specifically, States commit themselves to “review the progress made at local, national, regional and global levels in implementing the Global Compact in the framework of the United Nations through a state-led approach and with the participation of all relevant stakeholders.”⁸³ At the global level, the review process is coordinated by the IOM, which in the course of the process of adopting the GCM has officially become part of the UN system. The States welcome the decision of the Secretary-General “to establish a United Nations network on migration to ensure effective and coherent system-wide support to implementation, including the capacity-building mechanism, as well as follow-up and review of the Global Compact, in response to the needs of Member States.”⁸⁴ The Compact further notes that IOM will serve as a coordinator and secretariat of the Network and that the Network will draw on the expertise and experience of other relevant entities in the UN system.⁸⁵

To effectively realise a regular review process, an IMRF has been installed at the level of UN General Assembly, based on the former High-Level Dialogue on International Migration and Development.⁸⁶ The IMRF “shall serve as the primary inter-governmental global platform for Member States to discuss and share progress on the implementation of all aspects of the Global Compact, including as it relates to the 2030 Agenda for Sustainable Development, and with the participation of all relevant stakeholders.”⁸⁷ The IMRF shall not only discuss the implementation of the GCM's Objectives in the respective UN

⁸³ GCM, para. 40.

⁸⁴ GCM, para. 45.

⁸⁵ Ibid.

⁸⁶ GCM, para. 49(a).

⁸⁷ GCM, para. 49(b).

Member States, but also “allow for interaction with other relevant stakeholders with a view to building upon accomplishments and identifying opportunities for further cooperation.”⁸⁸ The review process takes place every four years, starting in 2022, and will “result in an inter-governmentally agreed Progress Declaration, which may be taken into consideration by the High Level Political Forum on Sustainable Development.”⁸⁹ While concrete recommendations to UN Member States are not envisaged, the Secretary-General is at least requested “to report to the General Assembly on a biennial basis on the implementation of the Global Compact”.⁹⁰

The meticulous description of the review process in the GCM and its anchoring in an established international organization seems to fulfil the basic conditions of institutionalization as well as of a regular review procedure. At first glance, this suggests rather favourable conditions for a noticeable impact of the GCM on future migration policies in light of the criteria developed above.

This preliminary finding is further supported by the fact that the GCM seems to envisage indeed a continuous dialogue on all governance levels. To effectively inform the IMRF, the GCM invites “relevant subregional, regional and cross-regional processes, platforms and organizations” to review the implementation of the GCM in the respective region every four years alternating with the review on the global level.⁹¹ Furthermore, other actors or fora, such as the Global Forum for Migration and Development and the IOM Interna-

tional Dialogue on Migration are invited to contribute to the IMRF by providing data, evidence, best practices, innovative approaches and recommendations.⁹² On the national level, governments are encouraged to develop “practicable, ambitious national responses for the implementation of the Global Compact, and to conduct regular and inclusive reviews of progress at the national level.”⁹³ The development of a national implementation plan is suggested, even if in a less compelling language. Notably, the national reviews “should draw on contributions from all relevant stakeholders, as well as parliaments and local authorities.”⁹⁴ Moreover, the Member States also commit themselves to “implement the Global Compact in cooperation and partnership with migrants, civil society, migrant and diaspora organizations, faith-based organizations, local authorities and communities, the private sector, trade unions, parliamentarians, National Human Rights Institutions [...] and other relevant stakeholders.”⁹⁵ This inclusive approach signals that the drafters of the GCM reflected upon the relevance of a broad public discourse about the implementation of the Objectives on the ground, in order to establish a justificatory community surrounding the Compact. In line with this assessment, earlier research on the GCMs impact suggests that it has a considerable potential to effectively constrain State action in the future.⁹⁶

⁸⁸ GCM, para. 49(d).

⁸⁹ GCM, para. 49(e).

⁹⁰ GCM, para. 46.

⁹¹ GCM, para. 50.

⁹² GCM, para. 51 and 52.

⁹³ GCM, para. 53.

⁹⁴ Ibid.

⁹⁵ GCM, para. 44.

⁹⁶ *Peter Hilpold*, Opening Up a New Chapter of Law-Making in International Law. The Global Compacts on Migration and for Refugees of 2018, in: *European Law Journal (ELJ)* 26 (2020), pp. 226-244 (231-232 and 237-238).

b. State-led review and the potential dominance of migration control over migrants' rights

Nevertheless, there remain a number of open questions and considerable doubts as to the real “bite” that this process may have in practice. The impact of the GCM in particular on the rights of migrants is likely to be limited by the fact that the review process so far is almost exclusively dominated by States. While a large number of non-governmental organisations has been included in the process leading-up to the GCM,⁹⁷ the text of the Compact emphasises “the important role of State-led processes and platforms at global and regional levels in advancing the international dialogue on migration.”⁹⁸ The Compact also mentions the inclusion of civil society actors and other stakeholders and the need to “foster multi-stakeholder partnerships around specific policy issues”.⁹⁹ However, it does not define concrete modes of participation or consultation. Whether States base their reports also on the findings of civil society actors, as envisaged by the GCM, is within their own discretion. Evidence from the review processes leading up to the 2022 IMRF demonstrates that States have only rarely done so,¹⁰⁰ despite existing civil society initiatives in some countries.¹⁰¹ Likewise, the perspective of

subnational levels of governance, in particular of cities and local communities, has so far not been systematically integrated in the review process despite relevant initiatives from local actors, for instance through the newly established Mayors Migration Council.¹⁰²

States have not only dominated the review process so far, but also cherry-picked those Objectives for reporting where they performed particularly well while ignoring other, more critical issues.¹⁰³ Cherry-picking was facilitated by the fact that, up until shortly before the event, the review process was not guided by any template to be followed. It was only in October 2021 that the UN Network on Migration provided a roadmap for the 2022 IMRF, including a template how to structure the national reports.¹⁰⁴ While this was a first

tion Centre, *ibid*, 26. Demonstrating a lack of systematic involvement of civil society actors in the implementation process with a view to Morocco, and Ecuador, Peru and Colombia, respectively, see *Younous Arbaoui*, *The Impact of the Marrakech Compact for Migration in Morocco. The Role of the Government and of Civil Society*, in: WCL/VRÜ 55 (2022), pp. 19–43, and *María D. Collazos* *The Global Compact for Migration and the Venezuelan Migration Crisis in Colombia, Ecuador, and Peru. A Comparative Approach*, in: WCL/VRÜ 55 (2022), pp. 44–63.

⁹⁷ *Evalyn Tennant/Christian Wolff*, *Civil Society and the Struggle for a Rights-Based Global Compact*, in: *Global Social Policy* 18 (2018), pp. 343–348 (345).

⁹⁸ GCM, para. 47.

⁹⁹ GCM, para. 47.

¹⁰⁰ See *Mixed Migration Centre*, *Wheels in Motion. Who's Done What Since the Global Compact for Migration Was Adopted (and What Should Happen Next)* (2019), p. 25, available at: www.mixedmigration.org (last visited 21 December 2023).

¹⁰¹ On examples of civil society action and practices of consultative processes, see *Mixed Migra-*

¹⁰² On the Mayors Migration Council, see <https://www.mayorsmigrationcouncil.org> (last visited 21 December 2023); for an analysis, see *Adriana Sletza Ortega Ramírez/Luis Alonso De Ita García*, *The Role of Cities in International Migration Governance. Migratory Paradiplomacy in the Global Compacts for Migration and Refugees*, in: WCL/VRÜ 55 (2022), pp. 64–82.

¹⁰³ See *Arbaoui* (fn. 101), neatly illustrating this selective reporting strategy by the Moroccan government, and *Collazos* (fn. 101), on how the Peruvian and the Ecuadorian governments have tightened their migration policies in many areas, despite initial support for the GCM.

¹⁰⁴ UN Network on Migration, *Note on the implementation, follow-up and review of the Global Compact for Safe, Orderly and Regu-*

step to systematise the implementation process and give it more coherence, the concrete instructions given in the template remained rather superficial and did not provide any specific guidance on how to assess the progress regarding the various Objectives. Likewise, the template did not give any information on the relation between the 23 Objectives or on how to integrate the GCM's ten guiding principles, including human rights protection. Regarding the latter, the template only vaguely "encourage[d the States] to discuss how the 10 guiding principles [...] are reflected in their policies and practices."¹⁰⁵

To further improve implementation in a cooperative mode, the UN Network on migration invited 27 countries to serve as so called "champion countries" for the implementation of the GCM.¹⁰⁶ The idea of this initiative is that these countries should provide best practices and share their experiences with other countries. The initiative can be interpreted as a tool to implement the cooperative implementation mode envisaged by the GCM. However, the concrete selection criteria for "champion countries" largely remain in the dark. As the GCM is lacking any priority between the diverse Objectives,¹⁰⁷ apparently it does not really make a difference for the qualification as a "champion" whether a country scores highly in best practices regarding migration control and data collection or regarding the treatment of mi-

grants in line with human rights.¹⁰⁸ This practice runs indeed counter the idea that "[a]ll the commitments must be taken into account and implemented as a whole".¹⁰⁹ Rather, it illustrates how the effective review of the GCM risks to be impaired by the broad range and variety of Objectives covered by the Compact, despite the fact that the above-mentioned template "invites" Member States to provide information on all 23 Objectives.¹¹⁰ If the States in general and "champion countries" in particular focus predominantly on Objectives dealing with effective migration management, migrant's human rights risk to be side-lined in the implementation process.

The risk of selective implementation practice is particularly acute since the GCM's follow-up mechanism lacks any independent assessment procedure undertaken by an international institution or body. According to the GCM, it is the UN Member States that agree upon a Progress Declaration at the end of each IMRF. An individual assessment of States' reports is not foreseen in the review process. Likewise, neither the UN Network on Migration nor the UN Secretary General are supposed to issue specific recommendations to the States on how to best achieve the Objectives of the GCM. The latest report by the Secretary-General on the implementation of the GCM in the run-up to the 2022 IMRF displayed the same deficiencies. Rather than identifying concrete shortcomings in state practice, the report almost exclusively focused on best-practices and progress, while remaining largely superficial in its assessment. Unlike the Secretary-

lar Migration (GCM), 4 et seq., available at: <https://migrationnetwork.un.org/resources/imrf-roadmap-annexes-english> (last visited 21 December 2023).

¹⁰⁵UN Network on Migration, *ibid.*, 4.

¹⁰⁶See <https://migrationnetwork.un.org/champion-countries> (last visited 21 December 2023).

¹⁰⁷*Chetail* (fn. 73), p. 331.

¹⁰⁸On the case of Morocco, see *Arbaoui* (fn. 101).

¹⁰⁹*Chetail* (fn. 73), p. 331.

¹¹⁰UN Network on Migration (fn. 104), p. 4.

General's first report,¹¹¹ the second report indeed barely mentioned the concrete Objectives of the GCM nor did it recommend any specific steps to improve implementation in the future.¹¹² It merely encouraged States "to consider how to develop benchmarks and mechanisms to measure progress on, and monitor the implementation of the commitments in the Compact."¹¹³

Moreover, the fact that the IOM plays a crucial role as the institutional hub of the GCM—its personnel actually sits at the centre of the UN Migration Network's secretariat—has raised concerns as to the prominence of human rights in the GCM process.¹¹⁴ The IOM has long been perceived as a "service-oriented" international organization helping States in effectuating migration policies of their own choice and organizing the relocation of migrants.¹¹⁵ It became a member of the UN family as an "UN related organization"

only in 2016.¹¹⁶ Given its trajectory as a donor-driven organization and its focus on migration management, including its most repressive elements such as detention, the IOM has long been criticised for not being committed to the protection of migrants' human rights.¹¹⁷ Much of this critique is outdated by now, given that the IOM has shifted alliances at some point in the last decade and adopted a more liberal approach in its language and projects, including the ample use of human-rights talk.¹¹⁸ However, the IOM still has not developed any practice of criticizing its Members for their poor human rights performance.¹¹⁹ The incorporation in the UN family potentially is a crucial step to close this long-standing gap. According to Art. 2.5. of the UN-IOM Agreement, the IOM is now explicitly obliged to respect migrants' human rights and all relevant international law for that matter. This treaty-based obligation makes up for the lack of such reference in IOM Constitution. Legally, the IOM can now not only be held accountable by international human rights law itself regarding its operative work¹²⁰ but may also start using these standards vis-à-vis its own Members. There remain, however, doubts whether the new institutional and normative context will smoothly translate into

¹¹¹General Assembly, Report of the Secretary General, UN Doc. A/75/542 of 26 October 2020.

¹¹²For a critique, see *Elsbeth Guild/Maja Grundler*, Implementing Migrant Protection? The UN's second report on the implementation of the Global Compact for safe, orderly and regular migration (2022), available at: <https://protectproject.w.uib.no/implementing-migrant-protection-the-uns-second-report-on-the-implementation-of-the-global-compact-for-safe-orderly-and-regular-migration> (last visited 21 December 2023).

¹¹³General Assembly, Report of the Secretary General, UN Doc. A/76/642 of 27 December 2021, para. 110.

¹¹⁴E.g., by *Desmond* (fn. 29), p. 89.

¹¹⁵On the history of the IOM, see *Jürgen Bast*, International Organization for Migration, in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (last updated March 2012). On the IOM's role in the global architecture of global migration governance, see *Chetail* (fn. 73), pp. 340–397. For a comprehensive analysis, see *Megan Bradley*, *The International Organization for Migration. Challenges, Commitments, Complexities*, 2020.

¹¹⁶Agreement concerning the Relationship between the United Nations and the International Organization for Migration, ratified 19 Sept 2016, UN Doc. A/Res/70/296 (Annex I) and A/70/976.

¹¹⁷*Fabian Georgi*, *Managing Migration? Eine kritische Geschichte der Internationalen Organisation für Migration (IOM)*, 2019; *Martin Geiger/Antoine Pécoud*, *The International Organization for Migration. The New "UN Migration Agency" in Critical Perspective*, 2020.

¹¹⁸Cf. *Georgi*, *ibid.*, pp. 325 et seq.

¹¹⁹*Chetail* (fn. 73), p. 396.

¹²⁰*Jürgen Bast*, *Der Global Compact for Migration und das internationale Migrationsregime*, in: ZAR 2019, pp. 96–99 (98).

the practice of the organization as the UN's migration agency. This is a concern also in the context of the GCM, which itself offers ample opportunities to concentrate on technical issues of migration management rather than on migrants' human rights.¹²¹ Moreover, some fear that reporting to the IOM may further reduce incentives to provide to UN human rights treaty-bodies.¹²² The lingering distrust by civil society actors and academics vis-à-vis the IOM, as reflected in such statements, may in itself pose an obstacle to its productive role in the GCM process. The degree to which the incorporation into the UN family will change the organizational culture of the IOM, therefore, remains crucial for the impact of the GCM in terms of migrants' human rights.

Finally, the dominant role of States in reviewing the implementation of the GCM Objectives is further exacerbated by the fact that civil society actors do not fully "own" this process. The drafting of the GCM was marked by a high degree of involvement of NGOs and other non-state actors at the global level, a fact that has left its traces in the final text.¹²³ This is less evident in the context of the IMRF, which operated under the more restrictive rules of the UN General Assembly. The "shrinking space for civil society" was explicitly criticised by the Civil Society Action Committee, a self-organised, joint civil society advocacy mechanism on migration policy and governance, in an open letter to the President of the Gen-

eral Assembly, calling for "meaningful participation of all relevant stakeholders in the entire IMRF" a few weeks before the IMRF took place.¹²⁴ What is even more important is a considerable gap between the global and the domestic level in respect of civil society participation in the GCM process. The reception of the GCM by national NGOs is rather mixed. Only in some places have civil society actors already taken up the GCM in their daily work and try to push States in implementing it more diligently and in conformity with human rights standards.¹²⁵ In other countries NGOs have taken a rather sceptical stance on the GCM,¹²⁶ and have therefore not engaged substantially with the GCM and its implementation. Non-state actors in many countries may also simply lack the knowledge and/or capacity to involve themselves with distant affairs like the GCM. The hesitant reception by civil society actors on the ground, at least in some countries, further reduces the likelihood that the GCM will become a core standard for practices of "naming and shaming" in the international realm.

¹²¹*Desmond* (fn. 2), pp. 234-235.

¹²²*Desmond* (fn. 29), p. 89.

¹²³Cf. *Jenna Henneby/Nicola Piper*, *Global Migration Governance and Migrant Rights Advocacy. The Flexibilization of Multi-stakeholder Negotiations*, in: Catherine Dauvergne (ed.), *Research Handbook on the Law and Politics of Migration*, 2021, pp. 369-383.

¹²⁴Civil Society Action Committee, *Endorse the Open Letter on Shrinking Space for Civil Society!* (2022), available at: <https://csactioncommittee.org/endorse-the-open-letter-on-shrinking-space-for-civil-society> (last visited 21 December 2023); and see *Stefan Rother*, *Global Migration Governance from Below. Actors, Spaces, Discourses*, 2022, pp. 119-120.

¹²⁵Civil Society Action Committee, *Civil Society Engagement in Global Compact for Migration* (2020), available at: <https://csactioncommittee.org/wp-content/uploads/2020/07/Mapping-report-FINAL.pdf> (last visited 21 December 2023).

¹²⁶For a paradigmatic example, see *Arbaoui* (fn. 101), pp. 27-33.

3. How to improve the GCM's follow-up mechanism to facilitate human rights-based implementation

In the light of the risks and shortcomings identified above, the next section will offer a few suggestions to improve the follow-up so as to enhance its ability to further a human rights-based implementation of the GCM. They may help to ensure a broader public discourse about migrants' human rights in the future implementation process.

a. Making the GCM review process more effective

First, the UN Network on Migration should make sure that during the second review cycle the UN Member States indeed consult “all relevant stakeholders”. This would require regular consultations with civil society actors as well as with local authorities, rather than being limited to a “multi-stakeholder hearing one day prior to the IMRF” as in the roadmap of the UN Network on Migration prior to the 2022 IMRF.¹²⁷ While the UN Migration Network did respond to some of the demands from the open letter claiming civil society involvement, among others enabling civil society actors to provide comprehensive input and feedback on the various drafts of the Progress Declaration in 2022,¹²⁸ such consultations should become mandatory throughout the review cycle. Considering the views of civil society actors will allow highlighting existing deficits regarding migrants' rights and force governments to provide justification or remedies. Structurally including the perspective of local actors in the review process may help to ensure that the Objectives of the GCM can

actually be realised at all levels of governance. It may allow to better identify unused capacities as well as unknown obstacles for the implementation of the GCM's Objectives and acknowledge the increasing role of cities and local governments as agents of migration governance. Overall, ensuring broader stakeholder participation in the preparation of the national reports would emphasise the relevance of migrants' human rights in the GCM's implementation process, i.e., strengthen that “axis” of the GCM.

A second suggestion for improving the review process would be to further develop the existing follow-up template. Ideally, such a template would be developed with the participation not only of States but also of non-governmental actors. A revised template should go beyond the current template in at least two ways. First, it should include a procedural element indicating the type of actors that have to be consulted at the national level and give some guidance regarding the mode of their participation. Second, a revised template should also include indicators allowing to better assess Member States' performance on the respective Objectives. An improvement of the template according to these requirements would foster a more uniform reporting practice, could prevent cherry-picking, and allow for a better comparative assessment of implementation measures and remaining deficits. A similar path is already followed by the Observatory on the Global Compact in Chile, which seeks to provide an indicator-based assessment of state practice regarding the GCM's Objectives.¹²⁹

¹²⁷UN Network on Migration (fn. 104), p. 2.

¹²⁸Rother (fn. 124), p. 120.

¹²⁹Mixed Migration Centre (fn. 100), p. 26; Observatorio Pactos de Migración en América Latina, available at: https://espaciopublico.cl/nuestro_trabajo/observatorio-pactos-de-migracion-en-america-latina (last visited 21 December 2023).

In the medium term, the UN Network on Migration itself should consider issuing recommendations based on the objective assessment of the national reports. While this could significantly increase the chances for an effective impact of the GCM, it would be a rather bold step given the lack of a clear mandate in this respect. However, the GA's Resolution on format and organizational aspects of the first International Migration Review Forums already indicated that the Progress Declaration could have contained "recommendations on the implementation of the Global Compact, if appropriate".¹³⁰ While the Progress Declaration adopted in 2022 falls short of exploring the path towards country-specific recommendations, arguably it provides a sufficient legal basis for expanding the review activities of the UN Network on Migration to lay the groundwork for embracing such recommendations in the next inter-governmentally agreed document.

b. Aligning the GCM review process with treaty-based review mechanisms

Even in the absence of the measures mentioned so far, the review process of the GCM would benefit significantly from an alignment with the reporting procedures established under the various human rights treaties, and with the migration-related jurisprudence of the human rights treaty-bodies. For example, the CMW has established a working group on the Convention and the Global Compact for Safe, Orderly and Regular Migration, and is working towards a General Comment No. 6 on the convergence of the two instru-

ments.¹³¹ The CMW's General Comment No. 5 (2021) on migrants' rights to liberty and freedom from arbitrary detention is explicitly meant "to provide guidance to States on implementing the Global Compact for Migration",¹³² thereby also addressing scholarly concerns that the GCM lags behind the relevant guarantees when it comes to regularization, firewalls, criminalization and protection against detention.¹³³ At the same time, in strategically aligning with the GCM process, the CMW seems to benefit from the GCM's broader support among UN Member States.

Such cross-fertilization between human rights treaty-bodies and the GCM's review mechanism should be fostered on a systematic basis. In our view, the alignment should also pertain to country-specific evaluations. Given that our call on the UN Network on Migration to issue recommendations directed towards UN Member States is unlikely to be heard for the time being, the UNNM nonetheless could play a useful role in collecting the relevant reports and communications as they result from complaint procedures and state reporting procedures. These findings and recommendations of the treaty bodies could be organised according to the GCM's Objectives and form an integral part of a more comprehensive practice of state reporting in respect of the GCM.

¹³⁰General Assembly, Resolution on the format and organizational aspects of the international migration review forums, UN Doc. A/RES/73/326 of 29 July 2019.

¹³¹Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Call for submissions on concept paper and draft outline for its draft General Comment No. 6 on the Convergence of the Convention and the Global Compact for Safe, Orderly and Regular Migration, available at: <https://www.ohchr.org/en/calls-for-input/2022/call-submissions-concept-paper-and-draft-outline-its-draft-general-comment-no> (last visited 21 December 2023).

¹³²CMW/C/GC/5, para. 8.

¹³³*Desmond* (fn. 29), pp. 92-101.

Finally, the GCM review process would hugely benefit from another lesson learned in the realm of human rights: the consistent practice of non-governmental organizations to issue shadow reports on domestic implementation and to demand from their governments to have them discussed before filing the state report. Civil society organisations in some countries have already issued such reports in the context of the 2022 IMRF,¹³⁴ and the Global Coalition for Migration, with support of the Friedrich Ebert Foundation, published a “Spotlight Report on Global Migration” ahead of the IMRF, on a website with further material, aiming to “generate momentum for a rights-based, migrant-centred, and gender-responsive implementation of the Global Compact for Migration”.¹³⁵ Research on the implementation and review of human rights treaties has shown that shadow reports are not only an effective tool to raise awareness for critical issues that state reports tend to ignore but may also help to provide guidance for future reporting and assessment.¹³⁶ They may serve as a crucial tool to intensify public discourse surrounding the GCM and holding States publicly accountable for deficits and shortcomings. Non-gov-

ernmental organizations are particularly well positioned “to take the Compact back home”¹³⁷ and to ensure that the GCM’s Objectives are interpreted in line with existing human rights obligations. Shadow reports may help to make this link visible and promote a human rights-based interpretation of the GCM’s Objectives in public discourse. First initiatives in this direction already exist, including a handbook for legal practitioners to use the GCM as an interpretative tool.¹³⁸

While these suggestions certainly do not guarantee a significant impact of the GCM in the future, they may nonetheless serve as important steps to align it with the general conditions allowing for an effective impact of soft-law instruments, and thus to strengthen its human rights dimension.

III. Conclusions

The relationship between the GCM and migration-related human rights treaties is dynamic and open-ended. The Compact has the potential both to strengthen and to circumvent human rights law, at the level of its substantive provisions as well as at the institutional level.

At the substantive level, the abundance of both general and specific references to

¹³⁴On Germany, see *Marina Liebsch/Jonas Wipfler*, Das globale Überprüfungsforum für die Umsetzung des globalen Migrationspaktes. Forderungen der Zivilgesellschaft, in: ZAR 2022, pp. 360–364.

¹³⁵Global Coalition on Migration and Friedrich Ebert Stiftung, Spotlight Report on Global Migration (2022), available at: <https://spotlightreportmigration.org> (last visited 21 December 2023); and see *Rother* (fn. 124), p. 119.

¹³⁶See, e.g., the practice of civil society involvement in the implementation of the UN Convention on the Elimination of All Forms of Discrimination (CEDAW): *Mary S. Dairiam*, CEDAW, Gender and Culture, in: Rawwinda Baksh/Wendy Harcourt (ed.), *The Oxford Handbook of Transnational Feminist Movements*, 2015, pp. 367–393 (386).

¹³⁷*Tennant/Wolff* (fn. 97), p. 347.

¹³⁸Immigration Law Practitioner’s Association, Handbook for Legal Practitioners. Using the UN Global Compact for Safe, Orderly and Regular Migration as an Interpretative Tool, available at: <https://ilpa.org.uk/handbook-for-legal-practitioners-using-the-un-global-compact-for-safe-orderly-and-regular-migration-as-an-interpretative-tool> (last visited 21 December 2023).

human rights law makes it easy to read the Compact as a human rights instrument. Legally speaking, there is nothing in the text of the GCM that may legitimise a derogation from obligations assumed under existing human rights treaties. However, it is clear that the picture remains a somewhat fragmented image of the human rights of migrants. Moreover, the fact that the GCM *can* be seen as a human rights document does not preclude viewing it through its other axes, as an instrument either geared towards management or development, or any combination of the axes. Much therefore depends on how the instrument will be implemented in practice, which particular image will dominate the use of the Compact on the ground. Implementation, in turn, is determined by the institutional and procedural dimension of the instrument.

The review mechanism foreseen by the Global Compact displays some promising elements with a view to facilitating a human rights-based implementation, but also some factors indicating the potential dominance of migration control over migrants' rights. While the review mechanism is well institutionalised within the framework of the UN, it is so far predominantly State-led. Civil society has not yet systematically been included in the review process, although various actors have consistently and partly successfully fought for inclusion. To support a rights-based implementation of the Compact, the GCM review process could be made more effective by improving the template for State reports and foreseeing shadow reporting by NGOs. It would also benefit from an alignment and cross-fertilisation with the human rights treaty-based supervisory mechanisms.

While both the reinforcing and the bypassing dynamics can be at play at the same

time, steps can be taken with a view to turning the kaleidoscope to the human rights image: ultimately, dynamism is a matter of practice.

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