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THE GLOBAL COMPACT FOR SAFE, ORDERLY AND REGULAR MIGRATION: A SOFT LAW INSTRUMENT FOR MANAGEMENT OF MIGRATION RESPECTING HUMAN RIGHTS

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ABSTRACT: The Global Compact for Safe, Orderly and Regular Migration was adopted on 11 December 2018 by 163 States at the Marrakesh Intergovernmental Conference and, days later, was endorsed by the United Nations General Assembly in its Resolution 73/195. This Compact, together with the Compact for Refugees, addresses a low intensity normative action through soft law with which the States want to adopt common "rules" for "human mobility in the 21st century", while preserving their sovereignty. However, States proclaim their sovereignty on the subject. This instrument of soft law must serve as a reference for the exercise of sovereign powers in aspects that have hitherto belonged to the *domaine reservé* of the State, such as those relating to the management of regular migration, although it also regulates its reverse with the control of (un)safe, (un)orderly and irregular migration. It will also guide multilateral cooperation within the United Nations and the International Organization for Migration. This article will analyse the scope and legal nature of this instrument as well as its capacity to generate a model for the management of migratory flows that at the same time preserves human rights.

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KEYWORDS*: Soft law,* Global compact, (un)safe, (dis/un)orderly and (ir)regular migration, rule of law, human rights.

EL PACTO MUNDIAL PARA UNA MIGRACIÓN SEGURA, ORDENADA Y REGULAR: UN INSTRUMENTO DE *SOFT LAW* PARA LA GESTIÓN DE LA MIGRACIÓN RESPETANDO LOS DERECHOS HUMANOS

RESUMEN: El Pacto Mundial por una Migración Segura, Ordenada y Regular fue adoptado el pasado 11 de Diciembre de 2018 por 163 Estados en la Conferencia intergubernamental de Marraquech y, días más tarde, fue endosado por la Asamblea General de las Naciones Unidas en su Resolución 73/195. Este Pacto, junto con el Pacto por los Refugiados, afronta una acción normativa de baja intensidad a través del *soft law* con la que los Estados quieren adoptar unas «reglas» comunes para la «movilidad humana en el Siglo XXI», al tiempo que preservar su soberanía. Este instrumento de *soft law* ha de servir de referencia para el ejercicio de las competencias soberanas en aspectos hasta ahora pertenecientes al *domaine reservé* del Estado, como los relativos a la gestión de las migraciones regulares aunque igualmente regule su reverso con el control de la migración (in)segura, (des)ordenada e irregular. También guiará la cooperación multilateral en el seno de la Organización de las Naciones Unidas y de la Organización Internacional de las Migraciones. Este artículo analizará el alcance y la naturaleza jurídica de este instrumento así como su capacidad de generar un modelo para la gestión de los flujos migratorios que al mismo tiempo preserve los derechos humanos.

PALABRAS CLAVE: *Soft Law*, Pacto mundial, migración (des)ordenada, (in)segura, (ir)regular, estado de derecho, derechos humanos.

LE PACTE MONDIAL POUR DES MIGRATIONS SÛRES, ORDONNÉES ET RÉGULIÈRES: UN INSTRUMENT DE *SOFT LAW* POUR LA GESTION DES MIGRATIONS DANS LE RESPECT DES DROIT DE L'HOMME

RÉSUMÉ: Le Pacte mondial pour des migrations sûres, ordonnées et régulières a été adopté le 11 décembre 2018 par 163 États lors de la Conférence intergouvernementale de Marrakech et, quelques jours plus tard, a été approuvé par l'Assemblée générale des Nations unies dans sa résolution 73/195. Ce pacte, ainsi que le pacte pour les réfugiés, traite d'une action normative de faible intensité par le biais de la soft law avec laquelle les États veulent adopter des «règles» communes pour «la mobilité humaine au XXIe siècle», tout en préservant leur souveraineté. Toutefois, les États proclament leur souveraineté en la matière. Cet instrument de soft law doit servir de référence pour l'exercice des pouvoirs souverains dans des aspects qui appartenaient jusqu'à présent au domaine réservé de l'État, comme ceux relatifs à la gestion de la migration régulière, bien qu'il réglemente également son inverse avec le contrôle de la migration (non)sûre, (dés)ordonnée et irrégulière. Il orientera également la coopération multilatérale au sein des Nations Unies et de l'Organisation Internationale pour les Migrations. Cet article analysera la portée et la nature juridique de cet instrument ainsi que sa capacité à générer un modèle de gestion des flux migratoires qui préserve en même temps les droits de l'homme.

MOTS CLÉS: Soft law, Pacte mondial, migration (non) sûre, (dés)ordonnée et (ir)régulière, État de droit, droits de l'homme.

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I. INTRODUCTION

The Global Compact for Safe, Orderly and Regular Migration[2] was adopted by 163 States at the Marrakech Intergovernmental Conference on 11 December 2018, to the surprise of many who had considered its adoption an impossible mission. A week later, it was to be endorsed by the United Nations General Assembly, in its Resolution 73/195 adopted by 153 votes in favour, 5 against and 12 abstentions.[3] This Compact, together with the Global Compact for Refugees,[4] faces a low-intensity normative action through soft law, with which the States want to preserve their sovereignty and at the same time adopt common "rules"[5] for the management of the displacements that characterize today's "human mobility in the 21st century".[6] This instrument must serve as a reference for the adoption of national, regional and global

[2] *See* the different translations of the Global Pact that are available on the Internet at https://refugeesmigrants.un.org/migration-compact, last consulted on 31 July 2020.

[3] Resolution A/RES/73/195 adopted by the General Assembly on 19 December 2018, available on the Internet at https://undocs.org/en/A/RES/73/195, last consulted on 31 July 2020.

[4] On the Global Compact on Refugees, *see* Pozo Serrano, P., "El Pacto Mundial sobre los Refugiados: Límites y Contribución a la Evolución del Derecho Internacional de los Refugiados", (the Global Compact On Refugees: Limits and Contribution to the Development of International Refugee Law), *REEI*, núm. 38, December 2019, pp. 1-29; Aleinikoff,T. A., "The Unfinished Work of the Global Compact on Refugees", *International Journal of Refugee Law*, Vol.30, 2018, nº 4, p. 611-617, Betts, A., "The Global Compact on Refugees: Towards a Theory of Change", *International Journal of Refugee Law*, Vol. 30, Issue 4, December 2018, pp. 623-626; Chimni, B.S., "Global Compact on Refugees: One Step Forward, Two Steps Back", *International Journal of Refugee Law*, Vol. 30, Issue 4 (December 2018), pp. 630-634; Mcadam, J. "The Global Compacts on Refugees and Migration: A New Era for International Protection?", *International Journal of Refugee Law*, Vol. 30, 2018, nº 4, pp. 571-4; Turk, V., "The Promise and Potential of the Global Compact on Refugees", *International Journal of Refugee Law*, Vol. 30, Issue 4, December 2018, pp. 575-583; Appleby, K., "Strengthening the Global Refugee Protection System: Recommendations for the Global Compact on Refugees", *Journal on Migration and Human Security*, Vol. 5, Issue 4, 2017, pp. 780-799.

[5] Its provisions are only a minimum common denominator of rules and good practice, so says Newland, K., "The Global Compact for Safe, Orderly and Regular Migration: An Unlikely Achievement", *International Journal of Refugee Law*, 2019, Vol XX, No 4, pp. 657–660.

[6] *See* the final speech of the UN Secretary-General's Special Representative on International Migration Arbour, L., Statement by Louise Arbour, Special Representative of the Secretary-General for International Migration, available on the website of the Intergovernmental

policies for the management of regular migration, but it will also mark its reverse with the control of (un) safe, (un) orderly and irregular migration. This instrument will also guide multilateral cooperation within the United Nations Organisation (UN) and the International Organisation for Migration (IOM).

The Global Compact for Safe, Orderly and Regular Migration (Global Compact for Migration hereinafter) has been considered the first instrument to comprehensively address all aspects of global human mobility, although it should be noted that the first proposals made by the General Assembly that were condensed in the New York Declaration on Refugees and Migrants of 19 September 2016, had also added the aspects related to refugee movements. The latter were finally separated in the universal and regional negotiations due to the inevitable differences that would make it impossible to reach an agreement on immigrants and refugees, despite the fact that both groups share problems and vulnerabilities as well as rights and guarantees that are the responsibility of States as would be recognized in that Declaration. Thus, in paragraph 5, it is stated that States:

We reaffirm the purposes and principles of the Charter of the United Nations. 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. Our response will demonstrate full respect for international law and international human rights law and, where applicable, international refugee law and international humanitarian law.[7]

In the subsequent proposal for two compacts, the division between these groups of beneficiaries was marked by what would be their legal reference frameworks so that:

> 4. Refugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times. However, migrants and refugees are distinct groups governed by separate legal frameworks. Only refugees are entitled to the specific international protection as defined by international refugee law. This Global Compact refers

Conference at https://refugeesmigrants.un.org/migration-compact, last consulted on 22 July 2020.

[7] *See* New York Declaration on Refugees and Migrants, UN Doc. A/RES/71/1, 3 October 2016, available online at https://refugeesmigrants.un.org/declaration.

Paix et Securité Internationales
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> to migrants and presents a cooperative framework addressing migration in all its dimensions.[8]

Given this distinction between normative frameworks, the Global Refugee Compact is a soft law instrument for the development of the United Nations Convention relating to the Status of Refugees that would be negotiated under the leadership of the UN High Commissioner for Refugees and whose main objective would be to agree on principles and rules for the equitable distribution of refugees.[9] In the case of the Global Compact for Migration, there is no mention of a normative reference instrument on migration but rather a generic framework for cooperation in its management. This highlights the position of States that consider migration management as one of their sovereign competences and on which they would only be willing to agree on ways of cooperation for the management of cross-border mobility. However, this inter-State and institutional cooperation has to be carried out within the common framework of general international law, which implies the assumption of the minimum standard of rights granted to third State nationals and stateless persons as well as the basic rights recognized in the main human rights instruments as set out in the New York Declaration.[10] In any case, the Global Compact for Migration is due to the existence of normative gaps and an enormous fragmentation of the normative instruments that contemplate the human rights of migrants that should be saved with a soft law instrument in view of the impossibility for States to assume a normative exercise of greater intensity.[11]

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[8] Paragraph 4 of the Global Compact for Migration.

[9] *See* the Expert Views, "How Promising Is the Global Refugee Compact Zero Draft?", available online at https://www.newsdeeply.com/refugees/articles/2018/02/09/expert-views-how-promising-is-the-global-refugee-compact-zero-draft, last consulted on 31 July 2020.

[10] *See* the above-mentioned paragraph 5 of the New York Declaration.

[11] Soft law has already been used on numerous occasions in various migration regulation exercises, as discussed in detail in Part III, "Soft Law and Global Migration Governance", of the reference work on this subject, CHETAIL, V., *International Migration Law*, Oxford University Press, 2019, pp. 280-392. *See* also the study that already in 2010 recommended the use of soft law to propose a system for the protection of migrants in a more vulnerable position, BETTS, A., "Soft law and the protection of vulnerable migrants", *Georgetown Immigration Law Journal*, Vol. 24, 2010, p. 533.

In both cases, but especially in the case of the Global Compact for Migration, the choice of a soft law instrument has been the only possible formula for dealing with an agreement whose ambition is twofold insofar as it seeks to articulate multilateral cooperation as well as the adoption of a set of guidelines for the exercise of sovereign powers in aspects hitherto belonging to the domaine réservé of the State. The States have reaffirmed their sovereignty in the declarations of acceptance of the Compact and in their explanations of vote before the General Assembly, as I will discuss later. Their sovereign powers could hardly have been subject to the obligations of a conventional canonical rule imposing conditions on how a State should manage immigration and its borders.

Also in both Compacts, and in defence of the instrument of soft law that they adopt, we would be facing what can be described as global public policies in two sectors that need coordinated action that cannot yet be adopted in the form of a binding instrument. The fragility of the consensus on the issue has not prevented, however, that the need to act is articulated through a multilateral soft instrument loaded with proposals and provisions to inspire migration management in the framework of national policies and international cooperation.

The impossibility of reaching the consensus of the 193 member States of the United Nations that had initially been achieved in the New York Declaration was due to the rejection shown by some countries in the final phase of adoption of the Global Compact for Migration, which would lead to the abandonment of states that had initially joined Draft Zero and Draft Plus of the Compact. In Marrakesh, the Compact for Migration was adopted by a narrow consensus, that of the 164 participating States. General Assembly Resolution 73/195 would be put to a vote at the request of the United States so that votes against and abstentions would weaken the value of the Compact. This rejection was, however, a logical reaction to the inherent possibilities of a soft law instrument whose value lies in the normative expectations it is capable of generating. This is a *pactum de contrahendo* that once it begins to develop may trigger normative action from international institutions that will influence national practice as well as the practice and jurisprudence of the main international institutions. It is not surprising, therefore, that the final struggle for the adoption of the Compact was influenced by public opinion. In some

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States, initially willing to accept it, populist movements led to its rejection. On the other hand, the Global Compact for Migration is destined to be the legacy of politicians such as Angela Merkel who, during the Marrakech Conference, stated that it was a compact worth fighting for. Certainly, it is possibly one of her last great achievements as a European leader.[12]

Despite its adoption, many questions remain regarding the political and legal scope of this text, which has been rejected by countries such as the United States from an early stage,[13] or by Brazil, Italy, Austria, Hungary, the Czech Republic, Switzerland and Belgium where it also led to the resignation of its Prime Minister and the break-up of the government coalition.[14] All this shows that the consequences of a soft law text can be greater than initially expected and closer to the consequences feared. On the other hand, the normative expectations have to be dimensioned in the regional scope where the derivations of its non-application can be greater for a member State of the European Union, than they would be for the United States, which has turned its back on any international commitment of multilateral cooperation. So far, President Trump persists in his decision to build a wall as an ultimate solution to regional migration and to what he considers national security problems.

For all these reasons, in this study I will first deal with the final phase of the negotiation process that has led to the adoption of the Global Compact for Migration at the final intergovernmental conference in Marrakech and

[12] German Chancellor Angela Merkel would adopt a human rights approach in her speech, reiterating "our conviction that universal human rights apply to every individual in every country of the earth", «Speech by Federal Chancellor Dr Angela Merkel at the Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration in Marrakech on 10 December 2018», p. 1, available on Internet at https://www.bundeskanzlerin.de/bkin-en/news/speech-by-federal-chancellor-dr-angela-merkel-at-the-intergovernmental-conference-to-adopt-the-global-compact-for-safe-orderly-and-regular-migration-in-marrakech-on-10-december-2018-1560070.

[13] *See* United States Mission to the United Nations, "United States Ends Participation in Global Compact on Migration", available on Internet at https://usun.state.gov/remarks/8197, Gladstone, R., "U.S. Quits Migration Pact, Saying It Infringes on Sovereignty", *New York Times* (Dec. 3, 2017), available on Internet at https://www.nytimes.com/2017/12/03/world/americas/united-nations-migration-pact.html?rref=collection%2Fsectioncollection%2Fworld, last consulted on 31 July 2020.

[14] Wouters, J., Wauters, E., "The UN Global Compact for Safe, Orderly and Regular Migration: Some Reflections", *Leuven Centre for Global Governance Studies Working Paper Nº 210*, February 2019, p. 4.

ultimately to its adoption by Resolution 73/195 of the United Nations General Assembly. Secondly, I will examine the structure and legal nature of the Compact as a soft law instrument as well as the principles underlying it. I will also analyse and classify the objectives of the Compact and the actions with which the States must achieve them, distinguishing those that refer to migration management and those that refer to respect for human rights. I will conclude by assessing the institutional commitments undertaken that may lead to the adoption of mechanisms to monitor and promote compliance with the Compact in which the United Nations and the IOM are called upon to play an important role. In the conclusions, I will assess what possible future developments can be expected from the Global Compact for Migration from the perspective of soft law.

II. MODALITIES FOR THE NEGOTIATION OF THE GLOBAL COMPACT FOR MIGRATION

The New York Declaration on Refugees and Migrants was adopted at the United Nations General Assembly in Resolution 71/1 by all the States of the organization, with the ultimate aim of addressing the management of mass movements, whether of refugees or migrants.[15] The consensus that this resolution reached gave the instrument a special value that would feed the momentum of subsequent negotiations. However, it could not avoid the necessary segregation of powers and leadership in the Global Compact for Migration and the Global Compact for Refugees. As IOM had stressed, the Global Compact for Migration negotiations had been marked primarily by States, insofar as it was States that had taken the lead in the process and UN institutions had been at the service of their performance. With regard to sovereign powers, in the case of the Global Compact for Migration, the leading role could only be played by States. The ultimate objective of transnational migration management made it necessary to reconcile State sovereignty with the obligation to prevent damage and violations of the rights of persons who

[15] On the New York Declaration, *see* Genina, V., "Proposals for the Negotiation Process on the United Nations Global Compact for Migration", *Journal on Migration & Human Security*, Vol. 5, 2017, p. 682.

Paix et Securité Internationales
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migrate and those who are exposed to the dangers and threats they face in the migration *iter*.[16]

The negotiating modalities set out in Resolution 71/280 adopted by the General Assembly on 6 April 2017 marked the limits of the purpose of the intergovernmental conference to be held in Marrakech, as well as the distances from the Global Compact for Refugees by clearly stating that the two processes would be "separate, distinct and independent".[17] On the other hand, General Assembly Resolution 71/280 also noted that it would be through "principles, commitments and understandings among States" that it would achieve its objective of inspiring efforts to manage global migration, taking into account humanitarian, cooperation and human rights aspects. It would also build on the objectives already agreed upon in previous conferences and plans.[18] And in any case, an intergovernmentally negotiated and agreed outcome document, entitled "Global compact for safe, orderly and regular migration", whose scope is defined in annex II to Resolution 71/1 adopting the New York Declaration, should be passed.

Resolution 71/280 also recommended the creation of the post of Special Representative of the Secretary-General on International Migration, to which the Canadian Louise Arbour would eventually be appointed on 9 April 2017. Similarly, the President of the General Assembly was mandated to appoint two facilitators to promote regular consultations and the negotiation process among States and regional groups with the requirement that "the consultations and negotiations must be open, transparent and inclusive in order to promote

[16] While the existence of this obligation to protect persons who face risks and dangers during the migration process has yet to be established as discussed by KOSINSKA, A. M., MIKOLAJCZYK, B., "Does the Right to Migration Security Already Exist: Considerations from the Perspective of the EU's Legal System", *European Journal of Migration and Law*, Vol. 21, Issue 1, 2019, pp. 83-116.

[17] *See* Resolution 71/280 adopted by the General Assembly on 6 April 2017 on Modalities for intergovernmental negotiations of the global compact for safe, orderly and regular migration, Doc. *A/RES/71/280*, 17 April 2017.

[18] Such as the Agenda 2030 for Sustainable Development adopted by Resolution 70/1, the Addis Ababa Agenda for Action of the Third International Conference on Financing for Development, resolution 69/313, annex, and would build on the Declaration of the High-level Dialogue on International Migration and Development, adopted in October 2013, Resolution 68/4.

and strengthen Member States' ownership".[19] Finally, Juan José Gómez Camacho from Mexico and Jürg Lauber from Switzerland were appointed. The leadership exercised by the Presidents of the General Assembly has also been highlighted throughout the process – first, during the 72nd session, that of Miroslav Lajčák, from Slovakia, and then that of María Fernanda Espinosa Garcés from Ecuador during the 73rd session.

The negotiations took place in three phases, starting with a consultation phase in April 2017.[20] This first phase would be followed by a stocktaking phase starting in December 2017 and leading to the third phase of intergovernmental negotiations in which Draft Zero of 5 February 2018, Draft Zero Plus of April 2018 and the latest version of July 2018 that was adopted at the Intergovernmental Conference in Marrakech.[21]

In the consultation phase, a division of preparatory work was carried out according to thematic aspects and also to the specialization of the UN institutions. In the framework of the General Assembly, expert panels were established taking into account geographical balance as well as countries of origin, transit and destination of migration. The regional and subregional dimension of migration would also be addressed through a consultation of the regional economic Commissions.

Furthermore, in each of the United Nations offices, their human resources would be made available for reflection on the basis of their specialization. Thus, at the United Nations Office at Geneva, issues of a general nature but with a strong political content were examined by setting concepts and the framework of discussion to address the human rights of all migrants, irregular and regular migration, and international cooperation and management of migration and borders in all its dimensions. At United Nations Headquarters in New York, social and economic aspects would be addressed with a clear connection to the development dimension that should be clearly established in the final text and, in particular, its link to the Sustainable Development Goals adopted in 2015. The United Nations Office on Drugs and Crime (UNODC) in Vienna focused on issues such as the smuggling of migrants, trafficking in

[19] Paragraph 5 of Resolution 71/280.

[20] Resolution 71/280 establishes an agenda with three phases: a) Phase I (consultations): April to November 2017; b) Phase II (stocktaking): November 2017 to January 2018; c) Phase III (intergovernmental negotiations): February to July 2018.

[21] Draft Outcome Document of the Conference A/CONF.231/3, 30 July 2018.

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persons and modern forms of slavery, because of its experience and expertise in the implementation of the Palermo Convention on transnational organized crime and its protocols.

In this first phase of the negotiations, States would be consulted in particular on crosscutting. At the same time, their involvement would seek to fulfil the objective of inspiring their national policies through debate and also to ask them for a position on how to address these issues through international cooperation. Thus, they would be invited "to also take into consideration, in phase I, their perspectives with regard to the complex interrelationship between migration and sustainable development, as well as migration and all human rights, gender equality and the empowerment of women and girls, the needs of migrants in vulnerable situations, and perspectives involving migrant children and youth, including unaccompanied migrant children, in order to promote a comprehensive understanding of international cooperation and migration governance in all its dimensions".[22] However, issues of great importance and relevance to the human rights and well-being of the most vulnerable groups were left out, such as the thorny issue of the detention of unaccompanied minors and the alternatives that should be considered to such detention.[23]

The second phase of the stocktaking exercise began in December 2017 at the preparatory conference held in Mexico, in Puerto Vallarta, with funding from the host. This stocktaking exercise was conducted on the basis of the documentation prepared by the facilitators for the adoption of the preliminary draft and with the report prepared by the Secretary-General in consultation with IOM, entitled "Making Migration Work for All".[24] They contained the necessary recommendations and information presented to States as evidence

[22] *See* paragraph 20 of Resolution 71/280.

[23] In this sense, Marta Foresti criticizes the fact that the Compact "falls short of doing the right thing on something as important as child detention – where states could not agree to simply end detaining children, but rather to "ensuring availability and accessibility of a viable range of alternatives to detention in non- custodial contexts, favouring community-based care arrangement", véase FORESTI, M., "Long Live Multilateralism: Why the Global Compact for Migration Matters", *Refugees Deeply*, disponible en la Web https://www.newsdeeply.com/refugees/community/2018/07/19, last consulted on 23 March 2019.

[24] *Doc. A/72/643* de 12 de Diciembre de 2017, available on the Internet at https://undocs.org/en/A/72/643, last consulted on 31 July 2020.

of the need to reach a compromise at the intergovernmental conference in Marrakesh.

As we have already noted, the Marrakesh intergovernmental conference reached the adoption by consensus of the text submitted. However, this consensus was already diminished by the participation of only the 163 States that adhered to the agreed proposal. Some of the non-attending states became its opponents a week later, when they requested a vote within the United Nations General Assembly, where the Global Compact for Migration was adopted by 153 votes in favour, 5 against and 12 abstentions in its Resolution 73/195. The expressions of support and rejection that were made at the Marrakech Intergovernmental Conference and then in the General Assembly when this resolution was voted on will help us to assess the legal nature of the Global Compact for Migration, an issue that I will address in the following sections.

III. THE LEGAL NATURE OF THE GLOBAL COMPACT FOR MIGRATION

As noted above, the New York Declaration contained a mandate for the adoption of two soft law instruments whose objectives and scope would be defined in their annexes. The choice had been made for an instrument that would have no binding legal value, but which would nevertheless be negotiated as if it were a treaty, within an intergovernmental conference. The Vienna Convention on the Law of Treaties would certainly not apply, but General Assembly Resolution 72/244 on modalities for the Intergovernmental Conference for the Adoption of the Global Compact for Safe, Orderly and Regular Migration is extremely detailed on how the process of negotiation and adoption of this non-binding instrument should proceed. The instrument would, however, contain a series of "principles, commitments and understandings between States" on an expected behaviour that would relate to the management of migration in respect of basic human rights.[25] Thus the commitment should be translated, rather than into new obligations, into an understanding that cooperation is the only way to make this type of management possible:

> Recalling also that the global compact for safe, orderly and regular migration would set out a range of principles, commitments and understandings among

[25] As mandated by General Assembly resolution 71/280, p. 1. This resolution was adopted by consensus.

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> Member States regarding international migration in all its dimensions, make an important contribution to global governance and enhance coordination on international migration, present a framework for comprehensive international cooperation on migrants and human mobility, deal with all aspects of international migration, including the humanitarian, developmental, human rights-related and other aspects of migration, and be guided by the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda of the Third International Conference on Financing for Development and informed by the Declaration of the High-level Dialogue on International Migration and Development adopted in October 2013.[26]

Thus, the Global Compact for Migration, as a soft law instrument, had the mission of articulating the bases of a migration governance understood as a set of rules, a *lex migratoria* that should inspire multilateral cooperation as well as the coordination that should be assumed by the UN institutions for a management of human mobility in respect of human rights.

1. The Global Compact for Migration as a Soft Law Instrument

Recourse to soft law and to the broad repertoire of non-binding –but not devoid of legal character– instruments has become the most frequent option when consensus cannot be reached and consent is conditional on the provision of a wide margin of discretion by the State to preserve the national interest.[27] The instrument of soft law becomes in such cases the functional equivalent of international treaties. For this reason, a soft law instrument is chosen in negotiation processes where a limitation of sovereignty is foreseen through the proposal of measures that imply a progressive development of international law or that have to be developed in the domestic legal system. These conditions are present in the numerous soft law instruments that have been adopted in the field of migration in the last two decades, since the United Nations took up the challenge of articulating a global response, first, based on the migration and development binomial and, later, from multilateral cooperation for its management. In the case of the Global Compact for Migration, the soft law instrument reconciles the affirmation of the sovereignty of States to establish their national policies for managing migration, with the commitment

[26] *Ibid.*

[27] On soft law, *see* FAJARDO DEL CASTILLO, T., "Soft Law", *Oxford Bibliographies*, Oxford University Press, 2014, p. 1-40.

to prevent the harm suffered by migrants, through complementary multilateral and transnational cooperation for the management of mobility.

In the light of the soft law nature of the Global Compact for Migration, it is worth asking what its legal effects are in the light of general and particular international law, as well as its capacity to generate the necessary *opinio juris* in the process of forming customary norms. The soft law offers a normative way without primary obligations and without consequences derived from its noncompliance, but creating normative expectations that may result in expressions of greater legal intensity in the future. Ultimately, the normative intensity depends on the intention of the States parties, so that if their intention is to comply with the recommendations of the Compact, the latter can acquire a normative nature through its incorporation into domestic law, or into particular international law, as is the case with the European Union, in whose normative processes soft law is transmuted into enforceable norms.

Similarly, one may ask what are the functions of soft law that have been attributed to the Global Compact or which have been excluded in the light of the Declarations of the States adhering to the Compact at the Marrakesh Intergovernmental Conference[28] and on the basis of the explanations of a vote in the United Nations General Assembly.[29] From this point of view, these declarations convey to us the idea that the Compact has only succeeded in

[28] All the statements made are compiled on the Intergovernmental Conference website at https://www.un.org/en/conf/migration/statements.shtml, last consulted on 17 May 2019.

[29] On the value of these statements, Wouters and Wauters believe that "Every State that participated in the Intergovernmental Conference of Marrakech or in the discussion that culminated in the UNGA's endorsement resolution, was free to produce such a statement. This could take the form of a position statement ('explanation of position') or an explanation of vote. The procedural rules of the Intergovernmental Conference provided for the possibility of making a short explanation of vote before or after the vote, and this possibility is also provided for in the procedural rules of the UNGA. As such, this is not the same as an 'interpretative declaration': that concept refers to a statement made by a State signing or ratifying a treaty, which reflects the view of that State on the interpretation of a specific treaty provision. The following can be noted with regard to the status of the type of statements as made by Belgium in the UNGA. From an *international* legal perspective, such statements form a relevant element for the assessment of State practice and the *opinio juris* of States as part of the investigation into the existence of rules of customary international law. However, an explanation of position or vote to a treaty would not lead to fewer obligations under that treaty for the State concerned, as it does not constitute (in principle) a reservation. At the *domestic* level, such statements can be taken into account by national courts as relevant

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DOI: http://dx.doi.org/10.25267/Paix_secur_int.2020.i8.03

laying the foundations for a policy of cooperation informed by the minimum standard of rights rather than a set of emerging rules. These statements express not only interpretative nuances but also clear objections to the future crystallizing drifts of normative promises that many would see in the text.[30] For this reason, in view of the potential effects that the Global Compact for Migration may have, and in particular its influence on the future definition of sovereign competences, States have emphasized in their declarations those aspects of competence that cannot be affected by it and that must be preserved as part of an essential core of their sovereignty. For this reason, declarations can be distinguished and grouped according to the function of the soft law that they seek to inhibit or enhance.

Firstly, with regard to the role of soft law in promoting normative expectations and acting as a precursor to customary norms, States have issued declarations making it clear that the Compact is not intended to establish such norms and that it does not alienate the right of the State to decide who enters its territory in the same way that it does not give people a right to decide where to live or a right to migrate, let alone that migration is a human right in itself.[31] Nor would the Compact create legal categories that would distinguish between different types of migrants and grant them benefits accordingly.[32]

Secondly, soft law serves to support pre-existing norms through a *secundum legem* or *praeter legem* interpretation with which to set the scope of conventional and customary norms.[33] However, the position of States is clearly contrary to this trend that has been promoted and supported from academia and institutions to make use of soft law to clarify the content of human rights of

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interpretative information that may help them to determine the extent of the international commitment entered into by their country. ", WOUTERS, J., WAUTERS, E., *loc. cit.*, p. 13.

[30] Anne Peters "The text will thereby enjoy a much higher prominence than ordinary General Assembly resolutions. Still, the process does not give a decisive clue on the legal status of the resulting text" , PETERS, A., "The Global Compact for Migration: to sign or not to sign?", *EJIL: Talk!,* Noviembre de 2018, disponible en Internet en https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/, last consulted on May 15, 2019.

[31] *Ibidem*.

[32] In this regard, the Declaration of Finland, available on the Internet at http://www.un.org/en/conf/migration/assets/pdf/GCM-Statements/finland.pdf.

[33] This is expressed by Denmark in its Declaration, p. 4, available on the Internet at https://www.un.org/en/conf/migration/assets/pdf/GCM-Statements/denmark.pdf.

migrants. Hence the rejection by States of the use of soft law to determine the extent and understanding of how the human rights of migrants should be applied and respected, because they consider that it is contrary to the principle of sovereignty for other States or the bodies of international organizations in which they participate to impose on them an interpretation that they do not share or to whose adoption they have not contributed.

This does not prevent the intergovernmental negotiations from reaching an understanding on the scope and interpretation of the customary norms that make up the minimum standard of rights, which is in itself a valuable achievement, insofar as the attempts to adopt an interpretation of these rights by the Committees linked to the human rights conventional instruments have not always been well received by the States that consider that it is they and only they that are responsible for any normative and interpretative exercise that affects their competence. This is why it is necessary to highlight the declarations in favour of the minimum standard of rights in the sense that it should protect every human being regardless of where they are, without this implying that there is a human right to migration where it is desired.[34]

Thirdly, it is considered that soft law, regardless of the normative intensity attributed to it, can serve for the resolution of disputes and controversies between States, whatever the means chosen to do so,[35] and in this sense, the Global Compact for Migration will have to serve to overcome the existing differences between countries of origin, transit and destination regarding the fulfilment of obligations as problematic and disputed as those linked to the return of nationals to their countries of origin.[36]

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[34] *See* in this regard the Declaration by Denmark, which states, "Every human being has human rights. But migration is not a human right", *loc. cit.*, p. 2.

[35] This is a function that Gruchalla-Wesierski attributes to soft law, which characterizes it as "legal or non-legal obligations which create the expectation that they will be used to avoid or resolve disputes. They are not subject to effective third party interpretation, and their subject matter and formation are international in nature", Gruchalla-Wesierski, T., "A Framework for Understanding 'Soft Law'", *McGill Law Journal 30* (1984-1985), pp. 37-88, at p. 44.

[36] In this regard, Gallagher points out that "The Global Compact addresses some of the thorniest aspects of migration, marking out narrow but important areas of accord. The issue of return is one example. Subject to certain protections being in place, states are entitled to remove migrants who do not have a legal right to remain in their territory. But without cooperation from the country of origin, repatriation is invariably slow and often hostile. The Global Compact identifies the complementary responsibilities of countries of destination

Paix et Securité Internationales
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DOI: http://dx.doi.org/10.25267/Paix_secur_int.2020.i8.03

Nothing is said about the role that soft law can play as an authoritative criterion from which States can reach a common understanding or adopt a normative instrument at a later stage. This has been a successful practice in the past. Thus in the case of the European Union, the 20 Principles for Voluntary Return adopted by the Council of Europe were used by the European institutions and its Member States to negotiate and adopt the Return Directive.[37] And the Global Compact for Migration could be used as an authoritative criterion for future readmission agreements or partnership and development cooperation agreements promoting a policy of reintegration of legal and irregular migrants.

In any case, the practice of the States adhering to the Global Compact for Migration will ultimately determine its legal nature whether at the international, regional or domestic level, and as Dupuy pointed out with regard to soft law instruments it is necessary to observe the degree of discrepancy between what States accept and their subsequent practice.[38] Moreover, as some States

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and countries of origin to "facilitate[e] safe and dignified return and readmission, as well as sustainable reintegration". By doing this, it creates a framework that can be the basis of a genuine partnership. This won't solve the problem of return and reintegration, but it's much better than what we have now." *See* GALLAGHER, A., "3 reasons all countries should embrace the Global Compact for Migration", World Economic Forum, at https://www.weforum.org/agenda/2018/08/3-reasons-all-count, last consulted on 15 May 2020.

[37] *See* "The Twenty Guiding Principles on Forced Return", CM(2005) 40 final of 9 May 2005, adopted by the Committee of Ministers and prepared by the Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons and how they would be used as an authority criterion by the European Commission in the trialogue leading to the adoption of the Return Directive, FAJARDO DEL CASTILLO, T., "La Directiva sobre el retorno de los inmigrantes en situación irregular*", Revista de Derecho Comunitario Europeo*, Año nº 13, Nº 33, 2009, pp. 453-499, at p. 454.

[38] Thus Dupuy considers that"an accumulation of programmatic soft law instruments may help in the progressive affirmation of the emergence of a binding norm", but he comes to the conclusion that the "expressions of *opinio iuris* that are not sufficiently sustained by practice do not take us particularly far in terms of customary, and thus general, law-making", especially when there are discrepancies between what the state says and what it does, p. 459. DUPUY, P-M., "Formation of Customary International Law and General Principles", in BODANSKY, D., BRUNNÉE, J. y HEY, E. (Eds.) *The Oxford Handbook of International Environmental Law,* Oxford University Press, Nueva York, 2007, p. 459.

mentioned in their statements, in the case of the Global Compact for Migration its success will be measured by the growth of international cooperation.[39]

2. Objections to the Compact

The rejection of the Global Compact for Migration by those States that have participated in some stage of its negotiation has to be considered in the light of international law as an objection to the emergence of a potential customary norm.

The United States is the clear reference for objecting to the Global Compact for Migration, but it has not been the only one to formally consider itself as such, although it has set the trend in the ways in which the objection is carried out, due to the clarity with which it has been expressed. Likewise, its abandonment of negotiations can be considered from different approaches that also transfer the analysis to what would be the rules and principles that govern the processes of concluding international treaties and that can be applied *mutatis mutandis* to the process of concluding soft law. Thus, this early departure from the negotiating process can also be seen as a manifestation of its respect for the principle of good faith that governs the negotiation phase of an international instrument, even if it is a soft law instrument, and to the extent that the United States would adopt a belligerent position on the Compact after its departure.

The statement that the United States made at the time of leaving the negotiating process canonically fulfils the elements of an objection but is much more than that.[40] It is also an inventory of some of the objections the

[39] Thus in Bosnia-Herzegovina's statement, its Ambassador Milos Prica would point out that "…the success of Global Compact will be measured by its implementation on the ground. The more international on migration governance is seen, the higher percentage of migration will be safe , orderly and regular and the success in this field will be greater. But the long-lasting improvement and solution could be made only if the main causes of migration in countries of origin are succssfully resolved, in the world assists least developed and developing countriess in their economic development and technological transformation, post-conflict peacebuilding, if we reverse the process of climate change. Thus, we see the Global Compact on migration only as a first step in tackling this so important global challenge ", p. 3, available on the Internet at https://www.un.org/en/conf/migration/assets/pdf/GCM-Statements/bosniaandherzegovina.pdf , last consulted on 15 May 2020.

40 In its first paragraph, the statement says: "The United States did not participate in the negotiation of the Global Compact for Safe, Orderly, and Regular Migration ("the Compact"), objects to its adoption, and is not bound by any of the commitments or outcomes stemming

Paix et Securité Internationales
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DOI: http://dx.doi.org/10.25267/Paix_secur_int.2020.i8.03

United States has made to international human rights law by highlighting conventions it has not ratified[41] as well as its restrictive interpretation of the rights contained in them.[42] The defence of its sovereignty has led it not only to reject the Compact and its project of global governance of migration but also to undermine the New York Declaration by stating that

> We believe the Compact and the process that led to its adoption, including the New York Declaration, represent an effort by the United Nations to advance

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from the Compact process or contained in the Compact itself. The Compact and the New York Declaration for Refugees and Migrants, which called for the development of the Compact and commits to "strengthening global governance" for international migration, contain goals and objectives that are inconsistent and incompatible with U.S. law, policy, and the interests of the American people," *see* the National Statement of the United States of America on the Adoption of the Global Compact for Safe, Orderly, and Regular Migration, 7 December 2018, available in Internet at https://usun.usmission.gov/national-statement-of-the-united-states-of-america-on-the-adoption-of-the-global-compact-for-safe-orderly-and-regular-migration/?_ga=2.3841465.805335299.1596650243-1518615007.1596650243, last consulted on 20 July 2020.

[41] The United States notes, "The Compact's references to a range of international instruments that many countries have not signed or ratified creates a false sense of implicit international support and recognition for such documents. For instance, the United States has not signed or ratified many of the instruments cited, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of the Child, and several International Labor Organization (ILO) conventions (e.g., promoting decent work and labor migration)", National Statement of the United States of America... *cit.,* p. 2.

[42] In particular, the United States is critical that "The Compact mentions a "right to family life" and other rights to privacy and legal identity. We are concerned that the way these terms are used throughout the Compact creates false representations of the actual rights represented in relevant international human rights instruments. For instance:

• *Right to Family Life*: There is no "right to family life" as such – only a right not to be "subject to arbitrary or unlawful interference with his … family." (International Covenant on Civil and Political Rights (ICCPR) Art. 17).

• *Right to Privacy*: There is no absolute "right to privacy" in international law. The ICCPR only protects against arbitrary or unlawful interference with privacy.

• *Right to a Legal Identity*: There is no "right to a legal identity" as such. However, there is a "right to recognition everywhere as a person before the law," "right to a nationality" as articulated in the Universal Declaration of Human Rights (UDHR Art. 15(1)) and an obligation under the ICCPR to register "every child…immediately after birth" (Art. 24(2) (regardless of nationality/immigration status). National Statement of the United States of America... *cit., p. 3*.

> global governance at the expense of the sovereign right of States to manage their immigration systems in accordance with their national laws, policies, and interests. While the United States honors the contributions of the many immigrants who helped build our nation, we cannot support a "Compact" or process that imposes or has the potential to impose international guidelines, standards, expectations, or commitments that might constrain our ability to make decisions in the best interests of our nation and citizens.[43]

However, the United States has not been the only objector to the Global Compact for Migration but others have followed its example and clearly proclaimed it, as has Austria that:

> explicitly declares that the Global Compact for Migration is non-legally-binding under international law. The Global Compact for Migration shall not be interpreted as opinio juris or State practice for the emergence of customary international law, nor shall any general principle of law evolve from it. In such a case, Austria would have to be regarded as a persistent objector. Should any binding provision be created or adopted on the basis of the Global Compact for Migration, Austria will not be bound under international law to any such provision.[44]

In the same vein, the Czech Republic and Poland have reportedly stated before the General Assembly that they would also stress that the Global Compact for Migration "Nor should the Compact be treated as a point of reference for legal clarifications in any court proceedings".[45] To this, Poland "objects to the possibility of any State practice of customary soft law established based on the Global Compact for Migration".[46] It also adds that "the Compact will have no impact on our obligations or competences within the European Union".[47] In these statements, the scope of its objections aimed at undermining any legal consequences of the Compact that might be required of it under the principle of estoppel can be seen beyond doubt.

In other cases, the reasons that States have argued for disassociation from the Global Compact for Migration[48] have nothing to do with its content

[43] *Ibidem*.

[44] A/73/PV.60, p. 18.

[45] A/73/PV.60, p. 17.

[46] *Ibidem*.

[47] *Ibidem*.

[48] About them Anne Peters considers that "These excuses for standing aside seem pre-textual. The Compact does not contain any language obliging participating states to admit migrants.

Paix et Securité Internationales
ISSN 2341-0868, Num. 8, janvier-décembre 2020, pp. 51-94
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2020.i8.03

or are based on a biased interpretation of it that condemns it for creating unacceptable obligations such as the obligation to receive quotas for migrants - although these were never raised in the negotiations because this matter falls within the exclusive sovereign competence of the State. Nor can the elements of an objection be found among the statements charged with political demagogy; rather, this type of statement falls within the realm of politics, and not precisely international politics, but rather national politics through which certain leaders seek solutions to internal problems. Thus, among the arguments used to reject the Global Compact for Migration would be the pull effect that it could have on the countries that sign it or the security reasons under the long shadow of populism that countries like Hungary have projected.[49] In the latter case, it is more likely that its refusal is aimed at blocking any normative development that the Global Compact for Migration might have within the European Union, which would clearly result in a different legal nature for the commitments undertaken in the light of European law, and whose obligations and legal consequences would be those that Hungary would try to avoid.

IV. THE PRINCIPLES AND OBJECTIVES OF THE GLOBAL COMPACT FOR MIGRATION

1. The Principles and Approaches of the Global Compact for Migration

The principles of the Global Compact for Migration are reflected in the preamble initially proposed by the IOM[50] as well as in one of its main sections

Quite to the contrary, one of the Compact's objectives is "to cooperate in facilitating a safe and dignified return and readmission" of migrants. The states of origin "commit to ensure that our nationals are duly received and readmitted" (objective 21, para. 37)", *loc. cit.*, p. 2.

[49] *See* in this respect the Press Release of 6 November 2018 of the Hungarian Minister of Foreign Affairs and Trade, "The UN Global Compact for migration is endangering the security of the Hungarian people", available on the Internet in https://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/the-un-global-compact-for-migration-is-endangering-the-security-of-the-hungarian-people.

[50] *See* International Organization for Migration, Input to the UN Secretary General's Report on the Global compact for Safe, Orderly and Regular Migration, September 2017, available on Internet in https://www.iom.int/sites/default/files/our_work/ODG/GCM/Input1-IOM-Input-to-SG-Report-Structure-and-Elements.pdf.

under the heading *Our vision and guiding principles*.[51] The preamble refers to the principles and purposes of the Charter of the United Nations as well as to the major human rights conventions and declarations that form a body of general conventional and customary law from which the minimum standard of rights protecting all persons is drawn. This preamble also incorporates the principles derived from the commitments already made by States in the New York Declaration of 2016 and the Agenda 2030 for Sustainable Development. In addition to all these principles, there are also emerging principles derived from the soft law adopted over the last two decades in the area of migration.

Depending on their degree of adherence to the proposals of the Global Compact for Migration, States have chosen between the terms "principles" and "approaches" to record that when an approach is present it means that the legal nature of the principle on which it is based is in question. For this reason, the references made in the Compact to the principles deriving from the Charter of the United Nations and the main conventions on human rights and humanitarian law constitute a reaffirmation of all those accepted and consolidated principles that derive from a process of abstraction of pre-existing norms of conventional and customary law and that form not only the core of the minimum standard of rights but also what could be called a *lex migrationis*, understood as the set of rules of varying normative intensity that address the migration phenomenon. The principles of this *lex migrationis* would also have to be complemented by systemic principles with which to articulate the necessary relations with normative regimes in potential conflict

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[51] In its paragraph 15 (*Res. 73/195*, p. 3-5), it says "We agree that this Global Compact is based on a set of cross-cutting and interdependent guiding principles:

(a) *People-centred* […];
(b) *International cooperation* […];
(c) *National sovereignty* […];
(d) *Rule of law and due process* […];
(e) *Sustainable development* […];
(f) *Human rights* […];
(g) *Gender-responsive.* [...];
(h) *Child-sensitive* […];
(i) *Whole-of-government approach*. The Global Compact considers that migration is a multidimensional reality that cannot be addressed by one government policy sector alone. […];
(j) *Whole-of-society approach.* […]".

Paix et Securité Internationales
ISSN 2341-0868, Num. 8, janvier-décembre 2020, pp. 51-94
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2020.i8.03

or in potential synergy, such as international human rights law, international humanitarian law or development cooperation law.

The section of the Compact on *Our vision and guiding principles* brings together ten principles that "are cross-cutting and interdependent"[52] and, without fully responding to the definition of principles that we have used, they encompass the consolidated and emerging principles and approaches that inform migration management. Their enumeration with an ambiguous order as well as their formulation show that they are the result of an addition of recommendations and guidelines of a political nature that acquire greater force when they interact with the general principles of international law as well as those of international human rights law. Thus, Paragraph (a) introduces the guiding principle that the Compact is people-centred and as such is a recommendation that informs the Compact as a whole. Paragraph (b) refers to multilateral cooperation in that the Compact becomes its manifestation and through its expression attempts to marry the non-binding nature of the Compact with its authority to guide cooperation:

> (b) *International cooperation*. The Global Compact is a non-legally binding cooperative framework that recognizes that no State can address migration on its own because of the inherently transnational nature of the phenomenon. It requires international, regional and bilateral cooperation and dialogue. Its authority rests on its consensual nature, credibility, collective ownership, joint implementation, followup and review;

It should also be added that the Global Compact for Migration has been a confirmation of the principle of multilateral cooperation not only as an expression of support for multilateralism within the United Nations but also as a pragmatic acceptance that this is the only way to address the global phenomenon of migration. This principle would also have been complemented by the principle of shared responsibility by countries of origin, transit and destination following the positions promoted by France[53] and also

[52] *Ibidem*.

[53] Thus the Secretary of State, Jean Baptiste Lemoyne, would have declared that "Nous sommes tous concernés par le phénomène migratoire, que nous le voulions ou non: nous sommes tous, à un titre ou à un autre, pays d'origine, de transit ou de destination, parfois tout cela à la fois. C'est une illusion de penser que chaque Etat peut traiter seul le défi des migrations. C'est ce qu'affirme ce Pacte, fondé sur le príncipe de la responsabilité partagée entre pays d'origine, de transit et de destination –principe promu par le gouvernement français depuis 2017, et que la France a tenu à voir clairement figurer dans le Pacte. En endossant ce texte, nous affirmons

by the Human Rights Council in its resolution 35/17 "Protecting the human rights of migrants: a global compact for safe, orderly and regular migration"[54] which was adopted without a vote.[55] However, this shared responsibility was also resoundingly rejected by Russia on the grounds that it is only States responsible for past interferences that should assume this responsibility.[56] All this raises the problem of implementation and subsequent practice by States, which will be conditional on their capacity. During the voting process in the General Assembly, this was an issue raised openly by Singapore, which claimed that it could comply with the initiatives of the Compact only on the basis of its

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l'utilité d'une coopération internationale efficace et d'une concertation permanente entre les Etats concernés à tous les titres", *see* Intervention du Sécretaire d'État auprès du Ministre de l'Europe et des Affaires Étrangères 10 December 2018, pp. 2-3, available on the Internet in https://www.un.org/en/conf/migration/assets/pdf/GCM-Statements/france.pdf.

[54] In its paragraph 13 it says that it: "Also calls upon all States to adopt a comprehensive and integral approach to migration policies, to facilitate safe, orderly, regular and responsible migration and mobility of people, to cooperate at the international level on the basis of shared responsibility to harness fully the economic developments and cultural and social opportunities that migration represents, and to address efficiently its challenges in accordance with international human rights standards"; Resolution 35/17 adopted by the Human Rights Council on 22 June 2017. Protection of the human rights of migrants: the global compact for safe, orderly and regular migration, A/HRC/RES/35/17, available on the Internet in https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_HRC_RES_35_17.pdf.

[55] *See* the Draft resolution submitted by States members of the Council Belgium, Germany, Netherlands, Paraguay, Philippines, Portugal, Switzerland, as well as the following non-member States Bosnia and Herzegovina, Chile, Cyprus, Haiti, Honduras, Mexico, Peru, Romania, Sweden, Turkey, Ukraine, adopted by the Human Rights Council at its thirty-fifth session from 6 to 23 June 2017 to address agenda item 3 on the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, A/HRC/35/L.28.

[56] Thus Russia would have stated in the vote in the General Assembly that "We want to once again express our non-acceptance of the concept of shared responsibility, which in its current form merely implies putting the burden of hosting forced migrants on States that frequently have nothing to do with the reasons for the mass migration of peoples. We are not in favour of shifting the burden to others when the current complex migration situation is largely a result of irresponsible interference in the internal affairs of sovereign States in the Middle East and North Africa. In that context, the countries that actively participated in that interference should bear the first and greatest responsibility for its consequences, including those related to migration", *A/73/PV.60*, p. 13.

Paix et Securité Internationales
ISSN 2341-0868, Num. 8, janvier-décembre 2020, pp. 51-94
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2020.i8.03

capacity and resources.[57] On the other hand, there are States –such as Spain– that instead of using the term "principle" have preferred to use the term "approach" to refer to "a multidimensional approach of shared responsibility and solidarity", in an effort to dilute the potential obligation that the principle of multilateral cooperation may have.[58]

With Paragraph (c), the Principle of National Sovereignty is introduced although so many limits are mentioned that its formulation makes it clear that States have carried out their own interpretations of what this principle means in their declarations in the process of voting on Resolution 73/195. Thus it is said that:

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

By limits to the sovereign prerogatives of the State, we mean the affirmation that these will be exercised in accordance with international law and that

[57] Thus, "Singapore regards the global compact as a multilateral effort to improve the prospects for migrants and migration, and we will continue to participate constructively in such efforts. However, we can support them only within the constraints of our national circumstances. The reality is that Singapore is a small country and one of the most densely populated island States in the world, which creates unique constraints and circumstances for us. We believe that all countries have a sovereign right to determine the conditions in which migrants may enter, reside and take up employment in their territories in accordance with international law, including the applicable human rights obligations. We also believe that States have a sovereign right to decide whether and how to implement the operating principles and the policy options listed in the objectives of the global compact. As the international community seeks to address the underlying issues affecting people's safe, orderly and regular movement, we have to recognize and take into account the different national contexts, realities, capacities and levels of development of Member States and respect their national policies and priorities", *A/73/PV.60***,** pp. 13-14.

[58] *See* Speech by the President of the Government, Intergovernmental Conference on the Global Compact for Safe, Orderly and Regular Migration, Marrakesh, 10 December 2018, p. 2, available on the Internet in https://www.un.org/en/conf/migration/assets/pdf/GCM-Statements/spain.pdf, last consulted on 17 July 2020.

the Compact will also be implemented through the adoption of legislative measures on what is further elaborated in Paragraph (d) when referring to the rule of law and procedural guarantees it says that it " recognizes that respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance. This means that the State, public and private institutions and entities, as well as persons themselves, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and are consistent with international law.[59]

Sustainable development is also introduced as a principle and links it to the achievement of Agenda 2030 and the Sustainable Development Goals, reflecting the link between migration and development and the role that migration should play in achieving the objectives of the Global Compact for Migration.

The international human rights law is made not only as a limit to the exercise of sovereignty but also a source of obligations for States in the field of migration. Therefore, international human rights law will become the parameter of legality and incontestable legitimacy when it comes to examining the application of the Compact and making a judgment on the results achieved in accordance with the commitments made, because it is formulated in a more prescriptive manner than the other principles by stating that

> The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect for and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle. We also reaffirm the commitment to eliminate all forms of discrimination, including racism, xenophobia and intolerance, against migrants and their families.[60]

The gender perspective and the child perspective are intended to broaden the content of this international human rights law but already diminish the prescriptive nature of its wording except with regard to the best interests of the child. [61] It is also the case of the "pan-government" and "pan-social" approaches that become a way of approaching the migration phenomenon that

[59] *Ibidem.*

[60] *Ibidem.*

[61] *See* paragraphs (g) and (h).

Paix et Securité Internationales
ISSN 2341-0868, Num. 8, janvier-décembre 2020, pp. 51-94
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2020.i8.03

incorporates not only all levels of State government but also all social sectors involved in the migratory movements addressed by the Global Compact for Migration.[62]

These principles do not include any reference to the principle of non-refoulement as a principle of the Global Compact for Migration, and this is because its respect is only addressed in the framework of return and readmission as one of the issues on which States request to retain their competence. Thus, China, although it supported the Compact and voted in favour of it, expressly objected to the application of the principle of non-refoulement to migratory movements. Therefore, Objective 21 and the first Paragraph in which it is developed is diluted by the positions of the States even though they had committed themselves to it:

> […] 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. We further commit to ensure that our nationals are duly received and readmitted, in full respect for the human right to return to one's own country and the obligation of States to readmit their own nationals. We also commit to create conducive conditions for personal safety, economic empowerment, inclusion and social cohesion in communities, in order to ensure that reintegration of migrants upon return to their countries of origin is sustainable.[63]

2. The Objectives of the Global Compact for Migration

The Global Compact for Migration contains 23 objectives that are complemented by actions that are 'actionable' and that are considered good practices that States can carry out by incorporating them into their national policies as well as into their multilateral and institutional cooperation. However, this set of proposals suffers from enormous heterogeneity insofar as these objectives aim to map the most problematic aspects of migratory movements without a clearly perceived commitment to institutional concerted action to ensure their achievement.

[62] *See* paragraphs (i) and (j).

[63] *See* the Objective 21 of the Global Compact on Migration: Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration, paragraph 37.

Different classifications have already been applied to these 23 objectives, which we are going to present at the same time as making a proposal for our own classification. To do this, we will start with the 23 objectives of the Compact that we are reproducing below:

1. Collect and utilize accurate and disaggregated data as a basis for evidence-based policies.
2. Minimize the adverse drivers and structural factors that compel people to leave their country of origin.
3. Provide accurate and timely information at all stages of migration.
4. Ensure that all migrants have proof of legal identity and adequate documentation.
5. Enhance availability and flexibility of pathways for regular migration.
6. Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work.
7. Address and reduce vulnerabilities in migration.
8. Save lives and establish coordinated international efforts on missing migrants.
9. Strengthen the transnational response to smuggling of migrants.
10. Prevent, combat and eradicate trafficking in persons in the context of international migration.
11. Manage borders in an integrated, secure and coordinated manner.
12. Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral.
13. Use migration detention only as a measure of last resort and work towards alternatives.
14. Enhance consular protection, assistance and cooperation throughout the migration cycle.
15. Provide access to basic services for migrants.
16. Empower migrants and societies to realize full inclusion and social cohesion.
17. Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration.
18. Invest in skills development and facilitate mutual recognition of skills, qualifications and competences.

Paix et Securité Internationales
ISSN 2341-0868, Num. 8, janvier-décembre 2020, pp. 51-94
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2020.i8.03

19. Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries.
20. Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants.
21. Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration.
22. Establish mechanisms for the portability of social security entitlements and earned benefits.
23. Strengthen international cooperation and global partnerships for safe, orderly and regular migration.

Thus, Vincent Chétail distinguishes them in 5 groups according to the following criteria:

- Objectives that address the reasons for migration and invest in sustainable development (2, 19 and 20).
- Objectives relating to border management to facilitate safe and regular cross-border movements to prevent irregular migration (Objectives 4, 5, 9, 10, 11, 12 and 21).
- Objectives relating to the protection of the human rights of migrants and promoting their inclusion in host states (Objectives 6, 7, 8, 13, 14, 15, 16, 17, 18 and 22).
- Objectives that seek to strengthen international cooperation and global partnerships (Objective 23).
- Objectives concerning the improvement of data and information (Objectives 1 and 3).

On the basis of their classification and analysis, Chétail considers that a compilation and consolidation exercise of the objectives of the main soft law instruments has been carried out with them, without it being possible to consider that new ones have been incorporated, beyond carrying out proposals for national measures.[64]

For her part, Kathleen Newland groups the objectives into three baskets because of the challenge they represent, as follows:

- The first package would consist of the "specific and relatively uncontroversial measures, such as improving migration data (Objective

[64] Chetail, V., *op. cit.,* p. 333 y ss.

1), ensuring that migrants have proof of their legal identity (Objective 4), enhancing consular services for migrants (Objective 14) and facilitating remittance transfers (Objective 20)". [65]

- The second would address "specific but controversial issues, such as opening wider legal pathways for migrants".[66]
- The third would encompass the "very broad and aspirational goals, such as reducing the negative drivers of migration (Objective 2), addressing and reducing vulnerabilities in migration (Objective 7), empowering migrants and societies for full social inclusion and cohesion (Objective 16) and eliminating all forms of discrimination and promoting evidence-based public discourse (Objective 17)".[67]

The World Migration Report 2020 of the IOM classifies the objectives according to the difficulties in achieving them and taking into account the various reasons for them:

- Specific and relatively straightforward measures, (Objectives 1, 3, 4, 6, 8, 9, 10, 12, 14, 20, 22), that enjoy a wide support and that are "subject to immediate implementation – indeed, implementation has already begun on some, including on data collection and research, ethical recruitment and remittances, among others". [68]
- Specific but contested issues (Objectives 5, 11, 13, 15, 18, 21), that "will require further negotiation, commitment of resources and summoning of political will".[69]
- Very broad and aspirational goals (Objectives 2, 7, 16, 17, 19, 23), that "will indeed take time to realise".[70]

My proposal for a classification is directly linked to the soft law nature of the Global Compact for Migration and the fact that many of these objectives are ultimately aimed at determining how sovereignty is to be exercised within the national framework and, in particular, how public policies on migration and

[65] Newland, K., *loc. cit.,* p. 658.

[66] *Ibidem.*

[67] *Ibidem.*

[68] IOM, *World Migration Report 2020*, p. 298.

[69] *Ibidem.*

[70] *Ibidem.*

Paix et Securité Internationales
ISSN 2341-0868, Num. 8, janvier-décembre 2020, pp. 51-94
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2020.i8.03

border management are to be designed. Therefore, I propose a classification into three blocks according to whether the objectives lead to the adoption of global public policies, to the adoption of national policies and measures and, finally, according to whether the objectives are of a cross-cutting nature that connects them to the protection of human rights and the promotion of sustainable development. Thus, since the objectives have a national destination, it is necessary to distinguish the objectives that have a clear vocation to be developed in the internal order from those objectives that frame and develop multilateral cooperation. It is also necessary to add a third block of transversal objectives that address migration issues from their direct impact on human rights as well as the ultimate causes that lead to transnational mobility.

(A) Objectives for the formulation of global public policies for migration management (Objectives 1, 3, 7, 8, 9, 10, 14, 23)

In view of the need to manage migratory flows, the Objectives can be grouped according to whether they promote global public policies for migratory management, which in a second phase should be developed through the adoption of national public policies. In addition, the necessary information must be available in order to formulate these policies adequately. Thus Objective 1 contributes to generating the information and data needed to articulate a global policy, while Objective 3 aimed at providing accurate and timely information at all stages of migration that also fulfil this function but is equally intended to have a preventive and deterrent effect on irregular migration. Objectives 7, 8, 9 and 10 would address the dangers, threats and harm that migrants may suffer as a result of smuggling of migrants or trafficking in human beings.[71] Objective 14 promotes consular protection, assistance and cooperation throughout the migration cycle in an attempt to develop good practices and with the hope of future adoption of a convention on the subject.

The corollary of the measures aimed at adopting a global public policy for migration management would be Objective 23, which provides for "strengthening international cooperation and global partnerships for safe,

[71] *See* the German Chancellor's speech: "We cannot allow human traffickers and smugglers to decide on whether someone from one country should enter another, robbing poor people of their money in the process. Ultimately, this money is then used for drug trafficking or the purchasing of weapons, which in turn makes these countries even more unsafe", *loc. cit.,* p. 1.

orderly and regular migration", although it should be interpreted further so as to also address the reverse of what it seeks and avoid its negative effects. And by negative effects, we mean that the formulation of global public policies that restrict regular migration will necessarily lead to the growth of insecure, disorderly and irregular migration in the absence of open legal channels for unwanted migration. For this reason, in the third block, the objectives that seek to correct this problem by promoting sustainable development in the communities of origin are essential.

(B) Objectives to be achieved through the adoption of public policies and national measures (Objectives 4, 5, 6, 15, 16, 17, 18, 19)

Global public policies on migration should be developed through national action by formulating specific policies that address issues such as regular migration and the integration of legal migrants into host societies. This would be the case of Objectives 5, 6, 15, 16, 17, 18 and 19, which are a clear example of the measures that would make up a *public policy for the integration of migration*, as shown by the "Strategic Plan for Citizenship and Integration" mentioned by President Sánchez in Spain's speech at the Intergovernmental Conference, which he intends to adopt in order to "promote active policies for the integration of migrants, which contribute to creating more cohesive and inclusive societies".[72]

Among the practices to be adopted through national measures, there would be those requiring all persons to have identity documents (Objective 4), which would allow results to be achieved in terms of legal migration, control of irregular migration as well as aspects relating to internal and border security control, which will also be achieved through national measures in the second block. Similarly, and by virtue of the principle of state sovereignty, it is up to states to manage their borders securely while ensuring migration procedures "for adequate background checks, assessment and referral" (Objectives 11 and 12), which, in line with the principles, should be done in accordance with international law.

[72] Speech by the President of the Government, Intergovernmental Conference on the Global Compact for Safe, Orderly and Regular Migration, Marrakesh, 10 December 2018, p. 2, available on the Internet in https://www.un.org/en/conf/migration/assets/pdf/GCM-Statements/spain.pdf last consulted on 17 July 2020.

Paix et Securité Internationales
ISSN 2341-0868, Num. 8, janvier-décembre 2020, pp. 51-94
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2020.i8.03

(C) Cross-cutting Objectives relating to the protection of human rights, development cooperation and sustainable development (Objectives 2, 13, 19, 20, 21 and 22)

As I have already pointed out, this third set of objectives plays a fundamental role, not only because of a desire to respect and preserve the basic rights of all migrants, but also, and especially, those who will be denied legal migrant status, by adopting a policy of restricting regular migration, which is considered necessary for proper management in accordance with the capacities of the destination states and the needs of their labour markets. Therefore, given the need to preserve the human rights of those who participate in migratory flows but will not be able to benefit from legal migration channels, Objective 2 promotes the improvement of conditions for people to remain in their homes, Objetive 13 deals with the conditions of people who will be detained so that alternatives to detention are also sought, and Objective 19, 20, 21 and 22, although they may also refer to regular migrants, address the links of irregular migrants to their home states and communities to which they will return after expulsion, and the stigma of failure, by seeking to "facilitate safe and dignified return and readmission, as well as sustainable reintegration" (Objective 21). However, the problem of promoting voluntary return has not been addressed in a different way from what has been done in recent decades and has failed. The words of Louise Arbour in her final speech in Marrakech as the Special Representative of the Secretary-General on International Migration, while hopeful, do not contain a new formula or promises of change:

> And to the millions who have left their homeland, either recently or a long time ago, most of them in full compliance with the law, we have much more to offer: whether an opportunity to return home, after years abroad, taking back with them their skills and the fruits of their labour, or whether an increased chance to see their children having a better future in a country that they will be proud to call their home.[73]

To some extent, the cross-cutting objectives address the fact that the causes of disorderly, unsafe and irregular migration are found in both developmental problems and in the restrictive measures of regular migration imposed by

[73] On Internet in https://www.un.org/en/conf/migration/assets/pdf/GCM-Statements/closingremarksarbour.pdf last consulted on 18 May 2019.

developed countries.[74] Therefore, from the beginning of the negotiation of the Compact, these objectives would be marked by their relationship with the Sustainable Development Goals as well as with Agenda 2030.[75]

Finally, I would like to point out that these cross-cutting objectives have been the subject of various criticisms from the States that voted against or abstained, but also from those that voted in favour and wanted to show their disagreement with the type of measures proposed for achieving the objectives, because they considered that they exceeded their capacities and went beyond the responsibilities that they were prepared to assume. For this reason, and claiming the wide margin of discretion for States in determining their level of commitment, the United Kingdom would say, "it is for each State to decide whether and how they will follow these examples in developing their national policies".[76]

Objectives	**Global public policies**	**National public policies**	**Cross-cutting issues**
1. Collect and utilize accurate and disaggregated data as a basis for evidence-based policies	*		
2. Minimize the adverse drivers and structural factors that compel people to leave their country of origin			*
3. Provide accurate and timely information at all stages of migration	*		
4. Ensure that all migrants have proof of legal identity and adequate documentation		*	
5. Enhance availability and flexibility of pathways for regular migration		*	
6. Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work		*	
7. Address and reduce vulnerabilities in migration	*		
8. Save lives and establish coordinated international efforts on missing migrants	*		

[74] Thus, Anne Peters criticizes "the responsibilities of the states of origin to improve living conditions so as to forestall the desire or need for migration are not mentioned in the Compact; neither is overpopulation", Peters, A., *loc. cit.*, p. 2.

[75] *See* in this sense Guild, E.,"The UN's Search for a Global Compact on Safe, Orderly and Regular Migration", *German Law Journal,* Vol.18, N°7, 2017, p. 1780.

[76] A/73/PV.60, p. 23.

Paix et Securité Internationales
ISSN 2341-0868, Num. 8, janvier-décembre 2020, pp. 51-94
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2020.i8.03

9. Strengthen the transnational response to smuggling of migrants	*		
10. Prevent, combat and eradicate trafficking in persons in the context of international migration	*		
11. Manage borders in an integrated, secure and coordinated manner		*	
12. Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral		*	
13. Use migration detention only as a measure of last resort and work towards alternatives			*
14. Enhance consular protection, assistance and cooperation throughout the migration cycle	*		
15. Provide access to basic services for migrants		*	
16. Empower migrants and societies to realize full inclusion and social cohesion		*	
17. Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration		*	
18. Invest in skills development and facilitate mutual recognition of skills, qualifications and competences		*	
19. Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries	**		*
20. Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants	**		*
21. Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration	**		*
22. Establish mechanisms for the portability of social security entitlements and earned benefits	**		*
23. Strengthen international cooperation and global partnerships for safe, orderly and regular migration	*		
* Objectives that fall into one of the above categories ** Objectives of a transversal nature that could also inspire global public policies from normative sectors such as international human rights law or international development cooperation law			

Table prepared by the author

V. A SOFT INSTITUTIONAL SYSTEM FOR THE GLOBAL COMPACT FOR MIGRATION

In accordance with the soft law nature of the Global Compact for Migration, the institutional system that will accompany it will also have a soft nature, based on the institutional synergies that are expected to be developed through joint and intersectoral action by the UN and IOM, as well as a system of summits that will be held every 4 years to evaluate the results achieved. It is in this system of summits that "the implementation and review of the Compact will be State-led and State-owned, though open to the participation of relevant stakeholders".[77]

This institutional system also fills a gap[78] in the coordination and distribution of mandates and competences in migration management of international institutions and which is addressed by the New York Declaration and the Global Compact for Migration by giving IOM a leading role in the management of the most relevant issues in cooperation on mobility, while the role of the United Nations High Commissioner for Refugees with its consolidated structure would be reflected in the Global Compact for Refugees.

1. The role of the International Organization for Migration

IOM joined the group of international organizations belonging to the United Nations family in July 2016,[79] on the occasion of the adoption of the New York Declaration, with the aim of becoming one of its specialized agencies and leading the future of the Global Compact for Migration. The cooperation between the UN and the IOM was sealed by Resolution 70/296, which strengthened the legal and working relationship between the two, while recognizing the IOM's status as the leading global agency in the field of migration.

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[77] *See* the explanation of vote of Bangladesh, *A/73/PV.60*, p. 19.

[78] Years ago, Betts criticised this gap pointing out "there is a lack of clear division of responsibility among international organisations for protection of vulnerable migrants, especially on an operational level. These gaps pose problems both because they lead to unfulfilled protection needs and to a lack of guidance for states on how to respond to these protection needs", Betts, A., *loc. cit.,* pp. 335-336.

[79] *See* Guild, E., Grant, S. & Groenendijk, K., "IOM and the UN: Unfinished Business", *School of Law Legal Studies Research Paper* No. 255/2017, Queen Mary University of London, 2017.

Paix et Securité Internationales
ISSN 2341-0868, Num. 8, janvier-décembre 2020, pp. 51-94
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2020.i8.03

Now, this organisation, which is headed by the former Commissioner for Home Affairs of the European Commission, Antonio Vitorino, will also be responsible for setting up the United Nations Migration Review Network, which will serve as its Secretariat. In this Network, states and organizations will have to address cross-cutting issues and management aspects. The expertise that IOM has developed over the years will be essential to this process and will be used to coordinate the network effectively, avoiding duplication of effort and working in synergy with the United Nations development system.[80]

It was surprising, however, that the International Labour Organization had not been given a greater role and that greater recognition had not been given both to its conventional instruments on regular migration and to the soft law instruments already adopted by that organization, which could have served as the necessary reference for certain issues relating to the integration of migrants into the labour market. One possible explanation for this would be the need to find a unitary solution at the institutional level to the fragmentation of the rules covering the migration phenomenon, which extends to treaty rules on human rights, humanitarian law, labour law and international criminal law. It is thus hoped that the institutional action of IOM and the structures arising from the Compact will address the problems of institutional fragmentation that would result from having to distribute tasks to each of the competent international bodies in specific cross-cutting areas. This question will have to be answered in practice, and in the way IOM will address the aspects relating to the human rights of migrants that have hitherto been dealt with by treaty bodies such as the Committee against Torture, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination or the High Commissioner for Human Rights.[81]

States also expressed their expectations of IOM by mentioning in their Marrakesh Declarations and explanations of vote in the General Assembly what they expected of IOM: from road maps to a greater role in managing crises as they occurred. They also expect that:

> The IOM will serve as the coordinator and secretariat of all constituent parts of the Network. We hope that the Network will function transparently and inclusively. On the question of operation, the Network should take into consideration the views and concerns of Member States and make full use of

[80] 60th Session, p. 15.

[81] *See* OHCHR and Migration, http://www2.ohchr.org/english/issues/migration/taskforce/.

> the expertise and capacities of its United Nations members, fully respecting their various mandates.[82]

On the other hand, the States participating in the negotiation process of the Global Compact for Migration showed clearly enough their desire not to develop traditional mechanisms leading to the evaluation of their behaviour[83] and therefore to the responsibility derived from it, which is the price to be paid for a compact whose ultimate aim is to influence the way in which States will exercise their internal competences in the field of migration. That was why the establishment of the International Migration Review Forum would be proposed as early as at the seat of the General Assembly.

2. The International Migration Review Forum

Following the adoption in Marrakech of the Global Compact for Migration, the General Assembly would also decide to contribute to the follow-up process. This would give concrete expression to Paragraph 49 (a) of the Compact by stating that, "since international migration requires a global forum in which Member States can review progress in its implementation and guide the work of the United Nations, the Heads of State and Government and High Representatives will decide that the high-level dialogue on international migration and development scheduled to take place every four sessions of the General Assembly should be reconvened and renamed the 'International Migration Review Forum', beginning in 2022".[84] Until that time, much remains to be decided as, in accordance with Paragraph 54 of the Global Compact, the President of the General Assembly will be requested to initiate and conclude in 2019 open, transparent and inclusive intergovernmental consultations to determine the specific modalities and organizational aspects

[82] *See* the statement of Bangladesh, A/73/PV.60, pp. 19-20.

[83] Ambassador D. Donoghue pointed out that "From the negotiations on the GCM, and also on the preceding New York Declaration, it is clear that in certain parts of the world there is little appetite for international scrutiny and accountability in relation to migration policy and commitments. This is a political reality with which we must live, and Marrakech provided renewed evidence of it. The UN will have a delicate task to perform as it tries to support states in their implementation of the GCM, treading a line between respecting national sensitivities and maintaining a clear focus on the many commitments entered into by states in this agreement", D. Donoghue, "The UN system needs to rise to the challenge", in ODI, https://www.odi.org/blogs/10712-163-states-just-approved-global-compact-migration-now-what.

[84] *See* A/73/PV.60, p. 2.

Paix et Securité Internationales
ISSN 2341-0868, Num. 8, janvier-décembre 2020, pp. 51-94
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2020.i8.03

of the International Migration Review Forum and to determine how regional reviews and other relevant processes will contribute to the deliberations of the Forum, as a means of further enhancing the effectiveness and overall coherence of the follow-up and review activities identified in the Global Compact.[85]

In 2022, when it first meet will be the moment of truth for the Global Compact for Migration, because the Forum will examine the information that States will have had to provide periodically on its implementation. It will then, and thanks to this, be when States as the ultimate judges of the process will be constituted as an intergovernmental Forum where they will discuss and present the progress made in the implementation of all aspects of the Compact and where they will identify the best practices at the different levels of its application: local, national, regional and global. This will also be the time to "identify opportunities for further cooperation".[86] It will be on this global platform that it will become clear that the Compact does not provide for sanctioning mechanisms but only for extremely soft ways of promoting compliance that are to the liking of States, without accountability and without sanctions. Any attempt to hold States accountable for their actions will be on the basis of their degree of compliance with the international instruments for the protection of human rights that will be required of them in the context of the exercise of their national sovereignty, which must always be carried out "*in accordance with international law*".

VI. CONCLUSIONS

It has not been altruism or humanism but the selfishness of national interest[87] that has led to the acceptance of a proposal for a Global Compact for Migration, unthinkable if it were not for the context of the global

[85] Therefore, once decisions are taken on the modalities, format and organization of the forums in 2019, in accordance with paragraph 54 of the Global Compact, the Secretary-General will submit the corresponding costs of such requirements, pursuant to rule 153 of the rules of procedure of the General Assembly.

[86] *See* Paragraph 49, letter d) of the Global Compact on Migration.

[87] Thus, for example, the German Chancellor will point out that Germany's interest is in the skilled workers it needs, saying "So we will be reliant on legal migration as far as qualified experts are concerned and will need to talk to other countries about what is in our interests", *loc. cit.,* p. 1.

migration crisis, which cannot be addressed through individual or unilateral responses as the United States wants. With enormous differences distancing the positions of the States that have adopted it, the Compact becomes the source of the new rules of the game for the management of a problem that past formulas have only made worse. These differences are bridged thanks to the principles that, although they are enshrined in the United Nations Charter and in international human rights law, are now being redefined through the affirmation of multilateralism and "the approach of shared responsibility and solidarity". In this way, both the countries of destination and the countries of origin of the former colonies in Africa, the Pacific and the Caribbean, as well as those in Asia and Latin America, which had always wanted to see recognition of the past in migration policies, have accepted a framework of reference from which to choose agreed formulas with which to resolve common problems.

That is why the process of negotiating the Global Compact for Migration has itself been an achievement of the sovereign States, guided by the UN and the IOM. And from this process an understanding has emerged on what global migration governance should be, as multilateral cooperation for the management of massive migratory flows through a global public policy inspired by "principles, understandings and commitments" that guarantee the respect of the minimum standard of rights of all migrants, in accordance with general international law. This common understanding will serve to consolidate a *lex migrationis* through the practice of States, which in recent decades has been shaped by the numerous normative and soft law instruments that have been adopted in a fragmented manner in the various international bodies.

From a legal point of view, this *lex migrationis,* although formulated in a soft law document, is not lacking in ambition; on the contrary, it will be the normative horizon for cooperation between States, as well as the model for the reformulation of fundamental concepts for all national migration policy, however isolated it may be from the legal influence of conventions and customary norms. Because the Global Compact for Migration incorporates concepts, standards, principles that potentially have the capacity to redefine sovereign competencies, making them the expression of a more humanized sovereignty. For this reason, States have sought to prevent such effects by reaffirming their sovereign rights to establish their migration policies. For this

Paix et Securité Internationales
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DOI: http://dx.doi.org/10.25267/Paix_secur_int.2020.i8.03

reason, one of the innovative contributions of the Compact is to adopt a bottom-up approach that is based on the proposal of each State and that must be respectful of the principle of State sovereignty by virtue of which the State claims exclusive competence to develop its national policies for the management of migration and its borders, albeit "in accordance with international law".[88]

The rule of law[89] in the framework of the Global Compact for Migration takes on a new meaning insofar as it enshrines a limit to State sovereignty that is no longer contested, such as the procedural guarantees due to all persons regardless of their legal status. Thus, making explicit their value, procedural guarantees are the only limits accepted by States in the exercise of their sovereignty and are also the substance of the minimum standard of rights recognized in every person.

With the Global Compact for Migration, the first steps have also been taken to create a soft institutional structure, a new architecture for institutional and inter-State cooperation that will be led by the IOM and that will help to design and consolidate. Criticizing the soft governance established by the Global Compact for Migration when none of these existed before necessarily leads to a negative judgment about the institutional weakness of multilateralism. However, it has always been through soft formulae that the foundations have been laid for what in time would become mechanisms for promoting and monitoring multilateral compliance, saving unilateral or regional attempts to make a vision prevail. The achievements made at the Marrakesh Conference and at the United Nations General Assembly must now be consolidated with the development in the coming years of monitoring bodies with which to achieve the cohesion and continuity that it has not been possible to achieve through the many regional forums that have followed one another over and over again and where results have never been achieved over an adequate institutional structure. These soft mechanisms for monitoring compliance with the Compact will be based on voluntary and concerted action

[88] As President Pedro Sanchez would recall in his statement that "States have the right to define their own migration policies and defend their borders but not to violate internationally recognized human rights", *loc. cit.*, p. 2.

[89] On the concept of the rule of law in international and European law, *see* as a reference work, Liñán Nogueras, D. J; Martín Rodríguez, P. J. (Dirs.), *Estado de derecho y Unión Europea,* Tecnos, 2018.

of varying profile in the International Migration Review Forum, where good practices and success stories will be selected which, in addition to avoiding any responsibility or prosecution for failures, will highlight the commitments that are achieved.[90]

As Louise Arbour said, 'yet the drawings of lines on maps have never sufficed to confine people whose needs, ambitions, dreams and opportunities expanded their horizons'.[91] However, one of the issues that has not been addressed is the cause-and-effect relationship on irregular migration of the increasing reduction in legal migration channels.[92] During the economic crisis, many countries, including Spain, left their quota of immigrant labour at zero. Therefore, in the future, the implementation of the Global Compact for Migration should mitigate the formulation of global public policies that restrict regular migration, which will necessarily lead to the growth of insecure, disorderly and irregular migration in the absence of open legal channels for unwanted migration. It will then be necessary to demonstrate that the ultimate objective of the Global Compact for Migration is not the containment of migratory flows but their humanised management in accordance with international law.

[90] In this regard, Ambassador Daniel Donoghue would have pointed out that "Monitoring a non-binding agreement with no agreed benchmarks or targets is, of course, challenging. However, in addition to the four-yearly International Migration Review Forum, there will be a number of other processes that will enable us to keep track of implementation on an on going basis. The Global Forum on Migration and Development will provide space for informal exchanges. Regional platforms and processes will have a role to play (bearing in mind that most migration takes place within regions). And fora such as IOM's International Dialogue on Migration will also make an important contribution, helping to disseminate best practices and innovative approaches. Altogether these fora will, I hope, facilitate detailed monitoring and evaluation of the steps being taken by states to implement the GCM. The emphasis should be on mutual support, lesson-learning and partnership", "The UN system needs to rise to the challenge", in ODI... *cit.*

[91] Arbour, L., "Statement by Louise…" *cit.,* p. 2.

[92] In this sense, Foresti, M., *loc. cit.,* p. 2.

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SOMMAIRE / Janvier -Décembre 2020 / Nº 8