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# From Zero (draft) to Hero? An analysis of the human rights protections within the Global Compact for Safe, Orderly and Regular Migration (GCM)

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## ABSTRACT

This article examines the Global Compact for Safe, Orderly and Regular Migration (GCM) from three perspectives: First, while the GCM is not legally binding, the human rights obligations of states which underpin the GCM are. The application of international human rights law to everyone, including migrants, has led to frictions in the inter-governmental negotiation process, with some states declining to sign the GCM. States cannot relieve themselves of the human rights obligations to which they are already, voluntarily, bound by refusing to sign the GCM. Second, the GCM asserts the human rights of migrants, and by implication condemns state practices contrary hereto, but it also yields to political sensitivities. Thus, we encounter a Compact that defends existing human rights standards, but concurrently submits to political will and tolerates conditions of vulnerability. Third, the GCM's implementation depends upon, as yet undefined, partnerships with non-State actors and monitoring against human rights standards.

**Keywords:** Global Compact on Migration; cooperation; migration; human rights

## 1. INTRODUCTION

Two UN agreements,<sup>1</sup> both entitled “Compacts” were adopted by the UN General Assembly on 17 and 19 December 2018 (UN News, 2018b). A UN Resolution of 19 September 2016 had called for their negotiation (UN General Assembly, *New York Declaration*, 2016) - one on refugees, the other calling for safe, orderly and regular migration (the GCM). While at the commencement of the intergovernmental negotiations in December 2017, the USA had formally withdrawn from the GCM stating that it was inconsistent with US state sovereignty in the field of borders and immigration control, the international community was taken by surprise by a rush of state defections from the GCM from November 2018 onwards (France 24, 2018). The sudden anxiety of a number of states, mainly in Europe, about the consequences of the GCM for their state sovereignty followed a fairly uncontentious negotiation of the contents of the GCM from January to July 2018. Thus, the flurry of negative voices came as something of a surprise to the international community.

At the final vote on 19 December 2018 at the UN General Assembly of 194 states only five voted against the GCM – the Czech Republic, Hungary, Israel, Poland and the USA (noticeably the majority within the European Union) (UN General Assembly, 2018b) Another seven abstained from the vote (Austria, Bulgaria, Chile, Dominican Republic, Italy, Latvia and Romania – again, the majority EU Member States) (Ibid, 2018b). One government coalition fell as a result of the Prime Minister’s insistence to sign the GCM

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(Belgium), though the major party continues to govern in a minority position (ABC News, 2018).

This turmoil surrounds the adoption of an instrument entitled a Compact – a new form of UN agreement, which is expressly stated not to be legally binding.<sup>2</sup> So much controversy for an agreement which does not have legally binding effects on states seems somewhat unusual. The GCM expresses the political will of those states which sign it. The relationship between the expression of political will at the international level and the consequences for state sovereignty in the form of border and immigration controls in national law has clearly excited concern among a number of states. In this article, however, we will develop the relationship between the GCM's cooperative framework and the legally binding international human rights instruments on which it is built. As the GCM states: "The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination." (UNGA, Global Compact on Migration, 2018a). What does this mean in terms of the commitments and the objectives? This is our objective here.

This article examines the Global Compact for Safe, Orderly and Regular Migration (GCM), the more contentious of the two Compacts, from the perspective of its contents and its relationship with pre-existing human rights obligations of states. Our premise is that the GCM was, from the outset, designed and solemnly declared to do no more than provide a cooperative framework on migration within which states could rely on common commitments arising from pre-existing UN human rights obligations.

We will demonstrate this in a number of steps. First, we will look at what a cooperative framework is and the ambiguity which the use of the title "compact" has introduced. One of the things which this new terminology does is provide a way to designate mobilization beyond state actors – the move of migration softly beyond the grip of (central) state actors. Hence, less of an ambiguity, than the will of the UN to move beyond state actors.

Secondly, we will carry out an examination of the principles and legal basis of the GCM from the perspective of pre-existing state human rights obligations as guaranteed under the most widely signed and ratified UN conventions, such as the Convention on the Rights of the Child and the Convention against Torture. Thereafter, we will briefly examine the contents of the GCM – what its objectives are and how they reflect the existing state of international human rights law.

In the next section we will look at one of the original aspects of the GCM, one which has come under no criticism by those states which have publicly refused to sign the GCM because of their concerns about sovereignty in border and migration governance (McAdam and Goodwin-Gill, 2018; Peters, 2018). This aspect concerns the actors specified in the GCM, as negotiated by states, who will be responsible for implementing parts of the GCM objectives. Of course, as an intergovernmental agreement, the delivery of results under the GCM is the responsibility of states. However, the GCM indicates which responsibilities under the GCM will be devolved to regional and local government, and even to private actors, non-governmental organizations and faith-based organizations.

Finally, we will draw some conclusions from our research regarding the potential impact of the GCM as a new form of international agreement in the field of migration. It is also a research path forward, emphasizing how the operationalization of the GCM (i.e. indicators), must be in compliance with human rights obligations and respect these obligations as their baseline for the review mechanisms 2022.

## 2. THE GLOBAL COMPACT ON MIGRATION: A COOPERATIVE FRAMEWORK

The New York Declaration contained over 30 references to human rights. The GCM has 45 references. It states that it rests on the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other core international human rights treaties (footnoted) (GCM, para 2). But it also rests, according to paragraph 2, on international criminal law, the two Palermo Protocols against trafficking and smuggling of human beings, the Slavery Conventions, international climate rules, ILO labour law conventions and the UN sustainable development commitments (GCM, para 2). This is quite a menu of international obligations. As the former UN Special Representative on Migration, Peter Sutherland, one of the architects of the Resolution, stated:

The global compact on migration could bundle agreed norms and principles into a global framework agreement with both binding and non-binding elements and identify areas in which States may work together towards the conclusion of new international norms and treaties (UNGA, 2017).

Historically, the framework of the GCM is founded in UN development, in particular Goal 10.7 of the Sustainable Development Agenda 2030: “Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well managed migration policies” (UNGA, 2015). The language of the objective will change from the “orderly, safe, regular and responsible migration” of the 2030 Agenda to “safe, orderly and regular migration” in the GCM. The loss of responsibility is a pity as it clarifies the consequence of states failing to work together to achieve safe, order and regular migration.

The choice of a “compact” as a form of international agreement was new for the UN in 2016. The term compact had only been used for a Global Compact on business contribution to the SDGs, environment, social and governance. (United Nations, 2004). It has subsequently been used by UN institutions as a form of agreement among parts of the UN. The document itself, referred to as an agreement at least by some parties, (Fella, 2018) states clearly that it is a “non-legally binding, cooperative framework” and that states have the “sovereign right...to determine their national migration policy... in conformity with international law” (GCM para 7). Thus, the compact does not create legal obligations, they exist as a result of international law. But the compact does create political obligations among the states. The principle of a cooperative framework is a political commitment towards border and migration management as a shared responsibility among states.

## 3. ANALYSIS OF THE PRINCIPLES AND LEGAL STATUS ON THE COMPACT

Among the most contentious issues regarding the GCM is its status. An oddly configured campaign in some Global North and European states in 2018 against the GCM resulted in a number of defections by EU states (including the Slovak Republic, which holding the presidency of the UN General Assembly at the adoption of the process, resulted in the departure of the minister for foreign affairs, Miroslav Lajčák, who had described the

compact as the “first comprehensive framework on migration the world has even seen” (Lajčák, 2018).

The USA was the first to give notice of its refusal to sign up to the GCM in December 2017 at a highly mediated presentation at the Mexico conference, at which the consultation period was to end (United States Mission to the United Nations, 2017). A silence then ensued until October 2018 when the Hungarian Prime Minister pulled out (Hungarian Ministry of Foreign Affairs and Trade, 2018) followed by statements against the Compact by political leaders in Austria (Austrian Internal Ministry, 2018), Bulgaria (New York Times, 2018), the Czech Republic (Reuters, 2018b), Slovakia (Reuters, 2018a), Australia (Remeikis and Doherty, 2018), Israel (Jerusalem Post, 2018) and, in Latin America, the Dominican Republic (SIN noticia, 2018) and Chile (Reuters, 2018c). Meanwhile, there was political uproar in Switzerland, a co-facilitator of the GCM, though in the end it signed the agreement (Swiss Info, 2018); the Brazilian president elect gave notice that he would not participate (Agencia Brasil, 2018) and in Belgium, the Prime Minister signed up to the GCM resulting in the dissolution of his coalition government (Royan, 2018).

It is not clear how the campaign against the GCM began or why it was able to get so much traction. The damage appears to be greatest in the European Union where a hard core formed against to GCM in Central and Eastern Europe, but also Austria and Italy, led, according to former Belgian Prime Minister Guy Verhofstadt, by Austria (Verhofstadt, 2018). Other countries against the GCM seem to be more disparate – Israel’s legislative initiative that the country is a Jewish state is undoubtedly related to its reluctance to imagine migration as a shared responsibility (Liberty Nation, 2018). Australia’s difficulties with its extraterritorial asylum policy was undoubtedly at the heart of its reluctance to participate in any international process (Karp, 2018).

But what is the issue? At the centre of all the arguments by dissenting states is the question of state sovereignty. The most grotesque of the claims is that the GCM will create a right to migrate. At the more nuanced end of the spectrum is the claim that the Compact will constrain national sovereignty in regards to measures on borders and migration. What was the response to these fear and concerns from the international community? Louise Arbour, the UN’s Special Representative on Migration, in an interview with the Associated Press expressed her disappointment with those countries reneging on their commitments, stating that there is nothing to sign in any event and, further, that the Compact does not oblige states to do anything that they do not want to do (Lederer, 2018). This argument is based on the wording of the text of the GCM that it is a non-legally binding, cooperative framework. According to the former President of the UN General Assembly, Miroslav Lajčák, “it does not encourage migration, nor does it aim to stop it. It is not legally binding. It does not dictate. It will not impose, and it fully respects the sovereignty of States” (UN News, 2018a). Yet, it consolidates existing human rights obligations and iterates the principle of non-regression and non-discrimination. States must comply with their human rights obligations including in respect of migrants and are prohibited from discriminating against migrants (or between them).<sup>3</sup>

So, where does this rather arcane debate with profound international consequences come from? The text of the GCM states clearly that it is a non-legally binding, cooperative framework “which fully respects the sovereign right of states to determine their national migratory policy in conformity with international law” (GCM, para 7). On the other hand, the GCM is also based and founded on international human

rights law. This is composed of the international human rights treaties, such as the UN Convention on the Rights of the Child 1990 signed by 196 states, (ergo the whole world) and the other UN human rights treaties (of which there are ten). At the commencement of the GCM process, the NY Declaration stated clearly that human rights were a foundation for the two compacts whilst confirming that neither compact would go beyond the existing commitments of states under their human rights and refugee obligations already voluntarily accepted (UNGA, 2016). Thus, while the GCM is not legally binding, the human rights undertakings of states which underpin the GCM are. States cannot relieve themselves of the human rights commitments (including extending them to migrants) which they have bound themselves by signing and ratifying international agreements, by refusing to sign the GCM.

The GCM does not create any new rights but only brings together existing rights providing a cooperative framework to work towards their better implementation for a specific category of people – migrants (always remembering that one country's migrant is another country's citizen). It is the application of international human rights law, enshrined in the international conventions, to everyone, including migrants, which creates the friction; despite the fact that these existing conventions already ensured the non-discrimination of human rights. The objective of international human rights conventions is to set a baseline below which no state can go in its treatment of people (including migrants). The classification of people as irregular migrants does not exclude them from the class of people entitled to protection under international human rights conventions, such as the Convention on the Rights of the Child.<sup>4</sup>

The GCM does no more than provide a cooperative framework within which states can work together to assure the delivery of human rights protection. The obligations of states come directly from their human rights commitments, not the GCM. The GCM provides political commitment to ensure the rights of one category of people, migrants - who are having difficulties claiming and receiving their international human rights, are effectively delivered. The political commitment is important and can be taken into account by international bodies charged with reviewing and ensuring the correct implementation of human rights commitments. So, the GCM has an important role in demonstrating political commitment to the human rights of migrants, those human rights set out in the UN human rights conventions states have signed and ratified. Those states which refused to sign the GCM are not only revealing contempt for the UN processes, but also for their own human rights commitments.

The recent contestation of the GCM underlines the transgressions by states against international human rights over the last decades and their desire to make a distinction between the rights of citizens and welcome migrants on the one hand and unwelcome migrants, labelled irregular or illegal migrants, on the other. While states have the right to control their borders, this does not exempt them from their human rights obligations. Nonetheless, over the last decades a number of state practices have arisen that single out particular categories of migrants for differential treatment. The Compact creates, to some extent, a corrective hereto, particularly in its statements on migration status and immigration detention (see section 4 of this article). Hence, it is hardly surprising that a number of states are discontent with this long overdue corrective to their practices, so far largely uncontested by the global community. The GCM, in spite of being non-legally binding in nature, carries significant weight in this sense.

#### 4. THE COMPACT AND HUMAN RIGHTS - ANALYSIS OF THE FINAL DRAFT<sup>5</sup>

Over the last decades, some state practices have become increasingly repressive, singling out migrants for treatment contrary to international human rights law in many cases of contested compliance, and in some cases condemned by regional human rights courts. The Compact seeks to introduce correctives hereto, and insists on realigning state practices with internationally agreed standards. It affirms existing international human rights obligations in the face of contested state practices. This is evident particularly in relation to irregular migrants and the human rights of migrants independent of their state designated migration status. Unsurprisingly, this critique of state practices has not been welcomed by states, particularly those in contempt of human rights of irregular migrants, including the United States, Australia as well as a number of European states.<sup>6</sup> During the inter-governmental negotiations, states have sought to defend their policies and practices through claims of sovereignty, i.e. the right unilaterally to set policies, generally couched in the context of national security (Basaran, 2008; Guild, 2009), in an effort to prioritize sovereignty over human rights.

While the Compact is powerful in asserting the human rights of migrants, and by implication condemning state practices contrary hereto, it also yields to political sensitivities, however, when states are not in direct breach of human rights obligations, but render migrants vulnerable through their laws, policies and practices. Examples for the latter are single employer tied work visas and the deletion of firewalls on the sharing of information about migrants among state authorities, both with significant implications for access to human rights. Thus, we encounter a Compact that strongly defends existing human rights standards at its core, but concurrently submits to political will and tolerates conditions of vulnerability, with potentially grave implications for human rights. In the following, we will provide a detailed analysis of these issues.

##### 4.1 Affirming Human Rights, Contesting State Practices

The Compact is crucial for (re)asserting human rights standards. It seeks to correct and realign (contested) state practices with international human rights standards. In particular, GCM targets the human rights of migrants in two areas - irregular migration and migration detention.

First, as to the **distinction between regular and irregular migration status**, the Compact underlines that “*States may distinguish between regular and irregular migration status ... in accordance with international law*”, but that the human rights of all migrants should be ensured at all times “*regardless of their migration status*” (GCM, para 15). This is consistently stressed throughout the objectives of the Compact and poses an important corrective to contemporary state policies, laws and practices. States have often violated the human rights of irregular migrants, both in law and practice, regularly excluding them from access to basic services, including education, housing, health care, social benefits, but also access to law and labour organization, rendering irregular migrants subjects of discrimination. The GCM stresses international human rights standards “*regardless of migration status*” for three objectives: in **objective 7** on support for migrants in a situation of vulnerability, regardless of migration status; in **objective 11** on border

management policies and human rights at border, regardless of migration status; and in **objective 15** on access to basic services, again regardless of migration status. Further, the GCM also employs the complementary language of “*all migrants*” throughout its text for various objectives, including **objectives 4** on legal identity and **objective 6** on recruitment and decent work.

Second, **objective 13** stresses that all forms of **immigration detention**, “*irrespective of whether detention occurs at the moment of entry, in transit, or proceedings of return*” (para 29), should only be used “*as a measure of last resort*” and alternatives sought. It reaffirms the absolute prohibition on arbitrary detention, as laid out in ICCPR 9(1) that “[n]o one shall be subjected to arbitrary arrest or detention” and reaffirmed by the OHCHR’s Working Group on Arbitrary Detention in 2018 (OHCHR 2018a). Immigration detention has been a particular contentious issue for the GCM, with Australia refusing to sign the Compact on grounds of objective 13 (Karp, 2018). Numerous states have mandatory immigration detention, automatically detaining particular categories of migrants, such as asylum seekers or foreign national offenders. These practices of mandatory immigration detention run counter to long-established international human rights obligations, however. Objective 13 carries a strong commitment to due process, legal representation, regular review of detention, access to justice, and state accountability for human rights violations. In the course of the inter-governmental negotiations, revision 1 introduced access to legal representation, revision 2 the requirement that domestic monitoring of immigration detention must be conducted by an independent body, revision 3 that the state and any private actors administering immigration detention should be held accountable for human rights violations. While some points could have been formulated stronger, i.e. a requirement for statutory maximum period of detention, compensation for victims of human rights’ breaches and automatic periodic reviews, objective 13 provides a good reflection of international standards and an important critique of state practices.

#### 4. 2 Tolerating Vulnerabilities, Yielding to Political Sensitivities

While the Compact defends human rights at its core, it also has important shortcoming from a human rights perspective. In an effort to cater to political sensitivities, it tolerates a number of state practices that render migrants vulnerable. Rendered vulnerable, migrants are “*unable effectively to enjoy their human rights*” and are “*at increased risk of violations and abuse*” (OHCHR, 2018b). The Compact tolerates vulnerable situations during migrants’ journeys and their conditions of stay, without acknowledging that these situations result from state action or inaction to deliver their human rights obligations to these migrants (for instance, health care, protection from criminal activities, social benefits etc). According to OHCHR, a “*human rights-based approach to migrants in vulnerable situations recognizes that both situational and personal vulnerability are created by external factors, by means of law, policy and practice*” (OHCHR, 2018b). This is where the Compact falls short. Four areas are of particular relevance.

First, as regards migrants’ condition of stay, in the course of the negotiations, all **references to firewalls have been deleted**. Firewalls between providers of essential services in society on the one hand and authorities tasked with the immigration enforcement on the other are particularly significant for irregular migrants. Due to the fear of being reported to immigration enforcement, and ensuing potential detention and deportation, irregular migrants may not go to doctors, report crimes to the police or withhold their children from school, leaving them in a permanent state of vulnerability.



The zero-draft referred to firewalls for “labour inspections in cases of exploitation” in **objective 6**, “between immigration enforcement and public services” in **objective 7** and “between service providers and immigration enforcement agencies” in **objective 15**. None of these were retained in the final text. Instead, states commit to “[e]nsure that cooperation between service providers and immigration authorities does not exacerbate vulnerabilities of irregular migrants” (objective 15), with a similar wording, “in a manner that does not exacerbate vulnerabilities of irregular migration” in objective 6, and “to ensure they do not create, exacerbate or unintentionally increase vulnerabilities of migrants” in objective 7.

Second, a controversial point was work permits tied to one employer. After lengthy debates, practices of **tying work visas to a single employer or sponsor** were **retained**. The zero draft pointed out that such practice should end in order to prevent human rights violations and promote opportunities for decent work (referenced in **objective 5** on regular migration and **objective 6** on recruitment and decent work). In the first revisions to the zero draft already, this was modified towards strengthening processes “that allow migrants to change employers” (objective 6, revision 2), effectively permitting work visas tied to single employers to be retained. Equally, “flexible visa status conversion” was deleted in objective 5. As such, changes to employer remain under administrative discretion. According to the Migrant Worker Convention (ICMRW), art. 52 “[m]igrant workers in the State of employment shall have the right freely to choose their remunerated activity”, subject to particular restrictions. Work permits tied to one employer render migrants vulnerable. Migrants’ fear losing their jobs, should they seek to claim their rights. Equally, it increases chances of abuse and exploitation by employers.

Third, the Compact’s references to the **presence and protection of civil society and particularly humanitarian actors at borders** are uneven. **Objective 8** on saving lives seeks to “ensure that the provision of assistance of an exclusively humanitarian nature for migrants is not considered unlawful”. It is weaker than the original version in adding the word “exclusively”, and more encompassing by moving from “never criminalized” to “not considered unlawful”. **Objective 9** on migrant smuggling, however, lacks any references to the need to protect humanitarian acts and actors (encompassing individuals, NGOs as well as commercial vessels) from investigation and prosecution under anti-smuggling laws, an issue that has arisen on multiple occasions in various countries (Basaran 2015). Equally in **objective 11** on borders and **objective 12** on migration procedures, civil society presence, but also access to legal representation, legal aid, interpreters and procedural rights at the border are not even mentioned. The presence of civil society and humanitarian actors provides, however, an important counter-weight to enforcement oriented state-policies and supports migrants in accessing their rights.

Fourth, the explicit reference to the principle of **non-refoulement**, present in **objective 8** on saving lives and **objective 21** on return and readmission (revision 2), has been substituted in the final text by a general commitment not to return 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” (only in **objective 21**). Complementary to this, bilateral, regional and multilateral cooperation for policing, return and readmission purposes is encouraged (objective 10 on trafficking and objective 21). This can pose problems for questions of responsibility, reducing ways of holding destination countries responsible under human rights law. Further, the use of flexible arrangements and memoranda of understanding may escape parliamentary scrutiny (European Commission, 2017) and impede democratic and judicial oversight, increasing vulnerable situations and human rights violations (Cassarino JP and Giuffré M, 2017).

Cooperation with countries of origin or transit cannot absolve countries of destination from their human rights obligations.

#### 4.3. On Political and Legal Commitments

As discussed in section 2, on the intersection of the political (GCM) and legal commitment of states (UN and regional human rights conventions), the Compact is “**non-legally binding**”, as formulated in **paras 7 and 15** of the Compact. To counter anxieties that the Compact may, nonetheless, be construed as promoting new or expanding existing legal obligations, the non-legally binding character of the Compact has been stressed through a particular set of formulations throughout the Compact’s objectives in the inter-governmental negotiations. The Member States of the European Union have insisted that the final text of the Compact “consistently reflects its non-binding nature, both in the introductory section and throughout the various objectives”, providing a “less prescriptive language” and emphasizing “a range of policy options and best practices” (10636/18). This is particularly evident for the commitment to sign, ratify and implement existing international legal instruments, diminished in the course of inter-governmental negotiations (**objectives 6, 9, 10**). Objective 9, for example, in relation to the Smuggling Protocol (UNGA, 2000), foresaw initially to “sign, ratify or accede to, and implement the Protocol” (zero draft), subsequently softened to “encourage” (draft revision one), “promote” (draft revision 2) and the reference to signature dropped (draft revision 3). The final text reads to “promote ratification, accession and implementation of the Protocol”. This is accompanied by an emphasis on “existing” legal obligations. Further, often, the large corpus of binding international agreements is not explicitly mentioned or stated only as a possible source for a political agreement as not to establish an onerous request on states. According to **objective 5**, for example, states should be “drawing on relevant ILO standards, guidelines and principles” in the development of labour mobility agreements, rather than applying those legally binding international standards. Scholars have expressed concern that rather than affirming existing standards regional and international obligations, some of the language may potentially be interpreted as softening of such obligations.<sup>7</sup> In an effort to evade statement that may be interpreted as legally-binding upon States, the modifications to the Compact have also avoided strong political commitments as to “avoid over-prescriptive objectives” (10636/18).

#### 4.4. Defining Migrants – Excluding Refugees, Including Climate Migration

The Compact defines various **categories of migration**, three of which are particularly of relevance.

First, the starting point of the Compact is a strict division between refugees and migrants, **excluding refugees** (persons in need of international protection) from its remit. Para 4 of the Preamble states: “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 to migrants

and presents a cooperative framework addressing migration in all its dimensions.” Whereas the original text still contained references to asylum seekers, refugees, and the UNHCR, these references have been deleted in the final version (**objective 3, 12**).<sup>8</sup>

Second, the Compact is the first international agreement to recognize **climate migration**, complementing the other three forms of regular migration labour migration, family migration and academic mobility (**objective 5**). The Compact distinguishes between two types of climate migration: One is due to “sudden-onset natural disasters and other precarious situations” for which states should use “compassionate, humanitarian” admission criteria, “providing humanitarian visas, private sponsorships, access to education for children and temporary work permits”. The other one is due to “slow-onset natural disasters, the adverse effects of climate change and environmental degradation, such as desertification, land degradation, drought and sea level rise” for which states should consider “planned relocation and visa options”.

Third, the Compact engages with **migrants in vulnerable situations (objective 7)**. Here the Compact’s focus is on particular categories, including children, women at risk, victims of violence, persons with disabilities and workers facing exploitation and abuse. The pre-determination of particular categories of migrants as vulnerable may explain the terminological confusion inherent to the Compact, and to objective 7, between “*migrants in situations of vulnerability*” and “*vulnerabilities of migrants*”. Objective 7 falls short of OHCHR principles and guidelines on migrants in vulnerable situations (OHCHR, 2018b), by placing emphasis on particular categories of migrants rather than state policies and practices that produce vulnerabilities of migrants, such as border controls and restrictive admission policies. This is not surprising, given the bent of the Compact towards political sensitivities, when it comes to state practices that render migrants vulnerable (see 3.2). On the other hand, however, the Compact accounts for situations of vulnerability by recognizing **irregular migration status** as an important vulnerability. Even though “the word “regularization” – considered as politically sensitive – has been deleted from the Compact”, states remain committed to address and reduce this vulnerability, on a case by case basis (Crepeau, 2018). In a late addition to the final draft, it calls for “facilitate[ing] transitions from one status to another and inform migrants of their rights and obligations, so as to prevent migrants from falling into an irregular status in the country of destination, to reduce precariousness of status and related vulnerabilities, as well as to enable individual status assessments for migrants, including for those who have fallen out of regular status” and to “facilitate access for migrants in an irregular status to an individual assessment that may lead to regular status, on a case by case basis”.

## 5. RESPONSIBILITY FOR THE GCM: STATES, STAKEHOLDERS AND MONITORING<sup>9</sup>

In the New York Declaration for Refugees and Migrants, States committed to protect “the safety, dignity and human rights and fundamental freedoms of all migrants” and to “cooperate closely to facilitate and ensure safe, orderly and regular migration” (GCM, para41). The GCM is the end result of a process of intergovernmental, multi-layered and cross-sectoral consultations and negotiations. As explored, it aims to realign state practices with internationally agreed standards affirming existing international human rights obligations in the face of contested state practices.

Now the GCM must be implemented and paragraph 41 of the Compact holds that it is States who “will implement the Global Compact” (GCM, para 41). There is a political expectation that the objectives will be respected by States and in order to do so, a State may draw upon the “toolbox” of actionable commitments under each objective. That is to say, the Compact does not prescribe a list of duties which the contracting parties must abide by, but rather objectives which must be aimed at, with a choice of actions which contracting parties may engage in to achieve these objectives. The structure of actionable commitments will influence how States act but it is clear that a State does not have to implement them all.

In addition to this traditional, State-led, implementation model, there lies a unique aspect of the GCM, one which has encountered little criticism by those States who refused to sign it based on fears of limiting sovereignty at borders. The GCM is to be implemented by States in co-operation and partnership with a wide range of non-State institutions and stakeholders – an unusual, and welcome, provision in an intergovernmental agreement. The GCM states that:

“We will implement the Global Compact in cooperation and partnership with migrants, civil society, migrant and diaspora organizations, faith-based organizations, local authorities and communities, the private sector, trade unions, parliamentarians, National Human Rights Institutions, the International Red Cross and Red Crescent Movement, academia, the media and other relevant stakeholders (GCM, para 44) “.

In addition, a number of the 23 objectives of the GCM specify actors who will assist in the implementation of the actionable commitments outlined therein.<sup>10</sup> The language used varies but includes that States will “involve” (para 23(k)), “engage” (para 34(g)), “collaborate”, “facilitate”(para 31(f)), “cooperate”(para34(h)), and “work in partnership” (para 37(f)) with a variety of local authorities, private sector actors, NGOs and local community groups. The diversity of terms demonstrates the multitude of ways in which States envisage the implementation of these commitments to occur, and the differing level of control envisaged over that implementation. However, it is clear that they will not be fulfilling these objectives alone. What then is the impact of these partnerships for implementation and monitoring, especially in relation to the underlying human rights protections inherent in the GCM?

It is necessary to consider the implications of paragraph 44 in terms of how these partnerships will be enacted. An initial point is one of practicalities. Many of the stakeholders working at the local level that are named in the GCM do not know about the Compact, much less what the implications of it for their work may be. This highlights the need to effectively disseminate information about the GCM; it will not be “given life” if it is not shared in a clear and accessible way that makes it relevant to the work people are doing to protect migrants and their rights. States must engage these stakeholders and clear channels of communication must be opened up to support them to implement the GCM. Furthermore, considering the GCM’s expansive content, several governmental departments will have an interest in its implementation, however, at the national level, how these departments will coordinate with stakeholders, and each other, remains unclear. This question of roles and responsibilities in the delivery of the GCM, is one in

which a distinct lack of clarity remains and as discussions move from the international to the national level, will be much needed.

The focus on implementation through partners is an opportunity for those who are recognised as integral to the delivery of “safe, orderly and regular” migration by paragraph 44. It empowers, legitimises and gives a voice to those organisations who witness the realities of working with migrants, but whom are often excluded from the table when decisions are made. The GCM can be used for advocacy and to promote sustainable cooperation across organisation’s and States who work with migrants. It also provides a resource for those working on these issues to build knowledge and political will. CSOs and local organisations can engage in the GCM’s implementation, reporting on local successes but also challenging States where delivery remains wanting. There is potential for horizontal discussions among local actors to share best practice, resources, and support. Some of the cross-cities networks demonstrate the value of synergy, sharing information and a baseline understanding. Such sharing of best practise, understanding of the GCM, and ideas about implementation will be key to success.

Two further points should be made. The first is the disconnect between implementation being carried out between the State and stakeholders, with the overarching coordination at the international level of the implementation of the GCM. The distinction between implementation and coordination is important in considering roles and responsibilities. The GCM highlights the role of the State in *implementation* at the national level in partnership with the stakeholders listed in para 44, but how this relationship will be managed will develop in the context of each State. Accordingly, there will be varying degrees of partnership, oversight and regulation in implementation at the national level. Para 44 and 43 allude to the implementation of the GCM within States, but the “what” and the “how” remain undefined in the final version of the Compact leaving open the level of oversight States will have. This lack of clarity at the national and international level inevitably trickles down to the stakeholders tasked with implementing the GCM.

The task of coordination and maintaining oversight of the GCM implementation is intended to sit at the international level, with the IOM and the UN Migration Network (Micinsk, 2018). How these bodies engage with stakeholders such as States and civil society organisations (CSOs) and how IOM will bring together, but not take control of, the streams involved in implementing the GCM, has also been left open by the final version of the GCM. The UN Migration Network is to be a forum for problem solving, addressing challenges, and sharing best practice. This sounds positive. However, the “terms of reference” for the roles of IOM, the UN Migration Network, and related working groups are still being discussed and so far, meetings of the group will only be every 4 years, providing little effective oversight or coordination.

This leads on to the second point, that of monitoring. There is currently no framework to monitor implementation at any level. Without coordination and monitoring of implementation, the commitments within the GCM that relate to pre-existing human rights obligations, hold little extra weight. To avoid a situation in which the GCM remains listless, without oversight, discussions must establish coordination between the local, national, regional, and international levels. In order to effectively realign State practices with their international obligations, GCM monitoring mechanisms must be introduced into existing ones. Given the GCM’s grounding in human rights obligations, it is suggested that monitoring should be linked to existing human rights mechanisms to maintain commitment and ensure resource availability. These mechanisms include the human rights monitoring processes through the UPR and regional human rights monitoring

mechanisms. As such indicators, that correlate with pre-existing human rights obligations and obligations under the GCM, must be developed to feed into the human rights monitoring. This will provide a starting point for effective monitoring and highlight the fundamental role of human rights in the GCM; not creating new obligations but making more effective those that States are already bound to uphold. Making links between pre-existing policy concerns and the GCM objectives will coordinate implementation and monitoring, thus making the GCM objectives part of public policy in local and national plans.

## 6. CONCLUSIONS

The historical significance of the GCM must not be underestimated. In a political context which is often hostile towards some migrants, it is already striking that States have negotiated and adopted a comprehensive agreement on migration. The GCM marks the end of the beginning of a longer process which will require the support of governments and other stakeholders. Given the legally non-binding nature of the GCM and its vague political commitments, the first years of its implementation will be influential for the direction and significance of the GCM.

We believe that two aspects will determine whether the GCM is on the right track and whether it can go full steam ahead. First, the implementation architecture, including the institutional framework and ways of involving stakeholders, will be crucial. As we explored in this article, this is an area where operational questions still need to be defined and refined, and where institutional, state and stakeholder preferences will ultimately determine which objectives of the GCM will be prioritized and immediately pursued and which ones will be left aside. Second, the operationalization of objectives will be crucial. As we have stressed throughout this article, the GCM must be in compliance with human rights obligation. Hence, these obligations need to be the baseline for any indicators and the review mechanisms foreseen from 2022 onwards. These are also two research paths forward. Only through identifying the key stakeholders, engaging them from the beginning and ensuring the monitoring of implementation is integrated into existing processes, will the GCM be effective at protecting the human rights of migrants.

The GCM is aspirational and founded on legally binding human rights commitments of states. Delivering on these human rights should be the core contribution of the GCM. The potential impact of the GCM as a new form of international agreement in the field of migration is great. It brings together diverse human rights, and other, obligations that states have already agreed to be bound by, into a cooperative framework, with workable objectives and commitments. By committing to implement this framework, States have made a clear political statement that they will fulfil these obligations – a momentous event in the current climate. However, the GCM's success will be defined in the months to come, as UN agencies, states and practitioners begin the process of implementation and realisation of the political commitments made therein.

## NOTES

1. We use the term “agreement” here as the title which is given by the UN institutions.
2. For discussion on the legal authority of a Compact see Guild and Grant, *Migration Governance in the UN: What is the GCM and What does it mean?* (Queen Mary University of London, School of Law Legal Studies Research Paper No. 252/2017); Gammeltoft-Hansen et al, *What is a Compact? Migrants’ Rights and State Responsibilities Regarding*

*the Design of the UN GCM for Safe, Orderly and Regular Migration* (Roaul Wallenberg Institute of Human Rights and Humanitarian Law)

3. The International Court of Justice has given interim relief to Qatar against the United Arab Emirates on the basis of the UN Convention against All Forms of Discrimination regarding the expulsion of Qatari nationals from UAE – No 173 23 July 2018 - <https://www.icj-cij.org/files/case-related/172/172-20180723-ORD-01-00-EN.pdf> accessed 8 January 2019.
4. See for example: UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986 and UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13 para 10
5. Our writing has greatly benefited from the objective by objective analysis of the final draft in <https://rli.blogs.sas.ac.uk/themed-content/global-compact-for-migration/>
6. On efforts by European states, Australia, India, Pakistan and China to provide for a distinction between regular and irregular migration, <https://www.odi.org/comment/10653-world-s-first-global-migration-agreement-view-negotiations>; regarding EU states see for example: *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: <https://www.refworld.org/cases,ECHR,4f4507942.html> [accessed 8 January 2019] or *Conference of European Churches (CEC) v. the Netherlands (decisions on the merits)*, Complaint No. 90/2013, Council of Europe: European Committee of Social Rights, 10 November 2014, available at: <https://www.refworld.org/cases,COECSR,54e363534.html> [accessed 8 January 2019]
7. See, for example, GCM commentary for objective 5 “Considering the status of the Compact as a primarily political document, the repeated statements that the Compact is not legally binding and the references to sovereignty of the states (in points 7, 15 and 23), in my view, it is far more likely that, at least in Europe, the Compact will legitimise restrictive immigration policies rather than courts interpreting the Compact as creating rights of migrants or binding obligations for states that courts should take seriously... the Compact could be used to legitimise restrictive immigration policies in the EU, however much drafters of the Compact, reasoning from a universal rather than a regional perspective, may have had the opposite objective in mind.” <https://rli.blogs.sas.ac.uk/2018/11/26/gcm-commentary-objective-5/>
8. The African Group, Arab Group, India and China are blocking such references and have presented this issue as a red line for them (ref 1). Others such as the EU and the Nordic states respond that this principle is part of international human rights law and was already included in the New York Declaration.
9. Our writing has greatly benefited from the discussions at the meeting of local stakeholders and UN agencies on “Partnerships for Practice: Making the Global Compact on Migration Work.” Meeting report available at: <https://www.biicl.org/event/1352/partnerships-for-practice-making-the-global-compact-on-migration-work>
10. See for example Objective 17 para 33(g) that specifies “political, religious and community leaders, as well as educators and service providers to detect and prevent incidences of intolerance, racism, xenophobia and other forms of discrimination....”

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