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

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

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Abstract
This paper examines the "protective potential" of the Global Compacts on Refugees and Migrants vis-à-vis existing commitments to fundamental rights within the European Union (EU). The relationship between the two normative frameworks is scrutinised to establish the extent to which the two might be mutually supportive or contradictory, since this determines the Compacts' capacity to inform the interpretation of EU fundamental rights within the Common European Asylum System (CEAS).

This paper explores this protective potential through three of the Compacts' key guiding principles: respect for human rights and the rule of law, the principle of non-regression, and the principle of non-discrimination. The Compacts' commitments to the first two are presented as sites of coherence where the Compacts concretely express pre-existing protections within EU law and provide a blueprint for implementation in the migration sphere. Yet, the Compacts' principle of non-discrimination reveals an area of friction with EU primary law. It is argued that the implementation of this principle can address the inherently discriminatory system underpinning EU law. Within the EU, rather than undermining international and national human rights obligations, the Compacts present an opportunity to refine the implementation of existing EU fundamental rights obligations applicable to migrants and refugees.

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

1. Introduction

The Global Compact on Refugees (GCR) and the Global Compact for Safe, Orderly and Regular Migration (GCM) were adopted in December 2018 by the United Nations (UN) General Assembly.[1] This article proposes a reading of the two Compacts as instruments that operationalise and contextualise existing State obligations in the migration context. In so doing, it examines the Compacts' potential to effect improved rights protection for migrants and refugees within the European Union (EU), given the Union's own legal framework that includes the Common European Asylum System (CEAS). This is not a question of conceiving the Compacts as a binding Treaty or not; there is agreement that the Compacts' commitments are not about creating new obligations.[2] Instead, our research focusses on the complementarity of the Compacts with pre-existing legal frameworks in refugee and human rights law, and their role in improving respect for the rights of refugees and migrants.[3] They can be used by the EU both as an internationally endorsed aid to interpretation and implementation of existing international human rights and as a new tool in EU development law. The EU's submission to the first regional review of the GCM in the European region specifies that the Union, through the work of the European External Action Service and the European Commission, "has been contributing to the implementation of the [GCM] objectives" including through "support for actions in and outside Europe to […] protect the human rights of all migrants with particular attention to children and the most vulnerable groups".[4] In exercising its functions in the field of development cooperation, the Union is already bound to comply "with the commitments and take account of the objectives they have approved in the [UN] context."[5]

Indeed, the Compacts are founded upon the refugee protection regime and human rights law obligations.[6] The fact that the Compacts are embedded in these two international legal frameworks means they have the potential to operationalise these pre-existing legally binding obligations at the national and regional levels, including through the migration and asylum law of the EU. Coming from this understanding of the Compacts, this article examines how these instruments align with what already exists in the EU to establish the potential for the Compacts to inform the interpretation of EU law and the implementation of policy and practice. Since its

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

[2] See Elspeth Guild and Raoul Weiland, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Does It Mean in International Law?' in *The Global Community Yearbook of International Law and Jurisprudence* (2019); Vincent Chetail, 'The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law' (2020) 16 *International Journal of Law in Context* 253; Thomas Gammeltoft-Hansen and others, 'What Is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration' (Raoul Wallenberg Institute Working Paper, 2017).

[3] See Elspeth Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?' (2019) 30 *International Journal of Refugee Law* 661; Elspeth Guild, Tugba Basaran and Kathryn Allinson, 'From Zero to Hero? An Analysis of the Human Rights Protections within the Global Compact for Safe, Orderly and Regular Migration (GCM)' (2019) 57 *International Migration* 43; Elspeth Guild, Stefanie Grant and CA Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (1 edition, Routledge 2017).

[4] Contribution by the EEAS / European Commission Services to the Regional Review of the Global Compact for Safe, Orderly and Regular Migration in the UNECE Region (12-13 November 2020) Available at https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/contribution_by_the_eeas_european_commission_services_to_the_regional_review_of_the_global_compact_for_safe_orderly_and_regular_migration_in_the_unece_region.pdf.

[5] *Consolidated version of the Treaty on the Functioning of the European Union* (TFEU), 13 December 2007, OJ 2008/C 115/01 Article 208(2). On the role of the EU in the Compacts' negotiation see, Tamás Molnár, 'The EU Shaping the Global Compact for Safe, Orderly and Regular Migration: The Glass Half Full or Half Empty?' (2020) 16 *International Journal of Law in Context* 321.

[6] See GCR (n1) para 5; GCM (n1) para 15.

creation, the EU legal order exists as an autonomous legal framework.[7] Yet, this framework is nonetheless shaped by the Union and its twenty-seven Member States' commitments to, and obligations under, international law, including refugee and human rights law. The expression of these obligations, as seen in the development of the asylum and migration *acquis,* means that ever since the Union exercised its competence to enact legislation in the area, Member States' action towards migrants and refugees must conform with their EU law obligations. As such, an assessment of the EU legal order's receptiveness to the Global Compacts' commitments can illustrate the extent to which these instruments complement pre-existing legal sources and can result in improved rights protection for migrants and refugees, particularly by fleshing out the content of these obligations in a migration-specific context.
The Compacts have been negotiated and adopted under the UN's Sustainable Development Goals (SDGs) – Goal 10(7). As the Commission's Legal Service has explained, Article 210 Treaty on the Functioning of the European Union (TFEU) requires the Union and the Member States to coordinate their action on development policy.[8] In the New European Consensus on Development[9] the multiple aspects of migration and forced displacement are agreed as development policy with specific reference to the Global Compacts. As the Legal Service argues, there is extensive case law requiring the Union to consider the objectives of development policy when implementing measures affecting developing countries. As a result, it concludes that the GCM has legal effects for Union development policy.[10] This means, according to the Legal Service, that the GCM is an integral part of Union positions in development cooperation as the GCM participates in the Union's legal framework. Our argument regarding the impact of the GCM on EU law goes in a slightly different direction, aligning it with that of EU migration and asylum law. As the Legal Service proposed regarding development policy, we claim that in respect of EU law in migration and asylum, EU law and policy needs to be compatible with the GCM objectives, not only based on the principle of loyal cooperation (Article 4(3) Treaty on European Union (TEU)) as proposed by the Legal Service regarding development cooperation), but also as the most recent definitive clarification of the meaning of existing human rights conventions as they apply to migrants. Human rights standards are an inherent part of EU development policy which is an integral part of EU law. The impact of the GCM on one field of EU law is directly relevant to its legal effect in other areas, including migration and asylum.

EU competence was extended to migration and asylum in 1999 when a revision of the treaties took place. A specific commitment was written into the Treaty requiring compliance with the principle of *non-refoulement*, the Refugee Convention and other relevant treaties (now contained in the TFEU Article 78(1)).[11] The EU legislator implemented the competence as regards asylum in the Common European Asylum System (CEAS) – a set of secondary EU legislation adopted from 2003 onwards, revised in the early 2010s and currently under revision

[7] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1.
[8] Commission Legal Service, *The legal effects of the adoption of the Global Compact for Safe, Orderly and Regular Migration by the UN General Assembly* (1 February 2019), available here: https://www.lavocedelpatriota.it/wp-content/uploads/2019/03/EU-Legal.pdf This document was leaked by an independent MEP to *La Voce del Patriota*, an Italian news outlet connected with the Fratelli d'Italia, a national conservative political party in Italy.
[9] Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission "*The New European Consensus on Development: Our World, Our Dignity, Our Future*" OJC 210, 30.6.2017, pp. 1-24.
[10] See Commission Legal Service, (n8), para 46.
[11] *TFEU* (n5)

again.[12] This secondary legislation currently establishes minimum standards but with the objective of achieving common standards. In 2000, the EU adopted the EU Charter of Fundamental Rights (EUCFR), which was given full legal effect and equivalence to the EU Treaties in 2009 on the last revision of the treaties.[13] The Charter includes a right to asylum with due respect for the rules of the Refugee Convention (Article 18 EUCFR) and an explicit prohibition of refoulement (Article 19 EUCFR). Further, as regards migration, the TEU states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (Article 2 TEU).[14] This is augmented by Article 6(3) TEU which confirms that fundamental rights, as enshrined in the European Convention on Human Rights (ECHR), are general principles of EU law. It is reflected in the Charter where Article 1 commences with the entitlement to human dignity. The full impact of the Charter in the Area of Freedom, Security and Justice, of which the CEAS and migration, form a part has been well examined elsewhere.[15] Thus, the application of the guiding principles of the Compacts: human rights including the rule of law, non-discrimination and non-regression fit easily into the EU treaty framework.[16] The Compacts, as instruments adopted after the relevant treaty changes and endorsed by the EU and most EU Member States, need to be taken into account in the interpretation and implementation of the CEAS and EU migration law in order to ensure the coherence of EU fundamental rights law with its international counterpart.

This contribution examines three key elements of the Compacts: human rights and the rule of law, the principle of non-regression, and the principle of non-discrimination. These elements are presented among the "cross-cutting and interdependent guiding principles" which the international community agreed should form the foundation of the Compact's aims and objectives.[17] This article argues that in the EU's fundamental rights framework, the emphasis on the rule of law (Art. 2 TFEU) and the principle of non-regression[18] are already embedded within the EU constitutional setup as obligations under EU law. As such, these points of coherence between the two frameworks result in a considerable protective potential for the Compacts within EU law. This coherence can ensure that these overarching principles are applied, in the context of migration, in line with the international commitments.

At the same time, the prohibition of discrimination on the basis of migration status that is espoused in the Compacts, primarily the GCM, emerges as a site of friction between the Compacts and the EU legal order. Despite a commitment to non-discrimination on enumerated grounds in primary law, the EU migration and asylum *acquis* is constituted along a structural principle that permits and creates the differential treatment of third-country nationals in their access to rights, based on their migration status. While non-discrimination based on nationality in EU law is limited in scope to EU nationals (and their family members), the Compacts take a wider approach calling for application regardless of migration status. As discussed below,

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

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

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

[15] Sara Iglesias Sánchez and Maribel González Pascual (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press, 2021).

[16] Bruno de Witte, 'The Relative Autonomy of the European Union's Fundamental Rights Regime' (2019) 88 *Nordic Journal of International Law* 65; Katja S Ziegler, 'Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law' in Sionaidh Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017).

[17] GCM, (n1) paragraph 15.

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

this approach has been partially at least adopted by the European Court of Human Rights (ECtHR). Here, extant EU law stands out as fundamentally inconsistent with the Compacts' commitments. At the same time, despite this apparent irreconcilability, the Compacts' status as instruments that express the contemporary commitment to the rights of migrants and refugees can act to prompt a reconsideration of this stance. They call into question the continued legitimacy of the failure to apply the principle of non-discrimination on the basis of migratory status across the different categories of third-country nationals in respect of which the EU legislator has exercised competence.

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

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

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

2.1 Respect for Human Rights and the Rule of Law

The two Global Compacts are both founded in the UN body of international human rights instruments commencing with the Universal Declaration of Human Rights (UDHR) notwithstanding their incorporation into the Sustainable Development Goals 2030. The GCR commences with reference to the UN Charter and the commitment to cooperation among states in the context of their faithful implementation of the Refugee Convention (paras 2 and 5). It refers also to regional instruments which complement the Refugee Convention including through more general human rights duties (para 5). The GCM is even clearer about its relationship with human rights. Its first paragraph confirms that it rests on the UDHR and references the full range of UN human rights conventions adopted to give the UDHR commitments convention status. It states that it is based on a set of cross-cutting and interdependent guiding principles which include respect for human rights and rule of law (para 15). As part of the GCM's commitment to human rights, it confirms that it upholds the principles of non-discrimination and non-regression (which will be dealt with later in this paper) and aims to ensure effective respect, protection, and fulfilment of the human rights of

all migrants, regardless of their migration status, across all stages of the migration cycle (para 15 indent 6).

As noted earlier, the EU is no stranger to human rights with human and fundamental rights being central to the EU's legal structure.[19] The long history of the EU's gradual incorporation of human rights into its legal order has been well described elsewhere.[20] The EU's language of rights includes both human rights (the UN and Council of Europe's terminology) and fundamental rights (EU formulation), in part to accommodate more rights in the Charter than appear in many human rights conventions.[21] Its constituting treaties now include references to fundamental rights and an express reference to the Refugee Convention. More recently the EU has signed UN human rights treaties, commencing with the Disability Convention.[22]

The protection of human rights is a key component of a system founded upon the rule of law. Rule of law features in the GCR at para 9 where States undertake to uphold the UN Charter as well as rule of law at the national and international levels (thereafter there are no further references to rule of law). In the GCM, rule of law and due process are part of the cross-cutting principles (para 15 indent 4). It recognises that rule of law and due process as well as access to justice are fundamental to all aspects of migration governance. States commit to ensuring that not only their authorities, but all public and private entities and natural persons are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated. This is quite a developed definition of the essential elements of rule of law for an instrument such as the GCM to contain.[23] It is perhaps a response to the widely existing problem of inadequate legal protection for migrants and limited or non-existent access to justice. For two Compacts which expressly state that they are non-legally binding (para 4 GCR, para 7 GCM), this is quite an ambitious legal framework within which the political commitment of the Compacts is defined.

As an organisation, the EU is a structure based on the rule of law. Unlike states which adopt constitutions to crystallise the relationship of the people and the state and confirm the existence of the state,[24] the EU was conjured into existence exclusively by treaties in the 1950s. The Treaty on European Union states in Article 2 that it is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. There has been substantial academic work on the meaning of rule of law in the EU as well as interpretation by the Court of Justice of the European Union (CJEU).[25] Much like the Compacts' reference to the rule of law as

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

[20] Steve Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury Publishing, 2021), Elspeth Guild and Guillaume Lesieur, eds. *The European Court of Justice on the European Convention on Human Rights: who said what, when?* (Martinus Nijhoff Publishers, 1998).

[21] De Búrca, Gràinne. "After the EU Charter of Fundamental Rights: The Court of Justice as a human rights adjudicator?." *Maastricht Journal of European and Comparative Law* 20.2 (2013) pp. 168-184.

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

[23] See for discussion: T Bingham, *The Rule of Law* (Penguin UK 2011).

[24] Armin Von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' (2008) 6(3) *International Journal of Constitutional Law*, 397.

[25] Laurent Pech, '*The rule of law as a constitutional principle of the European Union*' (2009); Theodore Konstadinides, '*The rule of law in the European Union: the internal dimension* '(Bloomsbury Publishing, 2017); Petra Bard, and Wouter Van Ballegooij. "Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM." *New Journal of European Criminal Law* 9.3 (2018) pp.353-365.

requiring the public promulgation of laws, their equal enforcement and independent adjudication, the EU's institutional set up, legislative process, and judicial oversight illustrate a similar understanding of the principle. As the European Commission's assessment of the upholding of the rule of law in the EU and its Member States makes clear, despite the diverse legal systems and traditions "the core meaning of the rule of law is the same across the EU".[26] It includes respect for the key principles of "legality, legal certainty, prohibition of the arbitrary exercise of executive power, effective judicial protection by independent and impartial courts respecting fundamental rights in full, the separation of powers, permanent subjection of all public authorities to established laws and procedures, and equality before the law".[27] In upholding the rule of law, Member States must comply with EU law and the principle of the primacy of EU law, upon which the Union is founded.[28]

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

2.1.3. Non-regression, the Compacts, the EU and the CEAS

The GCM's rootedness in international human rights and refugee law obligations and the rule of law is supplemented by its explicit commitment to upholding the principles of non-regression and non-discrimination.[29] The principle of non-regression, also referred to as non-retrogression within international human rights law,[30] acts to ensure that existing levels of protection are maintained once an instrument comes into force. As such, the GCM's basis in non-regression "resembles a standstill provision where the law at the time of the entry into force of the commitment must be maintained or changed only in the direction of the political commitment which has been undertaken".[31] It follows that in cases where States have preestablished higher levels of protection than that prescribed by an instrument, they cannot reduce those protections without expressly contradicting their commitment to non-regression. Moreover, once committed to non-regression, States should not undermine these higher levels of protection. Accordingly, States' commitment to uphold the principle of non-regression in the migration context operates as a prohibition on the adoption of retrogressive actions. States with higher standards in place than the relevant instrument, in this case the GCM, undertake not to lower extant standards of protection. This principle also applies to the EU, for instance, when revisiting the CEAS.

Prior to its inclusion in the GCM, the non-regression principle was already recognised within international environmental law and in the context of the protection of socio-economic

[26] European Commission, '2021 Rule of Law Report: The rule of law situation in the European Union' COM (2021) 700 final, p.1.
[27] European Commission, ibid, pp 1, 7.
[28] See, for example, the Court of Justice's ruling in *Repubblika v Il-Prim Ministru* (n 18).
[29] GCM (n1) paragraph 15(f) specifies that the GCM 'is based on international human rights law and upholds the principles of non-regression and non-discrimination'.
[30] This is especially the case for economic, social and cultural rights: See UN Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education*, 8 December 1999, para 45.
[31] Guild and Wieland (n 2) p.197.

rights, a place where it is expressed as the prohibition of retrogressive measures.[32] In environmental law, this may be viewed as "a negative obligation inherent in all positive obligations associated with fundamental rights".[33] In the context of socio-economic rights, backwards steps are impermissible with respect to core obligations, which include, for example, the provision of primary and emergency healthcare.[34] The possibility of States taking retrogressive steps with respect to other non-core obligations is contemplated only in specific circumstances which must be justified by the State Party.[35]

The principle of non-regression is not novel to the EU law framework either. Within the EU framework, the CJEU has explored standstill provisions in relation to the EEC-Turkey Association Agreement,[36] where it has highlighted how they act to freeze in time existing restrictions (if any) and ban the introduction of new more restrictive ones.[37] Moreover, non-regression clauses have long been articulated within employment law-related secondary EU law instruments which specify that the directive in question must not be used to justify reducing "the general level of protection afforded to workers" within the instrument's scope.[38] Granted, the clauses in EU social legislation and the CJEU's restrictive interpretation thereof focused on establishing a limited rule that does not encompass a comprehensive "standstill" clause which rules out lowering standards in connection with the Directive's implementation.[39] This led Peers to brand them as "entirely, or very nearly entirely, ineffective".[40] Yet, the same cannot be said of the importance accorded to non-regression in the fundamental rights context at the level of EU primary law.

The EU's fundamental rights architecture can already be said to incorporate a principle of non-regression, by pegging the substantive scope of EU fundamental rights against those of the ECHR. Article 52(3) EUCFR provides that Charter rights corresponding to rights protected by the ECHR must have the same scope and meaning, as interpreted by the ECtHR, and provide for an equivalent level of protection.[41] This standard is a minimum floor of protection that does not prevent EU law from "providing more extensive protection".[42] In addition, Article 53

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[32] See S Alegre, submission to *R Ferguson v AG & OUTBermuda et al v AG*[2018] SC (Bda) 46 Civ (6 June 2018) on non-regression in rights of same sex couples; available at: https://www.islandrights.org/wp-content/uploads/2018/06/Submissions-relating-to-the-contravention-of-the-European-Convention-on-Human-Rights.pdf [accessed on 15 September 2021); see UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No.3: The Nature of States Parties Obligations*, Art.2, Para.1 of the Covenant, 14 December 1990, E/1991/23, on the prohibition of "any deliberately retrogressive measures" (Para.9) The idea that once a human right is recognised it cannot be restrained, destroyed or repealed is shared by all major international instruments on human rights.

[33] Lynda Collins, 'Principle of Non-Regression' in Orsini and Morin, *Essential Concepts of Global Environmental Governance* (Routledge 2020).

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

[35] CESCR, ibid, para 32; CESCR (n32) para 9.

[36] Rolf Gutmann, 'Rollback im Standstill' in K Barwig, S Beichel-Benedetti and G Brinkmann (eds) '*Hohenheimer Tage zum Ausländerrecht 2015'* (Nomos Verlagsgesellschaft mbH & Co. KG, 2016), available at: https://ec.europa.eu/employment_social/soc-prot/schemes/regulations/turkey_en.htm

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

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

[39] As in *AG Opinion in Mangold* para 61; Steve Peers, 'Non-Regression Clauses: The Fig Leaf Has Fallen' (2010) 39 *Industrial Law Journal* 436, p. 438.

[40] Steve Peers, Ibid, pp. 436, 439.

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

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

EUCFR presents the Charter as a source of "better protection of fundamental rights within the scope of operation of the [EU] (…) [which] does not seek to displace existing protection of fundamental rights"; at a minimum, these must meet ECHR standards and those international agreements to which the EU is a party.[43] This is accompanied by the qualification that nothing in the Charter must restrict or adversely affect existing levels of fundamental rights protection provided by EU law, international law, and international agreements upon its entry into force. The provision establishes a minimum level of protection that incorporates human rights obligations originally conceived outside of EU law. Although in *Melloni*, this was interpreted to mean that higher levels of *national* fundamental rights protection than those established by the Charter are only permissible provided they do not affect the primacy, unity and effectiveness of EU law, the same restriction may not be as easily imposed on ECHR rights which are explicitly linked to the determination of the level of Charter rights protection.[44] In their opinion in *FMS*, Advocate General Pikamäe argues that the absence of the ECHR's formal incorporation in the EU legal order means that the consistency sought by Article 52(3) EUCFR "cannot adversely affect the autonomy of EU law and that of the [CJEU]" and the CJEU interprets Charter provisions "autonomously". Yet, they acknowledge that even if the CJEU were to side-line ECtHR caselaw, this remains subject to the caveat that "its interpretation leads to a higher level of protection than that guaranteed by the ECHR".[45] To that end, it appears possible to speak of the EUCFR as providing an example of a principle of non-regression within EU primary law. Arguably, although not legally binding, Compact provisions on non-regression in the migration context can inform the interpretation of a non-regression obligation in the migration and asylum field.

This interpretation is enhanced by the CJEU's explicit presentation of the principle of non-regression as a principle of EU law applicable to the EU values in Article 2 TEU, albeit specifically in the rule of law context.[46] The term "rule of law backsliding" has been used to refer to the weakening of democratic institutions by elected authorities and the systemic breaches of judicial independence and other violations that have plagued multiple Member States in recent years,[47] with additional criticism of the EU's own commitment towards the rule of law.[48] It is in this context that recent developments in the CJEU's jurisprudence indicate that the principle of non-regression is an important principle at the level of EU primary law. In *Repubblika v Il-Prim Ministru ta' Malta*, the CJEU was called upon to determine whether the Maltese system for judicial appointments was consistent with the principle of effective judicial independence.[49] Its ruling highlighted the existence of a principle of non-regression which is tied to the values enumerated in Article 2 TEU as EU foundational values; as such, an EU Member State which had freely and voluntarily acceded to the Union "cannot amend its

[43] de Witte, (n16), p.74.
[44] Case C-399/11 *Melloni ECLI:EU:C:2013:107.*
[45] See Advocate General's Opinion in Joined Cases C-924/19 PPU and C-925/19 PPU *FMS, FNZ* ECLI:EU:C:2020:294, paras 148-149.
[46] Case C-896/19 *Repubblika v Il-Prim Ministru* (n18).
[47] Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3; 'European Commission "Rule of Law Report 2021" COM(2021) 700' available at: <https://ec.europa.eu/info/sites/default/files/communication_2021_rule_of_law_report_en.pdf> accessed 15 September 2021.
[48] D Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34 *Yearbook of European Law* 74.
[49] *Repubblika* (n 18). For detailed commentary, see, M. Leloup, D. Kochenov and A. Dimitrovs, 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on Case C-896/19 Repubblika v Il-Prim Ministru' (2021), 46 *European Law Review* 668; Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice* (Swedish Institute for European Policy Studies 2021).

legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU".[50] In this scenario, the *value* of the rule of law meant Member States must "ensure that (…) any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary".[51] As Leloup, Kochenov, and Dimitrovs have pointed out, the assertion of an explicit principle of non-regression "marks a bold new step in the Court's jurisprudence".[52] Yet, it also builds upon earlier rulings in which it had emphasised the importance of adherence to EU values given Member States' free and voluntary commitment thereto in acceding to the Union.[53]

The recognition of a non-regression principle that is tied to the Union's values expressed in Article 2 TEU points towards the recognition of the same principle with respect to EU fundamental rights. This argument is foreshadowed by Kostakopoulos who argues "for the formal recognition of the principle of non-regression in the EU legal order", which is derived inter alia from a cumulative reading of the EU's objectives (Article 3 TEU) and the Charter's references to the preservation and development of common values (including fundamental rights) and its non-regressive clauses (as seen above).[54] In light of the CJEU's ruling in *Repubblika* with its emphasis on the non-regression of laws tied to the values in Article 2 TEU and of which fundamental rights form an explicit part, it would appear that it is justifiable to speak of an EU principle of non-regression with respect to fundamental rights and which forms a key principle of the EU legal order that goes beyond the need to ensure a consistent interpretation of EU law.

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

As can be seen from the case law of the CJEU, human rights arising from the Charter have been very important to the interpretation of the CEAS.[55] Member States application of the CEAS measures have been found flawed on fundamental rights grounds on numerous occasions. For instance, as regards reception conditions in *Saciri* the CJEU held that Article 1 of the Charter under which human dignity must be respected and protected, precludes the asylum seeker from being deprived, even for a temporary period of time, of the protection of the minimum reception standards.[56] A human rights compliant interpretation of the CEAS has required much modification of Member State practice as regards the treatment of asylum seekers in particular.[57] As regards rule of law, it was the CJEU which found unlawful

[50] *Repubblika* (n 18) para 63.
[51] *Repubblika* (n 18) para 63.
[52] M. Leloup, D. Kochenov and A. Dimitrovs, (n49), pp. 700-701.
[53] *Repubblika* (n 18) at para 61; See, also, C-621/18, *Wightman* ECLI:EU:C:2018:999.
[54] D Kostakopoulou, 'Justice, Individual Empowerment and the Principle of Non-Regression in the European Union' (2021) 1 *European Law Review* 92, 99. For earlier arguments see Carlino Antpöhler and others, 'Reverse Solange-Protecting the Essence of Fundamental Rights Against EU Member States' (2012) 49 *Common Market Law Review* 489; Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) *European Constitutional Law Review* 1.
[55] *Ex multis*, Joined Cases C-411/10 and C-493/10 *NS and ME* [2011] ECR I-13905; Case C-31/09, *Nawras Bolbol v Hungary* ECLI:EU:C:2010:351; Joined Cases C-175/08 C-176/08 C-178/08 and C-179/08 *Aydin Salahadin Abdulla and others* [2010] ECR I-1493; Case C-396/17 *Shajin Ahmed* ECLI:EU:C:2018:713; Joined Cases C-443/14 and C-444/14 *Alo & Osso* ECLI:EU:C:2016:127; Case C-364/11 *El Kott* ECLI:EU:C:2012:826; Case C-573/14 *Lounani* EU:C:2017:71.
[56] ECLI:EU:C:2014:103.
[57] Case C-199/12 *X, Y & Z* ECLI:EU:C:2013:720; Case C-562/13 *Abdida* ECLI:EU:C:2014:2453 ; Case C-148/13 *A, B & C* ECLI:EU:C:2014:2406 ; Case C-69/10 *Diouf* ECLI:EU:C:2011:524 ; Case C-239/14 *Tall*, EU:C:2015:824 ; Case C-181/16 *Gnandi* ECLI:EU:C:2018:465, to name only a few.

Hungarian border procedures which resulted in detention of persons on the basis of their inability to meet their own needs and the absence of an entitlement to effective judicial protection against arbitrary detention.[58] The need for effective judicial protection in respect of detention is a foundation of the rule of law.

Challenges to the rule of law further arise through the non-implementation of existing legislation, which can give rise to serious breaches of fundamental rights. After all, as Tsourdi argues, the implementation gap of existing EU law obligations towards migrants and refugees and the systemic violation of rights within the EU point towards "asylum (…) [as] one of the many faces of "rule of law backsliding".[59] Here, the acceptance of a principle of non-regression can be key to the CEAS, both in the implementation of existing obligations and in the development of the system. The recognition of non-regression as an obligation governing the CEAS would subordinate the development and implementation of new laws and policies at both EU and Member State level to heightened scrutiny on compliance with pre-existing levels of protection. The principle of non-regression in the GCM can strengthen the existing principle of non-regression of fundamental rights obligations within EU primary law through its explicit link and application to the migration and asylum *acquis*. Accordingly, a GCM-informed reading of the non-regression obligation in the case of fundamental rights law and policy towards migrants and refugees recognises an obligation to refrain from lowering existing standards of protection. This applies through the role of non-regression as an EU foundational value protected through Article 2 TEU and Charter provisions which, in turn, governs the application of the CEAS, as subordinated to the entire corpus of EU fundamental rights obligations.

Recognising this duty as applying to the EU institutions and the EU Member States would be particularly relevant at this moment in time, when the ongoing negotiations on the proposed Pact on Migration and Asylum have generated significant commentary on the extent to which the proposals risk lowering EU law protection standards for migrants and refugees.[60] A commitment to non-regression entails assessing new legislation and policy against existing human rights obligations. This would further illustrate the capacity of the Compacts to augment, rather than undermine, the protection of the rights of migrants and refugees in the European sphere and lay to rest concerns that they can be exploited by States to roll back on existing protections.

This framework of human rights and rule of law in the EU should provide a strong foundation for the two Compacts to be given legal effect within EU law. Yet, three EU Member States voted against the GCM at its adoption in the UN General Assembly in December 2018[61]

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

[59] Evangelia (Lilian) Tsourdi, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?' (2021) *European Constitutional Law Review* 17(3), pp. 471-497.

[60] See for example, European Council on Refugees and Exiles (ECRE), 'ECRE Comments on the Commission Proposal for a Screening Regulation' COM(2020) 612 available at: https://ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM2020-612-1-screening-December-2020.pdf [accessed 28 August 2021]; D Thym (ed), 'Special Collection on the "New" Migration and Asylum Pact' (2021), available at: https://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-daniel-thym/ [accessed 28 August 2021]; UNHCR, UNHCR's Recommendations for the Portuguese and Slovenian Presidencies of the Council of the European Union (EU), January 2021, available at: https://www.refworld.org/docid/5ff4799d4.html; UNHCR, Practical considerations for fair and fast border procedures and solidarity in the European Union, 15 October 2020, available at: https://www.refworld.org/docid/5f8838974.html [accessed 28 August 2021].

[61] See Mauro Gatti, EU States' Exit from the Global Compact on Migration: A Breach of Loyalty (EU Migration Law Blog, 2018) Available at: https://eumigrationlawblog.eu/eu-states-exit-from-the-global-compact-on-migration-a-breach-of-loyalty/ [accessed 28 August 2021].

though no such defection was demonstrated at the adoption of the GCR in the same month.[62] However, when the European Commission issued its New Pact for Migration and Asylum in September 2020,[63] two years later, not a single reference was made to either Compact. Nor is any mention made to them in the numerous documents which accompany the Pact.[64] Why this silence? The Commission itself had sought an exclusive negotiating mandate from the Council as regards the Compacts, which effort was unsuccessful.[65] Nonetheless, it was very active in the negotiations and strongly supported the conclusion.[66] The Legal Service, as noted above, has advised that the GCM in an integral part of the EU positions in development cooperation as the GCM participates to the EU legal framework. Yet, when the Commission came to revising its migration and asylum law it did not include any reference to the standards which it had been so keen to support only two years earlier.

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

The principle of non-discrimination on the basis of migration status is an innovation within the Compacts that has the capacity to augment the protection of migrants seeking international protection and of refugees. It is identified as a key cross-cutting and interdependent guiding principle, and as will be discussed below, it is also expressed throughout the Compact in different objectives. However, this commitment represents a key area of friction with existing EU law and jurisprudence which, through relying on exceptions and restrictive interpretations of non-discrimination obligations, has permitted States to confirm their loyalty to non-discrimination whilst continuing to discriminate both against third-country nationals and amongst categories of third-country nationals.[67]

References to non-discrimination run throughout the Compacts demonstrating its central position within them and wider human rights law. The GCR in paragraph 5 acknowledges its grounding in international human rights law.[68] Paragraph 9 calls on States to "promote, respect, protect and fulfil human rights and fundamental freedoms for all;" and to end exploitation and abuse, as well as discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or disability. This aligns with the International Covenant on Civil and Political Rights (ICCPR) which has been interpreted to include immigration and nationality status within "other status".[69] Paragraph 84 requires that programmes and projects should be designed in a way that combats "all forms of discrimination and promote peaceful coexistence between refugee and host communities". The GCR acknowledges the importance of non-discrimination for the durability and sustainability of protection in line with human rights law.

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[62] François Boucher and Johanna Gördemann. "The European Union and the Global Compacts on Refugees and Migration: A Philosophical Critique." *Interventions* 23.2 (2021) pp. 227-249.

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

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

[65] See Elspeth Guild and Katharine Weatherhead, 'Tensions as the EU negotiates the Global Compact for Safe, Orderly and Regular Migration' (EU Migration Law Blog, 2018) available at: https://eumigrationlawblog.eu/tensions-as-the-eu-negotiates-the-global-compact-for-safe-orderly-and-regular-migration/ [accessed 29 August 2021].

[66] Emma Martin Diaz and Juan Pablo Aris Escarcena. "The European Union and the background of the Global Compacts." *International Migration* 57.6 (2019) pp. 273-285.

[67] See for further discussion, Bjarney Friðriksdóttir, *What Happened to Equality?: The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration* (Brill Nijhoff 2017).

[68] See GCR (n1) fn 5.

[69] Olivier De Schutter, Links between migration and discrimination (European Commission, July 2016) p. 62; see also *Ibrahima Gueye et al. v France*, Communication No. 196/1985, UN Doc CCPR/C/35/D/196/1985

Non-discrimination is a guiding principle of the GCM with paragraph 15(f) specifying that, in its implementation, States "ensure effective respect for and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle".[70] Further, objective 17 aims to eradicate all forms of discrimination against migrants. It is underpinned by international legal obligations relating to non-discrimination.[71] It focuses on eliminating discriminatory practises however they may manifest themselves and condemns expressions and acts of racism and xenophobia. It acknowledges that, for non-discrimination to be eliminated, state policies must also be constructed so as to avoid directly or indirectly discriminating against migrants. Thus, discrimination must be addressed at all levels through a "whole of society" approach. The Compacts' alignment with international human rights law commitments creates a framework that does not permit any exceptions or justifications for discrimination on grounds of nationality or immigration status. Once an individual is within the territory of a State, they must generally have equivalent access to human rights as nationals.[72]

The Compacts commit to end discrimination[73] and the GCM highlights the need to avoid discrimination on the ground of migratory status in particular.[74] However, non-discrimination on grounds of nationality within the EU is a complex area. Article 18 TFEU prohibits discrimination on grounds of nationality but that is limited to EU Member State nationality.[75] Article 19 TFEU provides a competence to combat discrimination on the basis of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, which has been exercised and applies to all within the scope of EU law.[76] As already alluded to, the ICCPR[77] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[78] outline

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

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

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

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

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

[75] Case C-22/08 *Vatsouras* ECLI:EU:C:2009:344

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

[77] Article 26 of the ICCPR 'prohibits discrimination in law or in fact in any field regulated and protected by public authorities'. The prohibited grounds of discrimination extend to any 'other status', including thus refugee status or nationality. See HRC, 'General Comment No 18: Non-Discrimination', UN doc HRI/GEN/1/Rev.6 (12 May 2003) 148–9, para 12. See also Vincent Chetail, 'Moving Towards an Integrated Approach of Refugee Law and Human Rights Law', *The Oxford Handbook of International Refugee Law* (2021) p. 214.

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

fundamental rights available to "all" persons, regardless of their legal status. So, arguably, under international human rights law there is no permissible distinction between nationals and non-nationals due to the general applicability of human rights through the principle of non-discrimination.[79] However, the UN Convention on the Elimination of all forms of Racial Discrimination (CERD) which sets the international standards as regards the prohibition of discrimination includes Article 1(2) which permits distinction between citizens and non-citizens so long as it pursues a legitimate aim and is proportionate.[80] This tension within the human rights framework permeates the EU legal order and creates a friction with the Compacts' commitment to non-discrimination.

Whilst some case law of the CJEU demonstrates the Court is willing to extend specific workers' rights to third-country nationals[81] and Peers argues that discrimination between third-country nationals on the basis of nationality is also covered by the interaction of Article 18 and 19 of the TFEU,[82] the fundamental framework of EU primary law is constructed to permit differential treatment of third-country nationals. Friðriksdóttir argues that the "sectoral approach" of the common immigration policy entrenches this discrimination at the secondary law level, despite claims it is intended to promote fair treatment.[83] This approach ensures that differential treatment is permitted through differentiating migratory status.[84]

Criticisms of the discrimination permitted within EU primary and secondary law are often rebutted through reference to the ECHR non-discrimination protections which are considered general principles of law binding on the Union and Member States.[85] While not expressly stated in Article 14 ECHR, discrimination on the basis of nationality has been found unlawful by the ECtHR. Examples from this case law include the case of *Gaygusuz v. Austria* where a nationality limitation on access to some social rights in Austria was found to be prohibited discrimination on the basis of nationality.[86] However, this has only been applied in limited circumstances.[87] This limited application of the prohibition of non-discrimination on

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[79] See HRC, General Comment 15 on the position of aliens, para 2, 5 and 6; Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marin (ed), *Human Rights and Immigration* (OUP 2014) p. 26; However, the ILC's draft articles on the expulsion of aliens highlight in the commentary to Art 14(5) that: 'The reference in the draft article to "any other ground impermissible under international law" makes it possible to capture any legal development concerning prohibited grounds for discrimination that might have occurred since the adoption of the Covenant. On the other hand, it also preserves the possible exceptions to the obligation not to discriminate based on national origin. In particular, it preserves the possibility for States to establish among themselves special legal regimes based on the principle of freedom of movement for their citizens such as the regime of the European Union.'

[80] CERD, General Comments 30 (2004) para 4; See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.),* Preliminary Objections, Judgment (Feb. 4, 2021) wherein discrimination on the basis of nationality is deemed admissible (see paras 109-113).

[81] C-311/13 *Tumer* ECLI:EU:C:2014:2337.

[82] See ibid; See also Elspeth Guild and Steve Peers, Out of the Ghetto? The Personal Scope of EU Law in S. Peers and N. Rogers *EU Immigration and Asylum Law Text and Commentary* (2006, Martinus Nijhoff Publishers) p.111.

[83] Friðriksdóttir (n 67) pp. 4–5.

[84] See ibid p.328; Cholewinski, R, Labour Migration, Temporariness and Rights, in S. Carrera, E. Guild and K. Eisele (eds) *Rethinking the Attractiveness of EU Labour Immigration Policies: Comparative perspectives on the EU, the US, Canada and beyond* (2014, Centre for European Policy Studies) p. 25

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

[86] *Gaygusuz v Austria* (1996) 23 EHRR 364; See also *Koua Poirrex v France* (2003) 40 EHRR 2.

[87] Article 14 ECHR outlines the prohibition of discrimination for 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status..' however, Article 5(1)(f) permits 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to

grounds of nationality has reinforced a certain reluctance of some EU Member States to grant equal treatment to third-country nationals with own nationals. However, what the Compacts call into question is also discrimination based on migration status between third-country nationals. Non-discrimination on the grounds of migration status not only in terms of integration, but also relating to access to a territory or to a labour market, is an innovation of the GCM that runs contrary to the practice of EU Member States and the jurisprudence of regional courts.[88] The EU framework is utilised to enable EU Member States to commit to the right to non-discrimination whilst utilising restrictive interpretations to continue to treat third-country nationals differently. This is so in three ways.

First, the ECtHR has outlined that "Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention."[89] As such, indirect differential practice is permitted so long as it has a legitimate aim and is deemed proportionate. This is not unusual for non-absolute human rights protections. However, the expansive understanding of a legitimate aim in regard to national security, the welfare of the State and in the national interest, means that discriminatory practice against third-country nationals is often permitted despite claims by the Court that justifications must be "very weighty."[90]

Second, Article 14 requires that discrimination occurs within the ambit of another provision of the Convention.[91] Thus, it contains no substantive right such that it will only apply in conjunction with another right. Whilst the other right need not be breached, the applicant need only prove that the practise was discriminatory, this seriously limits its effectiveness.[92] In practise, the Court either fails to discuss the discrimination at all instead focussing on the breach of the "primary right"[93] or the state argues that there is no primary right breach and therefore, Article 14 is not applicable to the practice in question.[94]

Third, the ECtHR's interpretation of Article 14 sets out that discrimination occurs whenever there is "a difference in the treatment of persons in analogous, or relevantly similar, situations (…) based on an identifiable characteristic".[95] For discrimination to be established the applicant must first prove that they are in an analogous situation to someone else to whom the discriminatory practise has not applied and this difference in treatment was due to a prohibited ground.[96] This principle has also been found to require that people in different positions, should be treated differently.[97] This has been stretched to untenable lengths by some

deportation or extradition…'; Article (1) of Protocol 7 outlines the procedural safeguards relating to expulsion of aliens and Article 16 ECHR permits EUMSs placing restrictions on political activity of aliens.

[88] See ibid (n60); See *MA v Denmark* (2021) Application no. 6697/18 para 177.

[89] See *Zarb Adami v Malta* hudoc 2006-VIII; 44 EHRR 49 para 73

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

[91] *Koua Poirrex v France*, (n86) para 36.

[92] See Ellis and Watson, *EU Anti-Discrimination Law* (2012) p.13.

[93] *Dudgeon v UK* ECHR 22 Oct 1981

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

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

[96] ECtHR, *Case Relating to Certain Aspects of the Laws on the use of Language in Education in Belgium v. Belgium* (Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), 23 July 1968, para 284; see criticism of this approach in McColgan, A, Cracking the Comparator Problem: Discrimination, 'Equal' Treatment and the Role of Comparisons 11(6) *European Human Rights Law Review* (2006) 656.

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

EU Member States who argue that, due to the difference in position of refugees, beneficiaries of international protection, asylum seekers or migrants and EU Member States nationals, their situations are not identical or nearly so, such that discrimination cannot be established.[98] The ECtHR confirmed in the *MA* case that treating people with a different migratory status differently was not discrimination as their situations were not sufficiently similar. This returns to the sectoral approach within EU secondary law concerning immigration status and access to rights.[99] Through classifying access to rights for different migrant groups and status, the EU creates a system where differential treatment is justified because these groups are not analogous and, thus, Article 14 is not applicable.[100] Despite obligations of non-discrimination in human rights and EU primary law throughout their legal frameworks, these protections are caveated on differentiation of nationality and migration status potentially permitting even direct discrimination on the basis of nationality.

The rather bleak picture, however, is tempered by the CJEU's interpretation of some EU secondary migration law, for instance the Single Permit Directive,[101] where the Court held that discrimination against a migrant worker on the basis of the precariousness of her work and residence permit was contrary to the Article 12 right to equal treatment.[102] This interpretation of an equal treatment provision has been extended to two other secondary law instruments,[103] the long term residents directive[104] and blue card directive.[105] This line of cases is favourable for a positive EU interpretation of the prohibition on discrimination on the basis of migration status, but is currently limited to a number of instruments.

From the European perspective, the Compacts' commitment to end discrimination,[106] together with the GCM-expressed duty to avoid discrimination based on migration status present an area of considerable friction with both EU law and EU Member State practice. Articles 18 and 19 TFEU are utilised to embed discrimination against third-country nationals whilst the sectoral approach to migration status justifies further differential treatment amongst this group. Conversely, the Compacts provide clear guidelines on the equality of treatment which refugees and migrants should receive regardless of migration status.[107] To translate this into rights protection, it is necessary to link the commitments in the Compacts to the relevant existing EU obligations and read them through the lens of the Compacts. The commitment to non-discrimination on grounds of nationality or migratory status in both Compacts requires greater alignment with the commitments to non-discrimination as discussed under the ICCPR. In line with the case law on discrimination on grounds of nationality, interpretation of Article 14 ECHR[108], Member States need to provide "very weighty" justification for treating people

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

[99] See Friðriksdóttir (n 67) pp.328–340.

[100] ibid p.9.

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

[102] C-449/16 *Martinez Silva* ECLI:EU:C:2017:485

[103] C-462/20 *ASGI* ECLI:EU:C:2021:894.

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

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

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

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

[108] Protocol 12 ECHR is also relevant here.

with different migration status differently.[109] In order for EU law to align with the commitments made in the GCM, the material scope of the prohibition on discrimination would need to eradicate all forms of discrimination against migrants with a tightly circumscribed exception for rights attached to citizenship, i.e. voting rights and holding public office. A Compact compliant application of non-discrimination ensures that migrants are entitled to the same human rights protections as everyone else.

4. Conclusion

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

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

It is in the application of the non-discrimination principle that we see greater tension between the Compacts and the EU framework. The Compacts make clear that the human right to non-discrimination should apply irrespective of nationality or migration status, and that these are legitimate grounds for challenging differential treatment. Bringing this approach into EU law is far from straight forward as non-discrimination on the basis of nationality is reserved for EU nationals while for migrants, EU primary law calls for fair treatment, a term which is certainly not synonymous with non-discrimination.[110] Only through EU secondary law where an equal treatment provision is expressly included does there seem to be some progress towards non-discrimination on the basis of migration status. Even the interpretation of non-discrimination on the basis of nationality in the case law of the ECtHR has developed both slowly and very cautiously, starting with prohibitions on nationality exclusions from access to social benefits and more recently applied to different family reunification rules depending on how the principal acquired citizenship. This state of the law creates a friction with the commitments found in the Compacts.

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

[110] Article 67(2) TFEU.

References

Legal Instruments

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

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

Consolidated version of the Treaty on the Functioning of the European Union (TFEU), 13 December 2007, OJ 2008/C 115/01

Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] *OJ L 175/43 1999*

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

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

Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment *OJ L 155, 18.6.2009*

Council Decision of 26 November 2009 Concerning the Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] *OJ L 23/35*

UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106

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

UN Global Compact on Refugees, UN Doc A/73/12 (Part II) (2 August 2018)

UN Global Compact for Safe, Orderly and Regular Migration, UN Doc A/RES/73/195 (19 December 2018)

Academic sources

Antpöhler C. and others, 'Reverse Solange-Protecting the Essence of Fundamental Rights Against EU Member States' (2012) 49 *Common Market Law Review* 489

Bárd, P. and Van Ballegooij, W. "Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM." *New Journal of European Criminal Law* 9.3 (2018)

Bingham, T. *The Rule of Law* (Penguin UK 2011).

Boucher F and Johanna Gördemann. "The European Union and the Global Compacts on Refugees and Migration: A Philosophical Critique." *Interventions* 23.2 (2021)

Chetail, V. 'The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law' (2020) 16 *International Journal of Law in Context* 253

Chetail, V. 'Moving Towards an Integrated Approach of Refugee Law and Human Rights Law', *The Oxford Handbook of International Refugee Law* (2021)

Cholewinski, R. Labour Migration, Temporariness and Rights, in S. Carrera, E. Guild and K. Eisele (eds) *Rethinking the Attractiveness of EU Labour Immigration Policies: Comparative perspectives on the EU, the US, Canada and beyond* (2014, Centre for European Policy Studies)

Collins, L. 'Principle of Non-Regression' in Orsini and Morin, *Essential Concepts of Global Environmental Governance* (Routledge 2020)

De Búrca, G. "After the EU Charter of Fundamental Rights: The Court of Justice as a human rights adjudicator?." *Maastricht Journal of European and Comparative Law* 20.2 (2013)

de Witte, B. 'The Relative Autonomy of the European Union's Fundamental Rights Regime' (2019) 88 *Nordic Journal of International Law* 65.

De Schutter, O. Links between migration and discrimination (European Commission, July 2016)

Diaz EM. and Juan Pablo Aris Escarcena. "The European Union and the background of the Global Compacts." *International Migration* 57.6 (2019)

Friðriksdóttir, B. *What Happened to Equality?: The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration* (Brill Nijhoff 2017).

Gammeltoft-Hansen T and others, 'What Is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration' (Raoul Wallenberg Institute Working Paper, 2017).
Guild E. 'The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?' (2019) 30 *International Journal of Refugee Law* 661
Guild E. and Guillaume Lesieur, eds. *The European Court of Justice on the European Convention on Human Rights: who said what, when?* (Martinus Nijhoff Publishers, 1998).
Guild E and Raoul Weiland, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Does It Mean in International Law?' in *The Global Community Yearbook of International Law and Jurisprudence* (2019)
Guild E. Tugba Basaran and Kathryn Allinson, 'From Zero to Hero? An Analysis of the Human Rights Protections within the Global Compact for Safe, Orderly and Regular Migration (GCM)' (2019) 57 *International Migration* 43;
Guild, E. and Peers, S, Out of the Ghetto? The Personal Scope of EU Law in S. Peers and N. Rogers *EU Immigration and Asylum Law Text and Commentary* (2006, Martinus Nijhoff Publishers)
Guild, E Stefanie Grant and CA Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (1 edition, Routledge 2017).
Kochenov D, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34 *Yearbook of European Law* 74
Konstadinides, T, '*The rule of law in the European Union: the internal dimension* '(Bloomsbury Publishing, 2017)
Kostakopoulou, D. 'Justice, Individual Empowerment and the Principle of Non-Regression in the European Union' (2021) 1 *European Law Review* 92, 99
Leloup, M, Kochenov D, and Dimitrovs A, 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on Case C-896/19 Repubblika v Il-Prim Ministru' (2021), 46 *European Law Review* 668
Molnár, T 'The EU Shaping the Global Compact for Safe, Orderly and Regular Migration: The Glass Half Full or Half Empty?' (2020) 16 *International Journal of Law in Context* 321.
McColgan, A, Cracking the Comparator Problem: Discrimination, 'Equal' Treatment and the Role of Comparisons 11(6) *European Human Rights Law Review* (2006)
Pech, L. '*The rule of law as a constitutional principle of the European Union*' (2009)
Pech L and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice* (Swedish Institute for European Policy Studies 2021)
Pech L. and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3
Peers, S et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury Publishing, 2021),
Peers, S 'Non-Regression Clauses: The Fig Leaf Has Fallen' (2010) 39 *Industrial Law Journal* 436
Sánchez SI and Maribel González Pascual (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press, 2021)
Tsourdi, EL. 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?' (2021) *European Constitutional Law Review* 17(3)
Von Bogdandy, A, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' (2008) 6(3) *International Journal of Constitutional Law*, 397
von Bogdandy A. and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) *European Constitutional Law Review* 1
Ziegler, KS 'Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law' in Sionaidh Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017)

International Reports and Statements

European Commission, '2021 Rule of Law Report: The rule of law situation in the European Union' COM (2021) 700

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

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No.3: The Nature of States Parties Obligations*, Art.2, Para.1 of the Covenant, 14 December 1990, E/1991/23

UN Committee on Economic, Social and Cultural Rights, General Comment No 13: The Right to Education, 8 December 1999

UN Committee on Economic, Social and Cultural Rights (CESCR), '*General Comment No. 14: The Right to the Highest Attainable Standard of Health'* (2000) UN Doc E/C.12/2000/4

UN Committee on Economic, Social and Cultural Rights (CESCR), '*General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights,'* UN doc E/C.12/GC/20 (2 July 2009)

UN Human Rights Committee, 'General Comment No 18: Non-Discrimination', UN doc HRI/GEN/1/Rev.6 (12 May 2003)

Online sources

Alegre, S. submission to *R Ferguson v AG & OUTBermuda et al v AG*[2018] SC (Bda) 46 Civ (6 June 2018) on non-regression in rights of same sex couples; available at: https://www.islandrights.org/wp-content/uploads/2018/06/Submissions-relating-to-the-contravention-of-the-European-Convention-on-Human-Rights.pdf. [accessed 25 August 2021]

Commission Legal Service, *The legal effects of the adoption of the Global Compact for Safe, Orderly and Regular Migration by the UN General Assembly* (1 February 2019), available here: https://www.lavocedelpatriota.it/wp-content/uploads/2019/03/EU-Legal.pdf [accessed 20 August 2021]

EEAS, Contribution by the EEAS / European Commission Services to the Regional Review of the Global Compact for Safe, Orderly and Regular Migration in the UNECE Region (12-13 November 2020) Available at https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/contribution_by_the_eeas_european_commission_services_to_the_regional_review_of_the_global_compact_for_safe_orderly_and_regular_migration_in_the_unece_region.pdf [accessed 24 August 2021]

'European Commission "Rule of Law Report 2021" COM(2021) 700' available at: <https://ec.europa.eu/info/sites/default/files/communication_2021_rule_of_law_report_en.pdf> [accessed 15 September 2021]

European Council on Refugees and Exiles (ECRE), 'ECRE Comments on the Commission Proposal for a Screening Regulation' COM(2020) 612 available at: https://ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM2020-612-1-screening-December-2020.pdf [accessed 28 August 2021]

Gatti, M. EU States' Exit from the Global Compact on Migration: A Breach of Loyalty (EU Migration Law Blog, 2018) Available at: https://eumigrationlawblog.eu/eu-states-exit-from-the-global-compact-on-migration-a-breach-of-loyalty/ [accessed 28 August 2021].

Guild E. and Katharine Weatherhead, 'Tensions as the EU negotiates the Global Compact for Safe, Orderly and Regular Migration' (EU Migration Law Blog, 2018) available at: https://eumigrationlawblog.eu/tensions-as-the-eu-negotiates-the-global-compact-for-safe-orderly-and-regular-migration/ [accessed 29 August 2021].

Gutmann, R. 'Rollback im Standstill' in K Barwig, S Beichel-Benedetti and G Brinkmann (eds) '*Hohenheimer Tage zum Ausländerrecht 2015'* (Nomos Verlagsgesellschaft mbH & Co. KG, 2016), available at: https://ec.europa.eu/employment_social/soc-prot/schemes/regulations/turkey_en.htm

Thym D (ed), 'Special Collection on the "New" Migration and Asylum Pact' (2021), available at: https://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-daniel-thym/ [accessed 28 August 2021]

UNHCR, UNHCR's Recommendations for the Portuguese and Slovenian Presidencies of the Council of the European Union (EU), January 2021, available at: https://www.refworld.org/docid/5ff4799d4.html [accessed on 25 August 2021]
UNHCR, Practical considerations for fair and fast border procedures and solidarity in the European Union, 15 October 2020, available at: https://www.refworld.org/docid/5f8838974.html [accessed 28 August 2021].