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The Legal Effects of the Global Compact for Safe, Orderly and Regular Migration: EU Development Policy and Irregular Migration Management



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The Legal Effects of the Global Compact for Safe, Orderly and Regular Migration: EU Development Policy and Irregular Migration Management

1 Introduction

The Global Compact for Safe, Orderly and Regular Migration (GCM) explicitly states that it ‘presents a *non-legally binding*, cooperative framework’.¹ As a result, the GCM’s non-binding nature is not normally questioned. However, it has been pointed out that, even if *legally* non-binding, the GCM consolidates existing human rights obligations, which *are* legally binding upon states, contains a commitment to non-regression with regard to these standards, and, moreover, is *politically* binding.² This means that rather than setting new standards, the GCM consolidates existing law, while spelling out how states should act in order to comply with this existing law.

Framing the GCM, as well as its counterpart, the Global Compact on Refugees (GCR), as non-binding is likely to have contributed to governments endorsing both instruments.³ States may be more willing to endorse an instrument which is not considered to introduce any new obligations. Yet, a leaked 2019 document produced by the European Commission’s legal service, titled ‘The legal effects of the adoption of the Global Compact for Safe, Orderly and Regular Migration by the UN General Assembly’ suggests that, contrary to the predominant view that the GCM is non-binding, it has ‘legal effects’, specifically on EU development policy.⁴ While interpreting EU asylum law in line with GCM provisions and standards can serve

¹ Global Compact for Safe, Orderly and Regular Migration, UN doc A/RES/73/195 (19 December 2018) (hereinafter GCM) para 7; emphasis added.

² Kathryn Allinson, ‘GCM Commentary: The Legal Status of the UN’s Global Compact for Safe, Orderly and Regular Migration in International and UK Law’ (31 January 2019) RLI Blog <<https://rli.blogs.sas.ac.uk/2019/01/31/gcm-commentary-the-legal-status/>> (accessed 2 August 2022).

³ Tim Höflinger, ‘Non-binding and therefore irrelevant? The Global Compact for Migration’ (2020) 75(4) International Journal 662.

⁴ European 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) <www.lavoicedelpatriota.it/wp-content/uploads/2019/03/EU-Legal.pdf> (accessed 2 August 2022); NB: The document was published in March 2019 on the website of La Voce del Patriota, the newspaper of the Italian right-wing party Fratelli d’Italia (Brothers of Italy). The website explains that it was leaked by Janice Atkinson, an independent MEP at the time, and former UKIP and UK Conservative party member. While we distance ourselves from the content of the website, we believe the document merits discussion; see Ulderico de Laurentiis, ‘EXCLUSIVE. Global

to improve the rights of refugees, asylum-seekers and other migrants,⁵ the general view that the Compact is non-binding makes this an optional (though desirable) exercise. Suggesting that the Compact has legal effects on EU development policy, however, may lead to the conclusion that designing and interpreting legislation in this area in line with GCM standards ought to be mandatory. Thus, the GCM may have a much greater impact on states' existing and future laws and policies than they thought it would.

In this policy brief, we consider the Commission legal service's arguments regarding the legal effects of the GCM. We argue that the legal service opinion has the potential to address the effects of the long-standing intrusion of policy on irregular migration into the realm of development policy and its damaging effects on the rights of (irregular) migrants. This, in turn, has implications for future policy in this area.

2 Evidence and Analysis

2.1 The Commission Legal Service Opinion

The Commission legal service opinion argues that the adoption of the UNGA resolution endorsing the GCM 'created legal effects of the Global Compact within the EU legal order'.⁶ The legal service's argument rests on a number of provisions in the Treaty on European Union (TEU)⁷ and the Treaty on the Functioning of the European Union (TFEU).⁸ These include the principle of sincere cooperation (Art 4(3) TEU); the promotion of multilateral solutions to common problems, in particular in the framework of the United Nations (Art 21(1) TEU); the obligation to 'comply with the commitments and take account of the objectives [the EU and its Member States] have approved in the context of the United Nations and other competent international organisations' (Art 208(2) TFEU); and the obligation to coordinate EU and Member State policies on development cooperation (Art 210 TFEU).

Indeed, the legal service opinion relies mainly on EU law and policy on development cooperation in advancing its arguments on the GCM's legal effects in EU law. It refers to the New European Consensus on Development, which states that the EU and its Member States will 'actively support' the implementation of the GCM.⁹ The opinion also draws on the CJEU's judgement in Case C-377/12 (at times incorrectly referred to as C-377/13 in the opinion), which emphasises that migration is integrated into EU development policy.¹⁰ The opinion then

Compact: the EU secret document that makes it mandatory' (La Voce del Patriota, 27 March 2019) <www.lavocedelpatriota.it/en/exclusive-global-compact-the-eu-secret-document-that-makes-it-mandatory/> (accessed 2 August 2022).

⁵ Elspeth Guild, Kathryn Allinson, Nicolette Busuttil and Maja Grundler, 'A Practitioners' Handbook on the Common European Asylum System (CEAS) and EU and Member States' Commitments under the UN Global Compact on Refugees and the UN Global Compact for Safe, Orderly and Regular Migration' (Protect 2022) <<https://zenodo.org/record/7053969#.YxoWzi337-a>> (accessed 8 September 2022).

⁶ European Commission Legal Service (n 4) para 7.

⁷ Consolidated version of the Treaty on European Union [2008] OJ C 115 (hereinafter TEU).

⁸ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326 (hereinafter TFEU).

⁹ European Commission, Directorate-General for International Cooperation and Development, 'The New European Consensus on Development: Our World, our Dignity, our Future - Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament, and the European Commission' (2018) <<https://data.europa.eu/doi/10.2841/694595>> (accessed 22 September 2022) para 40.

¹⁰ C-377/12, *Commission v Council* (CJEU, 11 June 2014) paras 49-52.

highlights the interconnected nature of migration and development with reference to Regulation 1905/2006 and Regulation 233/2014 (both establishing a financing instrument for development cooperation; no longer in force),¹¹ which identify migration as an important area of cooperation on development. As the opinion shows, Regulation 233/2014 refers to the 2006 European Consensus on Development,¹² *and agreed modifications thereto*, as guiding its implementation, so that the New European Consensus (which, in turn, refers to the GCM) can be seen as being included as a guiding instrument for EU development cooperation.

The opinion then goes on to highlight the GCM's development dimension, including its rootedness in the Sustainable Development Goals (SDGs). It concludes that, as a result, the GCM itself falls within EU development policy and thus 'has legal effects' for this policy.¹³ Essentially, based on the TEU and TFEU provisions referred to above, the opinion suggests that EU development policy must be implemented in line with the GCM's objectives and standards. The GCM constitutes a multilateral solution to a common problem (i.e. migration), which must be promoted in line with Art 21(1) TEU. As an instrument adopted at UN level, the EU and its Member States must comply with the GCM's objectives according to Art 208(2) TFEU. Finally, the opinion refers to the CJEU's judgement in Case C-399/12, which states that an act has legal effects where it is 'capable of decisively influencing the content of the legislation adopted by the EU legislature'.¹⁴ Based on its earlier arguments showing that the GCM is a guiding instrument for EU development cooperation, the opinion argues that the Compact is indeed capable of decisively influencing the content of EU legislation on development and thus has legal effects.

Further, the opinion goes on to state that, based on the principle of sincere cooperation, even Member States which voted against endorsing the GCM, abstained or did not vote at all must still facilitate this implementation of EU development policy and must not jeopardise it in any way. This is significant because although 19 EU Member States voted in favour of adopting the Compact, three voted against (Czech Republic, Hungary and Poland), five abstained (Austria, Bulgaria, Italy, Latvia and Romania), and one did not cast its vote (Slovakia).

2.2 Linking Migration and Development: Irregular Migration as a Policy Priority

The linking of development and migration policy in the EU began in 2005 with the European Consensus on Development.¹⁵ While the focus at the time was making 'migration a positive force for development',¹⁶ in 2017, the tone of the revised New European Consensus on Development had shifted from emphasising the positive impact of migration generally on development to emphasising the positive impact of *regular* migration.¹⁷ At the same time, the New European Consensus put a focus on *irregular* migration and how it allegedly 'raise[s]

¹¹ Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation [2006] OJ L 378; Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 [2014] OJ L 77.

¹² European Commission, 'The European Consensus on Development' (June 2006) <https://ec.europa.eu/international-partnerships/system/files/publication-the-european-consensus-on-development-200606_en.pdf> (accessed 22 September 2022).

¹³ European Commission Legal Service (n 4) paras 36-37.

¹⁴ C-399/12, *Germany v Council* (CJEU, 7 October 2014) para 63.

¹⁵ See n 12 above.

¹⁶ *ibid* para 110.

¹⁷ See n 9 above, para 39.

major challenges and impact[s] negatively on the countries of origin, transit and destination'.¹⁸ As a result, a wide range of issues connected to irregular migration and displacement, such as 'smuggling and trafficking in human beings, border management, remittances, addressing root causes, international protection and return, readmission and reintegration' became linked with development policy.¹⁹ Thus, development policy became, and indeed remains, linked with security considerations and migration management strategies.²⁰

Yet, even before the adoption of the New European Consensus, a significant proportion of EU development funds was being spent on projects related to irregular migration.²¹ This led to tensions inside the European Commission. 'DG Home [the DG for Migration and Home Affairs] complained about the lack of own funding available as leverage vis-à-vis third countries, and DG Devco [the DG for International Cooperation and Development] felt that its development cooperation money was unduly used for the EU's internal security objectives'.²²

Although DG HOME and DG DEVCO were later allotted their individual budgets, irregular migration continued to be a priority of development policy. At the EU institutional level, this policy priority was eventually accompanied by a change in leadership at DG DEVCO. In 2016, Stefano Manservigi, formerly Director-General at the DG HOME became DG DEVCO's new Director-General. Since then, a stronger focus in development spending on deterring (irregular) migration has been observable, which includes increased cooperation with third countries.²³ In 2021, DG DEVCO was renamed 'Directorate General for International Partnerships' (DG INTPA), reflecting a shift in emphasis on cooperation with third countries.

Over time, a number of funding instruments (no longer in force at the time of writing) have reflected the intertwining between development and (irregular) migration.²⁴ For the 2014-2020 Multiannual Financial Framework (MFF), these included the Development Cooperation Instrument,²⁵ the European Neighbourhood Instrument (ENI),²⁶ and the Instrument for Pre-accession Assistance (IPA II).²⁷

The main funding instrument for EU external action in the 2021-2027 MFF is the Neighbourhood, Development and International Cooperation Instrument (NDICI). This instrument 'merg[es] the ten former external financial instruments – as well as the European

¹⁸ *ibid.*

¹⁹ *ibid* para 40.

²⁰ Thomas Spijkerboer, 'Migration management clientelism: Europe's migration funds as a global political project' (2021) *Journal of Ethnic and Migration Studies*.

²¹ Leonhard den Hertog, 'Money Talks: Mapping the funding for EU external migration policy' (CEPS, 2016) <http://aei.pitt.edu/81699/1/LSE_No_95_LdH_Mapping_Funding_final.pdf> (accessed 22 September 2022) 10.

²² *ibid* 12.

²³ Marta Latek, 'Briefing: Interlinks between migration and development' (European Parliament, 2019) <[www.europarl.europa.eu/RegData/etudes/BRIE/2019/630351/EPRS_BRI\(2019\)630351_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/630351/EPRS_BRI(2019)630351_EN.pdf)> (accessed 22 September 2022).

²⁴ For a discussion see Paula García Andrade *et al.*, 'EU Cooperation with Third Countries in the Field of Migration' (European Parliament 2015) <[www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU\(2015\)536469_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf)> (accessed 3 August 2022) 51-60.

²⁵ Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 OJ L 77.

²⁶ Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument OJ L 77.

²⁷ Regulation (EU) No 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II) OJ L 77.

Development Fund (EDF) - into one single financing tool.²⁸ 10% of its €79.5 million budget is ‘dedicated particularly to actions supporting management and governance of migration and forced displacement’.²⁹ The 10% spending target on migration has been described as ‘excessive’ and without ‘any basis in the Treaties’.³⁰ Further, there is an ‘emerging challenges and priorities cushion of EUR 9 534 000 000’,³¹ which can be used, inter alia, to address ‘migratory pressure and forced displacement’.³² Indeed, the NDICI lists ‘addressing irregular migration and forced displacement, including their root causes’ amongst its objectives.³³ It also clarifies one of the priorities of the European Fund for Sustainable Development Plus’s (EFSD+) operations as

contribut[ing] by promoting sustainable development, to addressing specific socio-economic root causes of irregular migration and root causes of forced displacement, and contributing to the sustainable reintegration of returned migrants in their countries of origin, as well as fostering the resilience of transit and host communities, with due regard to the strengthening of the rule of law, good governance and human rights.³⁴

Further, the Instrument for Pre-accession Assistance (IPA III) lists ‘tackling irregular migration’ amongst its objectives,³⁵ emphasising that it complements the NDICI.³⁶

Like Regulation 233/2014, cited in the Commission legal service opinion, the NDICI refers to the 2017 European Consensus on Development, which should guide the implementation of the Instrument.³⁷ The Consensus, in turn, speaks of ‘actively support[ing] [...] the elaboration of the UN Global Compacts on Migration and Refugees’.³⁸ Even though, in choosing the term ‘elaboration’ rather than the term ‘implementation’, the Consensus appears to attempt to avoid language creating any obligations with regard to GCM provisions, following the reasoning of the Commission legal service outlined above, the GCM can nevertheless be said to be capable of decisively influencing the content of the NDICI and to create legal effects.

²⁸ CONCORDE, ‘Guide to Global Europe Funding 2021-2027 for Civil Society Organisations Part I’ (2022) <<https://concordeurope.org/resource/guide-to-global-europe-funding-2021-2027-for-civil-society-organisations/>> (accessed 23 September 2022) 6.

²⁹ Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and repealing Regulation (EU) 2017/1601 of the European Parliament and of the Council and Council Regulation (EC, Euratom) No 480/2009 (Text with EEA relevance) [2021] OJ L 209 (NDICI) Recital 51; Art 6(1).

³⁰ CONCORDE, ‘Recommendations on the NDICI migration spending target’ (2019) <https://concordeurope.org/wp-content/uploads/2019/09/CONCORD_MFF_Migration_Spending_Recommendations.pdf> (accessed 23 September 2022).

³¹ NDICI (n 29) Art 6(3).

³² *ibid* Art 17(1)(b).

³³ *ibid* Art 3(1)(a).

³⁴ *ibid* Annex V f).

³⁵ Regulation (EU) 2021/1529 of the European Parliament and of the Council of 15 September 2021 establishing the Instrument for Pre-Accession assistance (IPA III) OJ L 330 Art 3(2)(a) and Recital 22.

³⁶ *ibid* Recital 2.

³⁷ NDICI (n 29) Recital 12.

³⁸ European Parliament (n 9) para 40.

2.3 Development Funding, Irregular Migration, and Human Rights Violations

Before turning to the significance of finding that the GCM may create legal effects in relation to EU development policy, it is necessary to outline why the policy focus on irregular migration in development funding instruments is problematic. EU cooperation with third countries has frequently led to human rights violations.³⁹ External action funded (at least partly) by development funds has led to pullbacks, *refoulement*, arbitrary detention, torture and other ill-treatment, and even death of migrants.⁴⁰ A prominent example of this is EU cooperation with Libya. The funding structure for Libya includes development funding as well as other sources, resulting in an intransparent web of actions funded through different instruments.

The relevant instruments – funding external action in Libya and elsewhere – contain insufficient safeguards to prevent human rights violations. As the European Court of Auditors (ECA) has noted, the ‘SaharaMed project, which received 10 million euro in funding to improve capacity in tackling irregular immigration and preventing and intercepting irregular immigrants in the Mediterranean area, included no precautionary measures to guarantee respect for migrants’ rights’.⁴¹ As the EU’s independent external auditor, the ECA is an appropriate forum to which to address concerns about funding instruments and their implementation. Thus, in 2020, the Global Legal Action Network (GLAN), the Association for Juridical Studies on Immigration (ASGI) and the Italian Recreational and Cultural Association (ARCI) filed a complaint to the ECA concerning the mismanagement of EU funds by the EU Trust Fund for Africa’s (EUTFa) ‘Support to Integrated Border and Migration Management in Libya’ Programme. The complaint stated that the ‘programme is illegal for using European development funds for the non-developmental purposes of border securitization, and for managing such funds without proper human rights safeguards and conditionality in contravention of EU law requirements’.⁴² The European Court of Auditors, however, decided to ‘not initiate a special review of the programme at this time, due in part to limited resources’.⁴³

This lack of attention to human rights protection in development funding used to manage migration, and the accompanying lack of a meaningful response to such concerns (as evidenced by the ECA’s decision not to initiate a review) is likely to also constitute a problem for EU external action funded through the 2021-2027 MFF. Although the NDICI does mention respect for human rights and the rule of law⁴⁴ and explicitly states that ‘Union funding under the Instrument shall not support actions or measures which [...] may result in the violations of human rights in partner countries’,⁴⁵ this does not constitute a sufficient safeguard. Indeed, EU cooperation with third countries on migration leads to human rights violations not only *in* partner countries, but also along the dangerous migratory routes individuals are forced onto as

³⁹ Violeta Moreno-Lax *et al.*, ‘The EU Approach on Migration in the Mediterranean’ (LIBE Committee, June 2021) <[www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU\(2021\)694413_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU(2021)694413_EN.pdf)> (accessed 3 August 2022) Chapter 6.

⁴⁰ *ibid.* 131-133.

⁴¹ European Court of Auditors, ‘EU external migration spending in Southern Mediterranean and Eastern Neighbourhood countries until 2014’ (2016) <www.eca.europa.eu/Lists/ECADocuments/SR16_09/SR_MIGRATION_EN.pdf> (accessed 22 September 2022) para 89.

⁴² GLAN, ‘Petition to European Parliament Challenging EU’s Material Support to Libyan Abuses Against Migrants’ (11 June 2020) <www.glanlaw.org/single-post/2020/06/11/petition-to-european-parliament-challenges-eu-s-material-support-to-libyan-abuses-against> (accessed 19 September 2022).

⁴³ *ibid.*

⁴⁴ NDICI (n 29) e.g. Recitals 3, 11, 40 and 51; Arts 3(1)(a), 8

⁴⁵ *ibid.* Art 29(a).

a result of containment measures.⁴⁶ Further, the NDICI does not contain any procedures to be triggered in case human rights violations do occur. Even if the ECA in the future agrees to review EU development funding programmes, a legal review of these measures provides additional safeguards. In particular, if the GCM indeed has legal effects on EU development policy, its provisions will assist in ascertaining whether the content and implementation of EU development funding intersecting with migration management is legal.

2.4 The Legal Effects of the GCM: Primacy of Human Rights and Best Practice Standards

Against the background of insufficient human rights protection in development funding instruments intersecting with migration management, a finding that the GCM has legal effects for EU development policy is significant. The GCM is underpinned by a wide range of binding human rights instruments⁴⁷ and human rights and the rule of law are amongst its guiding principles.⁴⁸ Thus, the GCM's main effect on development policy will be a requirement for projects supported by development funding instruments to be in line with relevant human rights standards. While it should be noted that EU external action must comply with international law even in the absence of the GCM's possible legal effects,⁴⁹ the added value of the Compact lies in its detailed provisions, which outline best practice standards for the treatment of migrants.

The GCM provides clear guidelines which have the potential to counter and prevent the human rights violations migrants experience as a result of EU cooperation with third countries under the guise of development. Of particular relevance in this context is the GCM's Objective 11 ('Manage borders in an integrated, secure and coordinated manner'). Although Objective 11 reveals a security dimension potentially at odds with human rights standards, the latter decidedly take a prominent role. Importantly, Objective 11 emphasises that prevention of irregular migration must go hand-in-hand with security for migrants through safe and regular cross-border movements. On 'cross-border collaboration among neighbouring and other States relating to the treatment given to persons crossing or seeking to cross international borders' the Objective points to the OHCHR Recommended Principles and Guidelines on Human Rights at International Borders (OHCHR Guidelines) as an important source of best practice.⁵⁰ The OHCHR Guidelines, in turn, recommend three principles on human rights at international borders – the primacy of human rights; non-discrimination; and assistance and protection from harm – as well as ten practical guidelines, ranging from human rights protection to cooperation, with an emphasis on state accountability and effective remedies.⁵¹

Principle 1 – 'the primacy of human rights' – emphasises, inter alia, that 'States shall ensure that all border governance measures protect the right of all persons to leave any country

⁴⁶ See e.g. Mariagiulia Giuffr  and Violeta Moreno-Lax, 'The Rise of Contactless Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows' in Satvinder Singh Juss (ed) *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019).

⁴⁷ GCM (n 1) para 2, n1.

⁴⁸ *ibid* para 15.

⁴⁹ TFEU (n 8) Art 205; TEU (n 7) Arts 3(5) and 21; cf Moreno-Lax *et al* (n 39) 119.

⁵⁰ GCM (n 1) para 27(g).

⁵¹ OHCHR, 'Recommended Principles and Guidelines on Human Rights at International Borders' (OHCHR Guidelines) (2014) <www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf> (accessed 3 August 2022).

including their own'.⁵² As such, containment measures in partner countries which prevent migrants from leaving for a third country or force them onto dangerous migratory routes are unacceptable. Principle 2 – 'non-discrimination' – meanwhile, states that prohibited grounds of discrimination in the context of border governance includes migration status.⁵³ Thus, border control measures specifically targeting individuals based on their irregular status, such as pullbacks, are not permissible. Finally, Principle 3 – 'assistance and protection from harm' – clarifies that not only must migrants be protected from harm, such as *refoulement* and collective expulsion, they must also have access to justice and effective remedies where rights violations have occurred.⁵⁴ Thus, cooperation with third countries which causes harm to migrants and does not provide them with remedies is not in line with the OHCHR Guidelines and, by extension, with the GCM.

The practical guidelines, then, show how these principles can be achieved. Each Guideline consists of several paragraphs and discusses best practice in relation to border governance to a degree of depth which is not within the scope of this policy brief to discuss in detail. Thus, we will only consider the points most pertinent to EU cooperation with third countries here.

Guideline 2 suggests 'amending legislation to ensure that respect, protection and fulfilment of all human rights, including mandatory protection and assistance provisions, are explicitly included in all border-related legislation, including but not limited to legislation aimed at addressing irregular migration'.⁵⁵ This goes beyond the NDICI's commitment to human rights, requiring more detailed provisions on assistance and protection of migrants. The Guideline also proposes regulating border authorities' powers, use of firearms, as well as their investigation and prosecution in case of excessive use of force and corruption.⁵⁶ This is currently not the case, as EU cooperation with Libya illustrates, where impunity, the use of firearms and force, as well as corruption, are rife.⁵⁷ Guideline 8 is also relevant in this context, as it recommends preventing arbitrary detention,⁵⁸ another practice which is common in Libya.⁵⁹ Guideline 3 further clarifies that border authorities should be 'mandated to only perform tasks for which they have adequate training, capacity and resources' and suggests 'rigorous recruitment and deployment procedures for border authorities, and ensuring that recruitment criteria include knowledge of or openness to learn relevant human rights law'⁶⁰ – neither of which is not the case for the so-called Libyan coast guard.⁶¹ Meanwhile, Recommendation 4 suggests '[s]uspending, amending and revising any rescue and interception cooperation agreements or arrangements [...] that may compromise human rights at international borders',⁶² a recommendation which, in light of the above, is of particular relevance to EU cooperation with third countries on migration management.

⁵² *ibid* 7.

⁵³ *ibid* 8.

⁵⁴ *ibid* 9.

⁵⁵ *ibid* 14.

⁵⁶ *ibid* 15.

⁵⁷ Amnesty International, "No One Will Look for You" - Forcibly Returned from Sea to Abusive Detention in Libya' (2021) <www.amnesty.org/en/wp-content/uploads/2021/07/MDE1944392021ENGLISH.pdf> (accessed 3 August 2022).

⁵⁸ OHCHR Guidelines (n 51) 33.

⁵⁹ Amnesty International (n 57).

⁶⁰ OHCHR Guidelines (n 51) 17.

⁶¹ Amnesty International (n 57).

⁶² OHCHR Guidelines (n 51) 24.

With regard to cooperation and coordination, Guideline 10 starts by recommending the signature and ratification of core refugee and human rights treaties (a requirement some EU partner countries, such as Libya, do not meet).⁶³ It goes on to suggest ‘[e]nsuring that bilateral, regional and international cooperation agreements, arrangements, laws and policies do not have a deleterious effect on the human rights of migrants at borders’, ‘[s]uspending any bilateral or regional cooperation agreements, arrangements or mechanisms in which human rights are not explicitly guaranteed,’ while stating that ‘joint operations that violate, or assist in the violation of, human rights law and standards should be terminated with immediate effect’.⁶⁴

In summary, the OHCHR Guidelines paint a comprehensive picture of what treatment of migrants at and around borders should look like. As a result, the EU and its Member States ought to take these guidelines into account when designing instruments pertaining to migration management financed (partly) through development funds. Potential EU partner countries unable or unwilling to meet the standards set out in the Guidelines should not be considered as recipients of development aid in exchange for migration management tasks. Further, any existing agreements which do not guarantee migrants’ human rights should be terminated.

2.5. The Role of the European Parliament

The importance of the GCM has also been emphasised by the European Parliament (EP) in its resolution on human rights protection and EU external migration policy.⁶⁵ Briefly, the EP resolution identifies as problematic the intransparent set-up and funding structure of EU external action on migration, the lack of effective human rights protection, parliamentary oversight, and available remedies. The resolution ‘reiterates the importance of fully implementing the 23 objectives of the Global Compact for Safe, Orderly and Regular Migration’.⁶⁶ In the context of EU external action on migration, the EU Parliament ‘stresses the need for ensuring parliamentary scrutiny and democratic oversight’,⁶⁷ which extends to ‘proper scrutiny of EU implementation of both compacts’.⁶⁸

Based on the Commission legal service’s opinion on the GCM’s legal effects on EU development policy, the EP may wish to adopt its own interpretation regarding these effects. The above analysis may provide a starting point. A detailed consideration of GCM provisions’ influence on external action on migration funded by development instruments would bring together parliamentary oversight of both EU external migration policy and the Compact. Such an analysis would strengthen the points made by the EP in its resolution and would be backed up by the Commission legal service, making it harder for the Commission to ignore.

⁶³ *ibid* 42.

⁶⁴ *ibid* 43.

⁶⁵ European Parliament resolution of 19 May 2021 on human rights protection and the EU external migration policy (2020/2116(INI)) <www.europarl.europa.eu/doceo/document/TA-9-2021-0242_EN.html> (accessed 9 September 2022).

⁶⁶ *ibid* para 28.

⁶⁷ *ibid* para 10.

⁶⁸ *ibid* para 28.

3 Policy Implications and Recommendations

The problematic nature of linking development funding with policy on irregular migration illustrates why the Commission legal service's opinion on the legal effects of the GCM is significant. In addition to a focus on development, the GCM has a strong focus on human rights compliance. Indeed, the GCM ensures effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle.⁶⁹

As a result, if, as the legal service's opinion suggests, the GCM is a guiding instrument for EU development cooperation, capable of decisively influencing the content of EU legislation on development, and has legal effects for this policy, any development policy measure which infringes human rights, such as cooperation with Libya, will not be in line with the GCM's principles. Therefore, the EU will have to completely rethink and redesign its approach to linking development and policy on irregular migration.

Based on the GCM's Objective 11 on border management, the EU ought to design any development policy pertaining to migration management in line with the OHCHR Recommended Principles and Guidelines on Human Rights at International Borders. This would involve ensuring that any such policy protects human rights and upholds the principle of non-discrimination. Protection and assistance provisions must be written into relevant legislation, including access to remedies. Cooperation with partner countries will only be possible where these countries, in practice, protect and ensure migrants' human rights.

The GCM and the OHCHR Guidelines are, of course, not the only sources of law mandating a human rights-compliant approach to development assistance and migration management. As mentioned above, EU external action must comply with international law. However, the Guidelines provide a level of detail on best practice which international law, even when interpreted by judicial authorities, usually lacks. As such, finding that the GCM has legal effects on development policy would force policymakers to engage with these detailed provisions and to ensure that legislation complies with best practice. Thus, both the design and implementation of development policy would have to reflect the protective standards set out in the GCM.

It should be noted, however, that the Commission does not appear to be keen to heed the opinion of its own legal service. In an answer to a Parliamentary question regarding the opinion, the Commission reiterated the general idea that the GCM is a 'non-legally binding instrument and 'therefore has no legal effect on national legal systems, nor does it impose any obligations'.⁷⁰ It went on to state that the legal service's opinion is an 'internal document, which does not represent the official Commission position.'

As such, it is all the more important to consider the opinion and its possible implications for development policy focussing on irregular migration, as we have aimed to do in this policy brief. Whether or not the Commission legal service opinion is found to be persuasive, we recommend that EU migration policy is informed by, and interpreted in line with, the GCM's (and GCR's) standards and principles. In this context, it should also be noted that the principle of non-regression in the GCM may have implications for EU development policy. The principle of non-regression resembles a 'stand still clause' and thus prevents countries which have

⁶⁹ GCM (n 1) para 15, indent 6.

⁷⁰ European Parliament, 'Parliamentary questions: Answer given by Mr Avramopoulos on behalf of the European Commission, Question reference: E-001383/2019' (20 June 2019) <www.europarl.europa.eu/doceo/document/E-8-2019-001383-ASW_EN.html> (accessed 22 September 2022).

endorsed the Compact from adopting any laws or policies which are less favourable than those in force at the time the GCM was adopted. In effect, states cannot adopt any laws or policies which are more restrictive than those which were in force in December 2018. This must be kept in mind by policymakers, not only with regard to development policy pertaining to migration management, but with regard to EU migration and asylum policy generally, including the planned reforms of the Common European Asylum System⁷¹ and the Schengen Borders Code.⁷²

In summary, we recommend that the EU and its Member States:

- *design and interpret EU migration policy in line with, the GCM's (and GCR's) standards and principles*
- *take account of the principle of non-regression in this context*
- *rethink and redesign their approach to linking development and policy on irregular migration and bring this in line with the standards and provisions contained in the GCM*
- *codify protection and assistance provisions in relevant legislation, including access to remedies*
- *take the OHCHR Recommended Principles and Guidelines on Human Rights at International Borders into account when designing instruments pertaining to migration management financed (partly) through development funds*
- *not enter into development-funded migration management agreements with partner countries who are unable to meet the standards set out in the OHCHR Guidelines*
- *disapply any existing development-funded migration management agreements which do not guarantee migrants' human rights*
- *take seriously relevant analyses and opinions, in particular by the European Court of Auditors, the European Parliament, relevant NGOs, activists and academia*

⁷¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum COM/2020/609 final.

⁷² Proposal for a Regulation amending Regulation 2016/399 regarding a Union Code on the rules governing the movement of persons across borders COM/2021/891 final.

4 Project Identity

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