Protect

The Right to International Protection

The Legal Significance of the two Global Compacts for the Right to International Protection

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1. Context and main research questions

Research in PROTECT's Work Package 2 (WP2) focussed on the *rights* dimension of the international protection regime. It assessed the potential impact of the Global Compacts – the Global Compact for Migration (GCM) and the Global Compact on Refugees (GCR) – on a rights-based system of international protection. The legal research conducted by WP2 researchers aimed at reconstructing the Compacts' interaction with pre-existing legal frames of protection, that is, their relationships with international treaties and domestic legislation that regulate international protection. The main focus of interest was on the Compacts' implications for the legal construction and future reform of the EU's Common European Asylum System, while benefiting from comparative insights on the respective situations in Canada and South Africa.

As a preliminary remark, it should be emphasised that the relationship of each of the two Compacts with the legal framework of international law is quite different. The GCR is firmly situated in the existing international protection system, with the United Nations High Commissioner for Refugees (UNHCR) and the Refugee Convention of 1951 as its cornerstones. The latter forms the uncontested reference text around which the global legal debate on refugee protection revolves. The GCR gradually adds to this well-developed regime in providing a multilateral forum to promote more equitable responsibility-sharing for international refugee protection. By contrast, the GCM constitutes a quantum leap in the development of international migration governance, which was previously marked by institutional incoherence and the lack of an agreed reference text. After decades of political blockade by Western powers, migration issues are now being addressed at the highest level of the United Nations (UN), with the International Organization for Migration (IOM) acting as coordinator of the UN Network on Migration (UNNM) supporting the implementation, follow-up and review of the GCM.

These developments have been met with mixed feedback from legal scholars, in particular regarding the GCM and its suitability for becoming the principal reference text of international migration law. Skeptical voices raised concerns that its legal nature as a non-binding document prevents it from being an effective tool of international governance strengthening the rights of migrants. Others are concerned that also in terms of substance the GCM may undermine the rights of migrants as laid down in existing human rights treaties. Moreover, scholars criticised the categorical distinction between refugees and migrants that is reflected in the parallel existence of the two Compacts. Accordingly, in order to evaluate the Compacts' interaction with pre-existing legal frames of protection, WP2 scholars first had to come to terms with these conceptual issues regarding the form, contents and scope of the Compacts (below, 2.1–2.4), before a substantive analysis of their potential impact on laws and policies could be carried out, both on a more general level in the EU, Canada and South Africa (2.5–2.6) and with regard to select thematic issues (2.7–2.10).

2. Key findings

2.1 Legal nature of the Compacts

The legal nature of the Compacts as non-binding instruments of international law ('soft law') does not prevent them from becoming effective tools of international governance strengthening the rights of migrants, including refugees. Soft law can entail legal and political effects in two ways: it may produce communicative power, creating an ongoing discourse of justification around consented governance goals, and it can serve as a source of interpretation to give meaning to hard law instruments. Both functions are relevant for understanding the significance of the Compacts.

The Compacts' non-binding nature is a typical feature of the regimes of global governance that have emerged in various branches of international law since the 1990s. In this regard, migration is a latecomer but not an outlier. Legally speaking, the soft law nature of a legal document means that a breach of 'obligations' (or rather, commitments) laid down in its provisions does not trigger the State's responsibility according to the rules of international law, and that these provisions are not justiciable in domestic, regional, or international courts. However, according to legal scholarship, soft-law instruments can entail legal and political effects in two ways, both of which are relevant for WP2: Soft-law standards may serve as a yardstick for reviewing compliance with the specific commitments voluntarily assumed, and they may inform the construction of binding rules of international law on which they are based (see D2.12).

According to the first line of scholarship, a soft-law instrument in international law can turn out to be a powerful tool of governance if the context in which it is embedded allows it to produce communicative power. The institutional and procedural context may create an ongoing discourse of justification around consented goals, which makes non-compliance politically or economically costly. Communicative power through soft law presupposes regularity, institutionalization and legitimacy of the relevant compliance mechanism. Accordingly, the crucial question for the GCM to actually impact migration policy and legal discourse is how to further develop and improve its implementation and review mechanisms (see D2.6; on the relevant findings, see below, 2.4).

According to the second approach, the established rules of treaty interpretation allow for non-binding instruments to be taken into account as relevant context for the purpose of the interpretation of binding treaties. Accordingly, a consent expressed in documents such as the GCM may be relevant for the construction of human rights obligations to which they refer, directly or indirectly. Consequentially, given that the EU is constitutionally obliged to respect human rights as laid down in the relevant treaties, a Compact-compliant interpretation of EU law is in order. Based on that premise, WP2 researchers have identified a number of concrete examples of how a Compact-compliant interpretation of EU law can lead to improved protection for asylum-seekers, refugees and (other) migrants, in particular in compiling 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' (D2.5). The analysis spans issues such as (access to) asylum procedures, reception conditions for asylum seekers, including access to health care, qualification for and content of international protection, and detention of asylum-

seekers and other migrants. In each of these areas, the binding human rights standards reiterated in the Compacts, as well as the Compacts' detailed provisions, can help to identify shortcomings in the treatment of asylum-seekers, refugees and other migrants. Conversely, a Compact-compliant interpretation of supranational and national law can address and improve those shortcomings (see also D2.8).

2.2 The GCM's references to human rights

The abundance of both general and specific references to human rights law in the GCM supports the view of a complementary function of the Compact in relation to human rights law. The strongest legal argument in that respect is the generic reference to the entirety of the treaties that form the 'core' of international human rights law.

Being a State-negotiated legal instrument, the GCM reflects the realities of migration politics in the 21st century, including restrictionist tendencies among States. WP2 research has revealed the 'mixed' character of the GCM in terms of substance, reflected in three intersecting 'axes' of migration management, development policy and individual rights. However, its rights-dimension is remarkably strong and its references to human rights law are sufficiently comprehensive to consider it a human rights document. There is a multitude of generic references, either to the notion of human rights in general or to certain human rights instruments. In addition, a limited number of specific rights are explicitly mentioned, and others – though not explicitly named – are described in substance. Moreover, there are various references to human rights institutions or infrastructure in a broader sense (see D2.6).

The Compact is certainly not *only*, but clearly *also*, a human rights document. In any case, this does not mean that the Compact weakens other human rights guarantees as laid down elsewhere in international law. Legally speaking, there is nothing in the text of the GCM that may legitimize a derogation from obligations assumed under existing human rights treaties. From a legal-doctrinal perspective, the analysis of the references to human rights in the text of the Compact rather supports the view of a *complementary* function of the GCM in relation to human rights law. *A contrario* arguments, stating that because the Compact's references to human rights law do not exhaustively cover existing human rights protection for migrants, or concerns about the lowering of standards by means of the GCM, cannot be justified. The strongest legal argument in that respect is the generic reference to the entirety of the treaties that form the 'core' of international human rights law.

2.3 The bifurcation between migrants and refugees

The bifurcation between refugees and migrants on which the two Compacts seemingly build is less straightforward than one would assume. Accordingly, not only the GCR but also the GCM has major implications in asylum policy. It addresses specific protection needs of protection-seeking migrants who are not covered by the Refugee Convention, and it serves as an 'umbrella', strengthening core human rights of migrants regardless of their status.

The duality of the two Compacts seems to build on a clear dichotomy between refugees and migrants as distinct classes. This view finds support in recital 4 of the GCM Preamble, which

states that ‘migrants and refugees are distinct groups governed by separate legal frameworks’. According to the understanding of WP2 scholars, the main purpose of recital 4 is to shield the well-developed legal regime of international refugee law from undue interference by way of discretionary migration governance. However, the legal and conceptual distinction between refugees and (other) migrants is not meant to preclude other legal instruments from providing additional sources of protection, including for refugees.

The legal construction which best serves the object and purpose of both documents is the assumption that the two Compacts have an overlapping scope of application: They have to be read together to unfold their full potential. The resulting understanding of the legal interplay of the two documents consists of two elements. First, *all refugees are migrants seeking protection*. Accordingly, all GCM Objectives that pertain to migrants regardless of a particular status are also applicable to refugees and other persons seeking international protection. In that regard, the GCM forms the umbrella, while the GCR is part of the special regime specifically addressing the protection of refugees. Second, *not all protection-seekers are refugees*. Refugees as defined in the Refugee Convention are a qualified part of those migrants who seek and potentially enjoy international protection. While the GCR addresses the protection needs of refugees, the GCM may contain elements that specifically relate to similar needs of protection-seeking migrants other than refugees. In that regard, both the GCM and the GCR are complementary components of the special regime governing international protection (see D2.11).

2.4 The GCM’s implementation and review mechanisms

The impact of the GCM on the rights of protection-seeking migrants is limited by the fact that the review process so far is dominated by States and permits cherry-picking from the various Objectives. Ensuring broader stakeholder participation in the preparation of the national reports, in particular from civil society, would emphasize the relevance of migrants’ human rights in implementing the GCM. The GCM review process would also benefit from an alignment and cross-fertilisation with the supervisory mechanisms based on human rights treaties.

With the International Migration Review Forum (IMRF) taking place every four years, as well as the biennial reports by the UN Secretary General (UNSG) and regional reviews that are foreseen, the institutional follow-up mechanism envisaged in the GCM promises to provide favourable conditions for the Compact to effectively impact domestic migration policies. Nevertheless, the impact of the GCM on the rights of migrants is likely to be limited by the fact that the review process so far is almost exclusively dominated by States. Whether States base their reports also on the findings of civil society actors, as envisaged by the GCM, is within their own discretion. The risk of selective implementation practice is particularly acute since the GCM’s follow-up mechanism lacks any independent assessment procedure undertaken by an international institution or body (see D2.6).

This critical finding is confirmed by a closer look into the review documents by WP2 researchers. The reports submitted by States mostly look at the GCs’ broad aims and objectives, tend to highlight mainly positive developments and give little detail on civil society

contributions to the review process. In addition, while the GCR reviews rely largely on quantitative data to measure progress, the GCM reviews are based mainly on qualitative data. Neither of these methods of measuring progress is particularly convincing, with the former causing the review to focus only on indicators that can be quantified and the latter allowing States to cherry-pick positive examples. Instead, what is needed is a detailed analysis of shortcomings, coupled with concrete suggestions on how these can be addressed to narrow the implementation gap (see D2.12).

In that regard, the GCM review process would hugely benefit from lessons learned in the realm of human rights: the consistent practice of non-governmental organizations to issue shadow reports on domestic implementation and to demand from their governments to have them discussed before filing the State report. Shadow reports are not only an effective tool to raise awareness for critical issues that State reports tend to ignore but may also help provide guidance for future reporting and assessment. They may serve as a crucial tool to intensify public discourse surrounding the GCM and holding States publicly accountable for deficits and shortcomings and promote a human rights-based interpretation of the GCM's Objectives.

Improvements of the review process are also warranted at the UN level. The review process of the GCM would benefit significantly from an alignment with the reporting procedures established under the various human rights treaties, and with the migration-related jurisprudence of the human rights treaty-bodies. Such cross-fertilization between human rights treaty-bodies and the GCM's review mechanism should be fostered on a systematic basis. The UNNM could play a useful role in collecting the relevant reports and communications as they result from complaint procedures and State reporting procedures. These findings and recommendations of the treaty bodies could be organized according to the GCM's Objectives and form an integral part of a more comprehensive practice of State reporting in respect of the GCM (D2.6).

2.5 The relationship between the Global Compacts and the Common European Asylum System

There are points of coherence and friction between the Common European Asylum System and the Global Compacts, which allow the former to be analysed in light of the latter.

WP2 researchers have scrutinised the relationship between the Global Compacts on the one hand and the Common European Asylum System (CEAS) on the other, to establish the extent to which the two might be mutually supportive. In the resulting paper (D2.8) they argue that three key elements of the Compacts, i.e. human rights and the rule of law, the principle of non-regression, and the principle of non-discrimination, illustrate why the Compacts can inform the interpretation and implementation of EU asylum law. The emphasis on the rule of law and the principle of non-regression are already embedded within the EU constitutional setup as obligations under EU law. Thus, these points of coherence between the two frameworks result in a considerable protective potential of the Compacts within EU law. At the same time, the prohibition of discrimination on the basis of migration status, which 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. 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.

2.6 Comparative studies on Canada and South Africa

At international level, Canada has a leading role both in the development and review of the Global Compacts. At the domestic level, a Compact-specific (re-)evaluation of existing and future policies, in close collaboration with civil society, would allow for a stronger visibility of Compact Objectives. In South Africa, the Global Compacts are experienced as top down international instruments and have limited impact on the protection system. The Compacts could better unfold their potential if civil society were engaged in the spirit of the 'whole of society' approach pursued by the Compacts.

In keeping with Canada's role as a GCM Champion, Canada has heavily focused on international initiatives in supporting refugee resettlement and complementary pathways to protection. Primarily, this has meant to share the country's long-standing expertise on Canada's private refugee sponsorship programs and to encourage and test labour pathways for refugees. As well, the Compacts have offered a platform for the government to showcase its best practices for gender equality through its commitment to gender-responsive migration management, protection from Gender-Based Violence in Emergencies, and various contributions for women empowerment. Canada also showed its dedication to promoting positive narratives on migration and the inclusion of refugees in decision making. At the same time, however, various alliances and agreements that Canada continues to implement with several source and transit countries ultimately create exclusion for asylum seekers and result in human rights violations, putting Canada at odds with its Compact commitments. Overall, the example of Canada has shown that more transparency and visibility is needed to raise awareness of the Compacts in domestic policies and make them evidently relevant at the field level of migration governance within Canada (D2.9; see also D2.12)

In South Africa, the lack of impact of recent global initiatives such as the GCR suggests that increased pressure 'from above' alone is unlikely to have lasting impact on how the State responds to refugees. While interviewees from UNHCR and other UN agencies were confident that the GCR could still play a positive role in southern Africa, civil society and academics in South Africa remain largely unconvinced about public commitments and shifts in government approaches based on the Compact. If South Africa, which has embraced both Global Compacts, is truly committed to new 'whole of government' and 'whole of society' approaches, then genuine engagement and open dialogue with organisations at the local level would be a positive step forward, with the interaction between formal and informal protection mechanisms working in both directions, rather than just one (D2.10, see also D2.12).

2.7 Humanitarian pathways to protection

The GCM has the potential to strengthen the international protection system in improving the legal condition of protection-seeking migrants other than refugees. GCM Objective 5 stands out as an example, laying down the commitment to expand safe pathways to protection, in particular by providing humanitarian visas.

The GCM complements the GCR to enhance safe pathways to protection beyond the refugee definition. Objective 5 of the GCM reflects a commitment of States to progressively expand grounds of protection and to rely on safe pathways to protection to secure the human rights of protection-seeking migrants. It complements the GCR by broadening the call for humanitarian pathways to forcibly displaced persons who do not qualify as refugees under the Refugee Convention. Beneficiaries of such routes to protection could be, inter alia, individuals forced to flee due to natural disasters or climate change. Given the almost complete absence of safe humanitarian pathways at present, living up to these commitments would require substantial policy changes on the part the EU and its Member States. In the legal context of the EU, the GCM therefore has the potential to enhance safe pathways to protection, not only by expanding qualification-based pathways to all migrants but also by specifically naming needs-based pathways. The latter expands the focus of protection in this area to encompass humanitarian grounds far beyond the limitations of current policy discourse in the EU (see D2.11).

2.8 Reception conditions

The GCM has the potential to strengthen the social and economic rights of protection-seeking migrants. Objective 15 of the GCM reflects a human right to a 'minimum core' of basic services for all migrants independent of their status. This is particularly relevant for the reception conditions of protection-seeking migrants whose status determination is pending, including asylum-seekers who are subject to so-called Dublin transfers.

In line with human rights doctrine developed in various fora, Objective 15 acknowledges an individual entitlement of all migrants to a 'minimum core' of socio-economic rights as well as the commitment of States to provide for access to the corresponding basic services. This commitment reflects the aim of working towards a progressive fulfilment of these rights. Policies of planned destitution, making such provision conditional on compliance with certain policy goals, such as the withdrawal of reception conditions in the context of onward movement of asylum-seekers under the EU Dublin system, conflict with this Objective. Thus, complying with GCM commitments in this context would significantly enhance the legal condition of protection-seeking migrants in the EU (see D2.11).

2.9 Immigration detention

Immigration detention is another example where the GCM functions as an 'umbrella', shielding protection-seeking and other migrants alike. The GCM, with its Objective 13, has the potential to limit the use of detention as an element of asylum policy, in particular in the context of border procedures.

Objective 13 of the GCM commits States to working towards ending immigration detention and using detention only as a measure of last resort. Accordingly, immigration detention must not be used as a deterrence measure in asylum policy. If the commitment reflected by the GCM were to be acknowledged and guide the EU legislature, protection-seeking migrants could not be contained on a systematic basis during border procedures in the context of the European asylum system (see D2.11). Against that background, it is worrying that the implementation gap in respect of the goal of ending immigration detention has even widened, in Canada, South Africa as well as the EU (see D2.12).

2.10 Further policy implications

Faithfully observing Compact standards could also have policy implications beyond the CEAS instruments, such as the Return Directive or the Schengen Borders Code. Moreover, the GCM may create legal effects for EU development policy.

WP2 researchers have also examined the Compacts' potential impact on EU policies beyond the field of asylum. E.g., they extended their analysis to the Return Directive in discussing detention in the migration context. As in relation to CEAS instruments, this analysis proved useful in uncovering instances of non-compliance and suggestions as to how EU law can be brought in line with Compact standards. A similar analysis may be conducted in relation to other EU law instruments relevant to the migration context – such as the Schengen Borders Code, the Visa Code, the Frontex Regulation, and the Carrier Sanctions Directive (see D2.5 and D2.8).

In a Policy Brief on 'EU Development Policy and Irregular Migration Management' (D2.7.), WP2 researchers considered the implications of an opinion issued by the European Commission's legal service, which suggests that the GCM has legal effects for EU development policy. By engaging with the legal service's arguments and taking them further to explore their potential practical impact, they find that the GCM has the potential to counter the negative effects of the conflation of EU development and migration policy. In conjunction with the OHCHR Recommended Principles and Guidelines on Human Rights at International Borders, the Compact's Objective 11 provides clear guidance which has 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 policy. While EU policy should be interpreted in line with Compact standards irrespective of the GCM's non-binding nature, if the GCM indeed creates legal effects for EU development policy, the EU will have to completely rethink and redesign its approach to linking development and policy on irregular migration.

3. Conclusions

Overall, the research conducted by scholars of WP2 offers conceptual clarifications on the legal nature of the Compacts, their mutual relationship, as well as their interaction with human rights treaties. WP2's approach may be summarized as *shifting from form to substance* (human rights) *and procedures* (review process), and from *separation to complementarity* (of the two Compacts, and with human rights law). Taking the Compacts seriously, in particular the substantive commitments laid down in the GCM's Objectives, would entail substantial changes

in EU policies, in the field of asylum and beyond. Moreover, certain shortcomings could be remedied by applying the method of Compact-compliant interpretation of EU law. Continuous research is needed on the next round of reviews, in order to create the conditions for good faith implementation through improved compliance procedures. Both civil society actors and UN bodies could benefit from lessons learned in the context of supervisory mechanisms in human rights law.

4. References to research output

For a more in-depth understanding of the results presented here, please refer to the research working papers and academic articles listed below. They will be available at:

Publications - PROTECT The Right to International Protection (uib.no)

D2.5: Elspeth Guild, Kathryn Allinson, Nicolette Busuttil and Maja Grundler (2022) '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 Deliverable no. 2.5. Bergen: PROTECT Consortium. https://zenodo.org/record/7053969#.Y1vPjy337PD (accessed 28 October 2022)

D2.6: Jürgen Bast and Janna Wessels, with Anuscheh Farahat (2022) 'The Dynamic Relationship between the Global Compact for Migration and Human Rights Law'. PROTECT Deliverable no. 2.6. Bergen: PROTECT Consortium.

D2.7: Elspeth Guild and Maja Grundler (2022) 'The Legal Effects of the Global Compact for Safe, Orderly and Regular Migration: EU Development Policy and Irregular Migration Management'. PROTECT Deliverable no. 2.7. Bergen: PROTECT Consortium. https://zenodo.org/record/7243756#.Y1vU3i335PO (accessed 28 October 2022).

D2.8: Elspeth Guild, Kathryn Allinson and Nicolette Busuttil (2022) 'The UN Global Compacts and the Common European Asylum System: Coherence or Friction?'. 11(2) *Laws* 35.

D2.9: Idil Atak, Claire Linley and Julie Kim (2023) 'Canada's Implementation of the UN Global Compacts on Migration and Refugees: Advancing Foreign Policy Objectives and the Status quo?', PROTECT Deliverable no. 2.9. Bergen: PROTECT Consortium. forthcoming.

D2.10: Nicholas Maple, Kudakwashe Vanyoro, Jo Vearey and Rebecca Walker (2023). 'From Global to Community: The Availability of Protection Mechanisms for Refugees in South Africa', PROTECT Deliverable no. 2.10. Bergen: PROTECT Consortium. forthcoming.

D2.11: Jürgen Bast, Pauline Endres de Oliveira and Janna Wessels, 'Enhancing the Rights of Protection-seeking Migrants through the Global Compact for Migration: the Case of EU Asylum Policy', PROTECT Deliverable no. 2.11. Bergen: PROTECT Consortium. forthcoming.

D2.12: Idil Atak, Maja Grundler, Pauline Endres de Oliveira, Jürgen Bast (2023) 'Reviewing the Reviews: The Global Compacts' Added Value in Access to Asylum Procedures and Immigration Detention', PROTECT Deliverable no. 2.12. Bergen: PROTECT Consortium. forthcoming.

Elspeth Guild, Kathryn Allinson and Nicolette Busuttil (2021) 'Implementing the UN Global Compacts for Refugees and Migrants in Times of Pandemic: A View from the EUMS' *European Yearbook on Human Rights* 319.

Anuscheh Farahat and Jürgen Bast, 'A Global View on the Global Compact for Migration: Introduction' (2022) 55 *World Comparative Law* 3.