

## A global view on the Global Compact for Migration – Introduction

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Ever since the Global Compact for Safe, Orderly and Regular Migration (GCM or “the Compact”) was agreed in November 2018 and eventually adopted by the UN General Assembly, it has sparked heated debate in public and academic discourse. While some praised the GCM as the first internationally consented document ever to comprehensively address all phases of migration (departure, transit, arrival, immigration or return), and essentially regard it as a human rights instrument that complements and strengthens existing obligations under international law,<sup>1</sup> others were more critical. Critique has been raised not only by right-wing populist movements or governments who were quick to (falsely) accuse the Compact of introducing a right to immigration,<sup>2</sup> but also by progressive actors from civil society and academia. For them the Compact entails the risk that states could use it as an excuse to bypass obligations following from human rights treaties, and to introduce further requirements for regular migration, in fact bringing more migrants in a situation of irregularity.<sup>3</sup>

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- 1 See the self-description on the official GCM website: <https://www.iom.int/global-compact-migration> (last accessed on 13 Dec 2021) and GCM, para. 11. This narrative has been repeated in a number of academic reflections on the GCM: *Michele K. Solomon* and *Suzanne Sheldon*, The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly, and Regular Migration, *International Journal of Refugee Law* 30 (2018), p. 584; *Elspeeth Guild*, *Tugba Basaran* and *Kathryn Allison*, From Zero to Hero?, *International Migration* 57 (2019), p. 43; *Madeline Garlick* and *Claire Inder*, Protection of Refugees and Migrants in the Era of the Global Compacts, *International Journal of Postcolonial Studies* 23 (2021), p. 207.
- 2 See, e.g., the declaration of the Austrian government explaining its abstention: [www.bundeskanzleramt.gv.at/2Fdam%2Fjcr%3A7de7e247-8513-4113-b3ad-959467a4b6fd%2F33\\_11\\_mrv\\_Votumserklaerung.pdf&usg=AOvVaw1rsU-7c94LTP8itBdqFawM](http://www.bundeskanzleramt.gv.at/2Fdam%2Fjcr%3A7de7e247-8513-4113-b3ad-959467a4b6fd%2F33_11_mrv_Votumserklaerung.pdf&usg=AOvVaw1rsU-7c94LTP8itBdqFawM) (last accessed on 13 Dec 2021).
- 3 This critique has been raised with regard to the interplay between the GCM and the Global Compact on Refugees by *Cathryn Costello*, Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?, *International Journal of Refugee Law* 30 (2018), p. 647. With a view to the UN Migrant Workers Convention, see *Alan Desmond*, A New Dawn for the Human Rights of International Migrants? Protection of Migrants’ Rights in Light of the UN’s SDGs and Global Compact for Migration, *International Journal of Law in Context* 16 (2020), p. 222; *Mariette Grange* and *Izabella Majcher*, Using Detention to Talk About the Elephant in the Room: The Global Compact for Migration and the Significance of its Neglect of

Much of the discourse has been fed by contributions from the Global North. The reception and initial implementation in the Global South have so far received little attention. Moreover, the dynamic relationship between the GCM and migration-related human rights treaties has rarely been discussed in detail. Four years after its adoption and with the first International Migration Review Forum (IMRF) taking place in 2022, the time is ripe to draw some preliminary conclusions as to the GCM's impact in the different world regions and on the governance of migration at large. This special issue contributes to this endeavor by providing the floor for regionally diverse analyses of the reception of the GCM, its interplay with other human rights instruments as well as its impact on global governance structures. Before outlining these contributions in more detail (B.), this introduction aims at assessing the GCM's potential impact in the light of the legal framework guiding the follow-up to the document adopted in 2018 (A.). Instead of focusing on the substantive provisions of the Compact, i.e., its Objectives, our paper rather focusses on the GCM as a process, i.e., its institutional and procedural dimension.

### **A. Procedural and institutional significance of the GCM: institutionalized soft law with potentially hard impact**

The Compact is explicitly qualified as “non-legally binding”<sup>4</sup> and repeatedly reaffirms the respect for “the sovereign right of states to determine their national migration policy”.<sup>5</sup> The question therefore arises in how far the GCM can actually impact the migration policy in UN Member States. Will its substantive provisions make any difference on the ground? To answer this question and assess the potential impact of the GCM, we will address the procedural and institutional framework established by the GCM. In a first step, we will benefit from insights into the conditions of effectiveness of soft-law instruments in public international law more generally (I.). We will then compare these conditions with the follow-up mechanisms provided for in the GCM and offer a preliminary assessment of its potential impact (II.). Finally, we will make a few suggestions on how to improve the implementation of the GCM, focusing in particular on the role of civil society actors (III.).

#### *I. Institutional conditions for effective soft law*

Soft-law instruments have been the object of intense research in international legal scholarship for over a decade. The non-binding character of a legal document, agreed upon

the UN Migrant Workers Convention, *International Journal of Law in Context* 16 (2020), p. 287; see also *Alan Desmond*, in this issue. For a nuanced critique from a human rights perspective, see *Ryszard Cholewinski*, *The Global Compact for Safe, Orderly and Regular Migration: What now with Standards?*, in: Paul Minderhoud et al. (eds.), *Caught In Between Borders: Citizens, Migrants and Humans*, Tilburg 2019, p. 315.

4 GCM, para. 7 and 15.

5 GCM, para. 7, 15 and 27.

among states or adopted by bodies of an international organization, *prima facie* seem to suggest that its policy relevance and effectiveness is limited. However, it is by now widely acknowledged that such documents can in fact have a strong impact on policy-making and legal discourse, provided that they are accompanied by proper institutionalization.<sup>6</sup> The gist of this line of research on the use of alternative instruments in international law<sup>7</sup> is that so-called soft law can turn out to be a powerful governance tool if the context in which it is embedded allows it to wield communicative power.<sup>8</sup> More specifically, soft law may be used as a means to internationalize a policy issue in the first place by creating an international communicative structure on the issue, particularly when states are reluctant to cease relevant decision-making powers to international institutions or to formally bind their hands by entering into treaty obligations.<sup>9</sup> Communicative power rests on the assumption that soft-law instruments create an ongoing discourse of justification around consented governance goals established by the respective instruments. Such discourse makes non-compliance politically or economically costly even in the absence of hard sanctions – which are sparse and often ineffective in public international law anyway.<sup>10</sup> In identifying the conditions for justificatory constraints we rely on research conducted on the exercise of International Public Authority (IPA) that has identified criteria for assessing both the effectiveness and the need for legitimation, of the use of alternative instruments in global governance.<sup>11</sup> According to this approach, communicative power through soft law presupposes regularity, institutionalization, independence and legitimacy of the follow-up mechanisms in place.

A first prerequisite for soft-law instruments to wield communicative power is that there are regular follow-up mechanisms put in place to assess the degree of compliance with the

- 6 *Matthias Goldmann*, We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law, *LJIL* 25 (2012), p. 335. In the context of migration law, see *Vincent Chetail*, *International Migration Law*, Oxford 2019, p. 293–339; *Thomas Gammeltoft-Hansen*, The Normative Impact of the Global Compact on Refugees, *International Journal of Refugee Law* 30 (2018), p. 605.
- 7 *Nico Krisch* and *Benedict Kingsbury*, Introduction: Global Governance and Global Administrative Law in the International Legal Order, *EJIL* 17 (2006), p. 1; *Armin von Bogdandy*, *Philipp Dann* and *Matthias Goldmann*, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, in: *Armin von Bogdandy et al. (eds.)*, *The Exercise of International Public Authority by International Institutions*, Heidelberg 2010, p. 3; *Benedict Kingsbury* and *Lorenzo Casini*, Global Administrative Law Dimensions of International Organizations Law, *International Organizations Law Review* 6 (2009), p. 319; *Ingo Venzke*, *How Interpretation Makes International Law*, Oxford 2012.
- 8 *Armin von Bogdandy* and *Matthias Goldmann*, Die Ausübung internationaler öffentlicher Gewalt durch Politikbewertung, *ZaöRV/HJIL* 69 (2009), p. 70; engl. version: *Id.*, The OECD's PISA Policy, *International Organizations Law Review* 5 (2009), p. 241.
- 9 *Chetail*, note 6, p. 300 et seq.
- 10 *von Bogdandy* and *Goldmann*, note 8, p. 70; *von Bogdandy*, *Dann* and *Goldmann*, note 7, p. 12.
- 11 *von Bogdandy*, *Dann* and *Goldmann*, note 7.

expectations or commitments laid down in the relevant document.<sup>12</sup> Through regular loops of reporting on the current state of implementation and identifying potential shortcomings, a continuous dialogue can emerge. Once such dialogue is established, the respective standards provide the benchmark for reviewing and assessing policies in a given thematic field, irrespective of their legally non-binding nature. The repeated reference to the soft-law instrument reinforces its relevance as a legal framework that complements the sources of hard law, if any. Such a discursive practice creates normative expectations (sometimes misleadingly referred to a “moral” in nature) that states rarely disappoint without providing justification, despite the absence of hard sanctions for non-compliance.

Mere reporting at the will of states, however, may not suffice to actually create such justificatory constraints. Mechanisms in which reporting takes place require a certain degree of institutionalization at the international level, i.e., an international institution or body that coordinates the process and also evaluates the reports. Soft-law instruments may only gain leverage as a benchmark for adapting public policies if the performance of states is “judged” by an external public authority that successfully claims to be independent in its assessment. The concrete modes of assessment may, however, vary depending on the specific context. While in policy areas where states have an intrinsic interest to become best performers, such as education, alternative instruments using outcome indicators and rankings based on scientific data have proven highly successful,<sup>13</sup> this may look different in other policy areas. Where a policy field is marked by significant power imbalances and intense contestation – as in respect of migrants’ rights – it is less evident what a “best practice” is and whether it is beneficial to become a “best performer”.<sup>14</sup> In these contexts, identifying and naming concrete shortcomings in meeting agreed standards seem more important, as well as issuing specific recommendations as to how shortcomings might be remedied. Hence, an independent and objective review in order to ensure the legitimacy of the review process is all the more important.

Finally, legitimacy of institutionalized review processes also hinges upon participation of relevant stakeholders. The acceptance of the soft-law mechanisms by states can be increased through ownership, i.e., a strong role of states in self-reporting as well as in selecting the implementation measures.<sup>15</sup> However, an exclusively state-driven process has significant shortcomings. States may paint an all too rosy picture of their compliance with the commitments made or cherry-pick areas where they perform particularly well while ignoring more critical policy tools. Therefore, soft-law’s effectiveness can be achieved best if civil society actors are also involved either directly in the review process or by

12 Ibid.

13 Ibid. p. 90.

14 See *Scott D. Watson and Corey Robinson*, Knowledge Controversies of Global Migration Governance: Understanding the Controversy surrounding the Global Compact, in: Catherine Dauvergne (ed.), *Research Handbook on the Law and Politics of Migration*, Cheltenham 2021, p. 323.

15 *von Bogdandy, Dann and Goldmann*, note 7, p. 93–94.

accompanying the review process with shadow reports and campaigning. Communicative power is ultimately based on a communicative environment in which a multitude of actors raise their voices and appropriate, interpret and specify a soft-law instrument.

These more general insights on the conditions under which soft-law instruments may become powerful and effectively impact domestic policies, provide a helpful matrix to assess the follow-up mechanism put in place by the GCM in the next section.

## *II. Institutionalization and follow-up mechanisms foreseen by the GCM: a complex process with uncertain impact*

At first glance, the institutional follow-up mechanism envisaged in the GCM promises to provide favorable conditions for the Compact to effectively impact domestic migration policies (1.). However, two critical features become apparent upon closer inspection of the early practice (2.). The GCM's follow-up mechanism is almost exclusively state-led and bears a significant risk of cherry-picking from the various Objectives of the Compact. This and the institutionalization at UN level under the auspices of the IOM beg the question of how prominent the role of human rights will actually be in specifying the standards of assessment during the ongoing follow-up and review of the Compact.

### 1. Some favorable conditions for the GCM's impact on migration policies

The GCM dedicates 15 out of its 54 paragraphs to issues of implementation, follow-up and review. This suggests that the drafters were well aware of the necessity of institutionalized mechanisms to ensure effective impact of the GCM on migration policies. The Compact emphasizes that “we require concerted efforts at global, regional, national and local levels, including a coherent United Nations system” to effectively implement the GCM.<sup>16</sup>

More specifically, states commit themselves to “review the progress made at local, national, regional and global levels in implementing the Global Compact in the framework of the United Nations through a state-led approach and with the participation of all relevant stakeholders.”<sup>17</sup> At the global level, the review process is coordinated by the International Migration Organization (IOM), which in the course of the process of adopting the GCM has officially become part of the UN system. The States welcome the decision of the Secretary-General “to establish a United Nations network on migration to ensure effective and coherent system-wide support to implementation, including the capacity-building mechanism, as well as follow-up and review of the Global Compact, in response to the needs of Member States.”<sup>18</sup> The Compact further notes that IOM will serve as a coordinator and secretariat

16 GCM, para. 40.

17 GCM, para. 40.

18 GCM, para. 45.

of the Network and that the Network will draw on the expertise and experience of other relevant entities in the UN system.<sup>19</sup>

To effectively realize a regular review process, a new International Migration Review Forum (IMRF) has been installed at the level of UN General Assembly, based on the former High-Level Dialogue on International Migration and Development.<sup>20</sup> The IMRF “shall serve as the primary intergovernmental global platform for Member States to discuss and share progress on the implementation of all aspects of the Global Compact, including as it relates to the 2030 Agenda for Sustainable Development, and with the participation of all relevant stakeholders.”<sup>21</sup> The IMRF shall not only discuss the implementation of the GCM’s Objectives in the respective UN Member States, but also “allow for interaction with other relevant stakeholders with a view to building upon accomplishments and identifying opportunities for further cooperation.”<sup>22</sup> The review process shall take place every four years, starting in 2022, and will “result in an inter-governmentally agreed Progress Declaration, which may be taken into consideration by the High Level Political Forum on Sustainable Development.”<sup>23</sup> While concrete recommendations to Member States are not envisaged, the Secretary-General is at least requested “to report to the General Assembly on a biennial basis on the implementation of the Global Compact”.<sup>24</sup> The meticulous description of the review process in the GCM and its anchoring in an established International Organization seems to fulfil the basic conditions of institutionalization as well as of a regular review procedure. At first glance, this suggests rather favorable conditions for a noticeable impact of the GCM on future migration policies in light of the criteria developed above.

This initial finding is further supported by the fact that the GCM seems to envisage a continuous dialogue on all governance levels. To effectively inform the IMRF, the GCM invites “relevant subregional, regional and cross-regional processes, platforms and organizations” to review the implementation of the GCM in the respective region every four years alternating with the review on the global level.<sup>25</sup> Furthermore, other actors or fora, such as the Global Forum for Migration and Development and the IOM International Dialogue on Migration are invited to contribute to the IMRF by providing data, evidence, best practices, innovative approaches and recommendations.<sup>26</sup> On the national level, governments are encouraged to develop “practicable, ambitious national responses for the implementation of the Global Compact, and to conduct regular and inclusive reviews of progress at the

19 Ibid.

20 GCM, para. 49, lit. a.

21 GCM, para. 49, lit. b.

22 GCM, para. 49, lit. d.

23 GCM, para. 49, lit. e.

24 GCM, para. 46.

25 GCM, para. 50.

26 GCM, para. 51 and 52.

national level.”<sup>27</sup> The development of national implementation plans is suggested, albeit in a less compelling language. Notably, the national reviews “should draw on contributions from all relevant stakeholders, as well as parliaments and local authorities.”<sup>28</sup> Moreover, the Member States also commit themselves to “implement the Global Compact in cooperation and partnership with migrants, civil society, migrant and diaspora organizations, faith-based organizations, local authorities and communities, the private sector, trade unions, parliamentarians, National Human Rights Institutions [...] and other relevant stakeholders.”<sup>29</sup> This inclusive approach signals that the drafters of the GCM reflected upon the relevance of a broad public discourse about the implementation of the Objectives on the ground, in order to establish a justificatory community surrounding the Compact. In line with this assessment, preliminary research on the GCMs impact suggests that it has a considerable potential to effectively constrain state action in the future.<sup>30</sup>

## 2. State-led review and the potential dominance of migration control over migrants’ rights

Nevertheless, there remain a number of open questions and considerable doubts as to the real “bite” that this process may have in practice. The impact of the GCM in particular 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. While a large number of non-governmental organizations has been included in the process leading-up to the GCM,<sup>31</sup> the text of the Compact emphasizes “the important role of State-led processes and platforms at global and regional levels in advancing the international dialogue on migration.”<sup>32</sup> The Compact mentions the inclusion of civil society actors and other stakeholders and the need to “foster multi-stakeholder partnerships around specific policy issues”.<sup>33</sup> However, it does not define concrete modes of participation or consultation. Whether Member States base their reports also on the findings of civil society actors, as envisaged by the GCM, is entirely within their discretion. Evidence from the review processes leading up to the 2022 IMRF indicates that as of yet states have only rarely done so,<sup>34</sup> despite existing civil society initiatives

27 GCM, para. 53.

28 Ibid.

29 GCM, para. 44.

30 *Peter Hilpold*, Opening Up a New Chapter of Law-Making in International Law: The Global Compacts on Migration and for Refugees of 2018, *European Law Journal* 26 (2020), p. 231–32 and p. 237–38.

31 *Evalyn Tennant and Christian Wolff*, Civil Society and the Struggle for a Rights-Based Global Compact, *Global Social Policy* 18 (2018), p. 345.

32 GCM, para. 47.

33 GCM, para. 47.

34 To date there is still no coherent established state practice regarding the consultation of civil society actors; see Mixed Migration Centre, *Wheels in Motion: Who’s Done What Since the Global Compact for Migration Was Adopted (and What Should Happen Next)* (2019), p. 25.

in some countries.<sup>35</sup> The contributions by Younous Arbaoui and María Dolores Collazos to this special issue illustrate the lack of systematic involvement of civil society actors in the implementation process with a view to Morocco, and Ecuador, Peru and Colombia, respectively.<sup>36</sup> Likewise, the perspective of subnational levels of governance, in particular of cities and local communities, has so far not been systematically integrated in the review process despite relevant initiatives from local actors, for instance through the newly established Mayors Migration Council.<sup>37</sup> Adriana Sletza Ortega Ramirez and Luis Alonso De Ita García analyze these shortcomings in their co-authored contribution to the present issue.<sup>38</sup>

States have not only dominated the review process so far, but also cherry-picked those Objectives for reporting where they performed particularly well while ignoring other, more critical issues.<sup>39</sup> The contribution by Arbaoui illustrates this selective reporting strategy neatly with a view to the practice of the Moroccan government. Collazos demonstrates in her piece how the Peruvian and the Ecuadorian governments have tightened their migration policies in many areas, despite initial support for the GCM. Cherry-picking was facilitated by the fact that until recently the review process was not guided by any template to be followed. It was only in October 2021 that the UN Network on Migration provided a roadmap for the upcoming 2022 IMRF, including a template how to structure the national reports.<sup>40</sup> While this is a first step to systematize the implementation process and make it more coherent, the instructions given in the template remain rather superficial and do not provide any specific guidance on how to assess the progress regarding the various Objectives. Likewise, the template does not give any information on the interaction between the 23 Objectives or on how to integrate the GCM's ten guiding principles, including human rights protection. Regarding the latter, the template only vaguely "encourage[s] the States] to discuss how the 10 guiding principles [...] are reflected in their policies and practices."<sup>41</sup>

To further improve implementation in a cooperative mode, the UN Network on Migration has invited 27 countries to serve as "champion countries" for the implementation of the GCM.<sup>42</sup> The idea of this initiative is that these countries should provide best practices and share their experiences with other countries. The initiative can be interpreted as a tool to facilitate the cooperative implementation mode envisaged by the GCM. However,

35 See on examples of civil society action and practices of consultative processes Mixed Migration Centre, note 34, p. 26.

36 See *María D. Collazos* and *Younous Arbaoui*, in this issue.

37 On the Mayors Migration Council, see <https://www.mayorsmigrationcouncil.org> (last accessed on 13 Dec 2021).

38 See *Adriana S. Ortega Ramirez* and *Luis A. De Ita García*, in this issue.

39 On paradigmatic examples, see the contributions of *Arbaoui* and *Collazos*, in this issue.

40 UN Network on Migration, Note on the implementation, follow-up and review of the Global Compact for Safe, Orderly and Regular Migration (GCM), <https://migrationnetwork.un.org/resources/imrf-roadmap-annexes-english> (last accessed on 25 Feb 2022), p. 4 et seq.

41 UN Network on Migration, note 40, p. 4.

42 <https://migrationnetwork.un.org/champion-countries> (last accessed on 13 Dec 2021).

the concrete selection criteria for “champion countries” largely remain in the dark. As the GCM is lacking a systematic order of the various Objectives,<sup>43</sup> apparently it does not really make a difference for the qualification as a “champion” whether a country scores highly in best practices regarding migration control and data collection or regarding the treatment of migrants.<sup>44</sup> This practice runs indeed counter the idea that “[a]ll the commitments must be taken into account and implemented as a whole”.<sup>45</sup> Rather, it illustrates how the effective review of the GCM risks to be impaired by the broad range and variety of Objectives covered by the Compact, despite the fact that the above mentioned template “invites” Member States to provide information on all 23 Objectives.<sup>46</sup> As Vincent Chetail has astutely noted, “the Compact looks like a kaleidoscope” due to the “complex mix of multi-faceted elements that are constantly changing and create different patterns depending on the angle of the relevant issue and related objective.”<sup>47</sup> While the GCM frequently mentions the respect for and the relevance of migrants’ human rights,<sup>48</sup> it also lists a number of Objectives that rather focus on effective migration management, the design of “demand driven [and] tailor-made [...] solutions”<sup>49</sup> as well as data collection.<sup>50</sup> To a considerable extent, the GCM process is therefore service-oriented, rather than rights-based. If the states in general and “champion countries” in particular focus predominantly on Objectives dealing with effective migration governance, migrant’s human rights and the impulses for migrants’ empowerment in the GCM would be sidelined in the implementation process. This, in turn, could also have detrimental effects on the role of binding human rights of migrants in assessing and shaping migration governance. This concern is expressed in more detail in Alan Desmond’s contribution to this special issue. Comparing the Objectives of the GCM with the International Convention on the Rights of All Migrant Workers and their Families (ICRMW), he identifies a considerable risk that migrants’ human rights may not only be neglected but even diluted in the implementation process to the GCM.<sup>51</sup>

The risk of selective implementation is particularly acute since the GCM’s follow-up mechanism lacks any independent assessment procedure undertaken by an international institution or body. According to the GCM, it is the UN Member States that agree upon a Progress Declaration at the end of each IMRF. An individual assessment of states’ reports is not foreseen in the review process. Likewise, neither the UN Network on Migration nor

43 *Chetail*, note 6, p. 331.

44 On the case of Morocco, see *Arbaoui*, in this issue.

45 *Chetail*, note 6, p. 331.

46 UN Network on Migration, note 40, p. 4.

47 *Vincent Chetail*, *The Global Compact for Safe, Orderly and Regular Migration: a Kaleidoscope of International Law*, *International Journal of Law in Context* 16 (2020), p. 254.

48 Most prominently GCM, para. 11, 12, 15 and 17.

49 GCM, para. 43.

50 GCM, Objectives 1–4, 9–12, 18, 21.

51 See *Desmond*, in this issue.

the UN Secretary-General are supposed to issue specific recommendations to the states on how to best achieve the Objectives of the GCM. The latest report by the Secretary-General on the implementation of the GCM also displays these deficiencies. Rather than identifying concrete shortcomings in state practice, the report almost exclusively focuses on best-practices and progress, while remaining largely superficial in its assessment. Unlike the Secretary-General's first report,<sup>52</sup> the second report indeed barely mentions the Objectives of the GCM nor does it recommend any specific steps to improve implementation in the future.<sup>53</sup> It merely encourages states "to consider how to develop benchmarks and mechanisms to measure progress on, and monitor the implementation of the commitments in the Compact."<sup>54</sup>

Moreover, the fact that the IOM plays a crucial role as the institutional hub of the GCM – its personnel actually sits at the center of the UN Migration Network's secretariat – raises concerns as to the prominence of human rights in the GCM process.<sup>55</sup> The IOM has long presented itself as a service-oriented organization helping states in effectuating migration policies of their own choice and organizing the relocation of migrants.<sup>56</sup> It became a member of the UN family as an "UN related organization" only in 2016.<sup>57</sup> Given its trajectory as a donor-driven organization and its focus on migration management, including its most repressive elements such as detention, the IOM has long been criticized for not being committed to the protection of migrants' human rights.<sup>58</sup> Much of this critique is outdated by now, given that the IOM has shifted alliances at some point in the last decade and adopted a more liberal approach in its language and projects, including the ample use of human-rights talk.<sup>59</sup> However, the IOM still has not developed any practice of criticizing its Members for

- 52 General Assembly, Report of the Secretary General, A/75/542 (last accessed on 26 Oct 2020).
- 53 For a critique, see *Elspeth Guild* and *Maja Grundler*, *Implementing Migrant Protection? The UN's Second Report on the Implementation of the Global Compact for Safe, Orderly and Regular Migration*, <https://protectproject.w.uib.no/implementing-migrant-protection-the-uns-second-report-on-the-implementation-of-the-global-compact-for-safe-orderly-and-regular-migration> (last accessed on 25 Feb 2022).
- 54 General Assembly, Report of the Secretary General, A/76/642 (last accessed on 27 Dec 2021), para. 110.
- 55 This concern is also emphasized by *Desmond*, in this issue.
- 56 On the history of the IOM, see *Jürgen Bast*, *International Organization for Migration*, in: Rüdiger Wolfrum et al. (eds.), *Max Planck Encyclopedia of Public International Law*, Oxford 2012. On the IOM's today's role in the global architecture of global migration governance, see *Chetail*, note 6, p. 340–397. For a comprehensive analysis, see *Megan Bradley*, *The International Organization for Migration: Challenges, Commitments, Complexities*, New York and Brighton 2020.
- 57 Agreement concerning the Relationship between the United Nations and the International Organization for Migration, ratified 19 Sept 2016, UN-Doc. A/Res/70/296 (Annex I) and A/70/976.
- 58 *Fabian Georgi*, *Managing Migration? Eine kritische Geschichte der Internationalen Organisation für Migration (IOM)*, Berlin 2019; *Martin Geiger* and *Antoine Pécoud*, *The International Organization for Migration: The New 'UN Migration Agency' in Critical Perspective*, Cham 2020.
- 59 Cf. *Georgi*, note 58, p. 325 et seq.

their poor human rights performance.<sup>60</sup> The incorporation in the UN family potentially is a crucial step to close this long-standing gap. According to Art. 2.5. of the UN-IOM Agreement, the IOM is now explicitly obliged to respect migrants' human rights and all relevant international law for that matter. This treaty-based obligation makes up for the lack of such reference in the IOM Constitution. Legally, the IOM can now not only be held accountable by the standards of human rights law regarding its operative work<sup>61</sup> but may also start using these standards vis-à-vis its own Members. There remain, however, doubts whether the new institutional and normative context will smoothly translate into the practice of the organization as the UN's migration agency. This is a concern also in the context of the GCM, which itself offers ample opportunities to concentrate on technical issues of migration management rather than on migrants' rights.<sup>62</sup> Moreover, reporting to the IOM may further reduce incentives to provide to UN human rights treaty bodies, as Desmond argues in his piece. The lingering distrust by civil society actors and academics vis-à-vis the IOM, as reflected in such statements, may in itself pose an obstacle to its productive role in the GCM process. The degree to which the incorporation into the UN family will change the organizational culture of the IOM, therefore, is a crucial factor for the impact of the GCM in terms of migrants' rights and empowerment.

Finally, the dominant role of states in evaluating the implementation of the GCM Objectives is further exacerbated by the fact that civil society actors do not fully "own" this process. The drafting of the GCM was marked by a high degree of involvement of NGOs and other non-state actors at the global level, a fact that left its traces in the final text.<sup>63</sup> This is less evident in the context of the IMRF, which operates under the more restrictive rules of the UN General Assembly. What is even more important is the considerable gap between the global and the domestic level in respect of civil society participation in the GCM process. The reception of the GCM by national NGOs is rather mixed. Only in some places have civil society actors already taken up the GCM in their daily work and try to push states in implementing it more diligently and in conformity with human rights standards.<sup>64</sup> In other countries NGOs have taken a rather skeptical stance on the GCM,<sup>65</sup> and have therefore not engaged substantially with the GCM and its implementation. Non-state actors in many countries may also simply lack the knowledge and/or capacity to involve

60 *Chetail*, note 6, p. 396.

61 *Jürgen Bast*, *Der Global Compact for Migration und das internationale Migrationsregime*, *Zeitschrift für Ausländerrecht und Ausländerpolitik* 39 (2019), p. 98.

62 *Desmond*, note 3, p. 234–35.

63 Cf. *Jenna Hennebray* and *Nicola Piper*, *Global Migration Governance and Migrant Rights Advocacy: The Flexibilization of Multi-stakeholder Negotiations*, in: Catherine Dauvergne (ed.), *Research Handbook on the Law and Politics of Migration*, Cheltenham 2021, p. 369.

64 Civil Society Action Committee, *Civil Society Engagement in Society Engagement in Global Compact for Migration* (2020), <https://csactioncommittee.org/wp-content/uploads/2020/07/Mapping-report-FINAL.pdf> (last accessed on 13 Dec 2021).

65 For a paradigmatic example, see *Arbaoui*, in this issue.

themselves with distant affairs like the GCM. The hesitant reception by civil society actors on the ground, at least in some countries, further reduces the likelihood of the GCM to become a core standard for practices of “naming and shaming” in the international realm.

### *III. How to improve the follow-up mechanism to ensure a stronger impact of the GCM*

In the light of the risks and shortcomings identified above and in the four contributions to this special issue, the next section will offer a few suggestions to improve the follow-up in order to further a human rights-based implementation of the GCM in the future. Three concrete suggestions may help to improve the implementation of the Compact and to ensure a broader public discourse about migrants’ rights in the implementation process.

First, the UN Network on Migration should make sure that the UN Member States indeed consult “all relevant stakeholders”. This would in particular require mandatory consultations with civil society actors and with local authorities. The necessary consultations should be on a permanent basis and not limited to a “multi-stakeholder hearing one day prior to the IMRF” as envisaged in the roadmap of the UN Network on Migration.<sup>66</sup> Considering the views of civil society actors would allow highlighting existing deficits regarding migrants’ rights and force governments to provide justification or remedies. Including the perspective of local actors more actively in the review process may help to ensure that the Objectives of the GCM can actually be realized at all levels of governance. It may also allow to better identify unused capacities as well as unknown obstacles for the implementation of the GCM’s Objectives, and acknowledge the increasing role of cities and local governments as agents of migration governance. Ensuring broader stakeholder participation in the preparation of the national reports would emphasize the relevance of migrants’ rights in the GCM’s implementation process as opposed to a more service-oriented understanding of the GCM. Moreover, broader stakeholder participation would help raising awareness of the GCM’s Objectives in the discourse about migration governance more generally.

Our second suggestion for improving the review process is to further develop the existing reporting template. Ideally, such a template should be developed with the participation not only of states but also of non-governmental actors and representatives of subnational governance levels. A revised template should go beyond the current one in at least two respects. First, it should include a procedural element indicating the type of actors that have to be consulted at the national level and give some guidance regarding the mode of their participation. Second, a revised template should also include indicators allowing to better assess Member States’ performance with regard to the respective Objectives. An improved template according to these requirements would foster a more uniform reporting practice, could prevent cherry-picking, and enable a comparative assessment of implementation measures and remaining deficits. A similar approach is already taken by the Observatory on

66 UN Network on Migration, note 40, p. 2.

the Global Compact in Chile, which seeks to provide an indicator-based assessment of state practice regarding the GCM's Objectives.<sup>67</sup>

In the medium term, the UN Network on Migration should also consider issuing recommendations based on its assessment of the national reports. While this could substantially increase the chances for an effective impact of the GCM, it would be a rather bold step given the lack of a clear mandate in this respect. However, according to the GA's Resolution on format and organizational aspects of the International Migration Review Forums, the Progress Declaration to be issued after the first IMRF "may contain recommendations on the implementation of the Global Compact, if appropriate".<sup>68</sup> This arguably provides a basis for expanding the review activities of the UN Network on Migration also towards making recommendations in order to lay the groundwork for an inter-governmentally agreed document.

Finally, even in the absence of the measures mentioned so far, the review process would benefit significantly from the publication of comprehensive shadow reports by non-governmental organizations at the domestic level. Research on the implementation and review of universal human rights treaties has shown that shadow reports are not only an effective tool to raise awareness for critical issues that state reports tend to ignore, but they may also help to provide guidance for future reporting and assessment.<sup>69</sup> Shadow reports may also serve as a crucial tool to intensify public discourse surrounding the GCM and holding states publicly accountable for deficits and shortcomings. Moreover, non-governmental organizations are particularly well positioned "to take the Compact 'back home'"<sup>70</sup> and to ensure that the GCM's Objectives are interpreted in line with existing human rights obligations. Shadow reports may help to make this link visible and promote a human rights-based interpretation of the GCM's Objectives in public discourse. First initiatives in this direction already exist, including a handbook for legal practitioners to use the GCM as an interpretative tool.<sup>71</sup> However, there is still room to improve and better coordinate the various initiatives in this respect.

67 Mixed Migration Centre, note 34, p. 26; Observatorio Pactos de Migración en América Latina, [https://espaciopublico.cl/nuestro\\_trabajo/observatorio-pactos-de-migracion-en-america-latina/](https://espaciopublico.cl/nuestro_trabajo/observatorio-pactos-de-migracion-en-america-latina/) (last accessed on 13 Dec 2021).

68 General Assembly, Resolution on the format and organizational aspects of the international migration review forums, A/RES/73/326 (29 July 2019).

69 Regarding the practice of civil society involvement in the implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), see *Mary S. Dairiam*, CEDAW, Gender and Culture, in: Rawwinda Baksh and Wendy Harcourt (eds.), *The Oxford Handbook of Transnational Feminist Movements*, Oxford 2015, p. 386.

70 *Tennant and Wolff*, note 31, p. 347.

71 Immigration Law Practitioners' Association, *Handbook for Legal Practitioners: Using the UN Global Compact for Safe, Orderly and Regular Migration as an Interpretative Tool*, <https://ilpa.org.uk/handbook-for-legal-practitioners-using-the-un-global-compact-for-safe-orderly-and-regular-migration-as-an-interpretative-tool> (last accessed on 28 Feb 2022).

While these suggestions certainly do not guarantee a significant impact of the GCM in the future, they may nonetheless be important steps to improve the review process and align it with the general conditions for an effective soft-law instrument more generally. Against the background of the substantial and procedural implications of the GCM identified in this introduction, the articles in this special issue deal in more detail with specific issues and difficulties of the GCM's reception and implementation.

## **B. The special issue on the GCM in a nutshell**

The four contributions address different facets of the implementation practice regarding the GCM. The first two articles provide exemplary regional studies and inquire the GCM's impact in specific local and regional political contexts.

Younous Arbaoui focuses on Morocco as one of the most prominent countries supporting and facilitating the adoption of the GCM. In his paper he discusses the practice both of the Moroccan government and of civil society actors in Morocco with regard to the implementation of the GCM. He shows that while the Moroccan government spearheaded the process leading up to the adoption of the GCM, its implementation record is rather mixed. The government, which has been selected as a "champion country", mostly cherry-picks Objectives where Morocco already performs well in its reporting practice. Other, more problematic practices are hardly thematized by the government. This is neatly illustrated in Arbaoui's contribution regarding the Objective to provide basic services, including health care. The reality of many migrants in Morocco still is that they do not have effective access to basic services in particular due to their precarious residence status. Rather than using the GCM as an aspiration for improvement, the Moroccan government basically has used it to preserve and legitimize the status quo. Arbaoui also critically reflects on the role of civil society actors in the implementation process. His analysis demonstrates that most civil society actors in Morocco have taken a very hesitant stance on the GCM since they fear that the GCM could water down migrants' human rights and provide governments with an opportunity to whitewash restrictive migration governance by highlighting compliance with selective Objectives. While this reluctance in using the GCM as an advocacy tool may limit its ability to actually impact domestic migration policies, Arbaoui's hope is, however, that the engagement of civil society with the GCM will increase during the upcoming IMRF in 2022, which would ideally provide new spaces and channels to address critical issues.

Arbaoui's findings regarding the thus far limited impact of the GCM in practice are partly mirrored by María Dolores Collazos' contribution on the role of the GCM in the context of the Venezuelan migration crisis. Her article explores how Colombia, Peru and Ecuador, the primary host countries for the Venezuelan migrants in the region, have implemented the GCM over the last years. She argues that by adopting the Compact these countries agreed to join forces to replace individual efforts to deal with migration with coordinated actions, following the rights-based approach to migration proposed by the Global Compact. And yet, her analysis reveals a great divergence in the implementation

practice of the three countries in the region. In particular Peru and Ecuador recently have tightened their refugee and migration policies by introducing new requirements for Venezuelan migrants. In the case of Ecuador, this contrasts with the prominent and supportive role of the government during the adoption and preparation process of the GCM. By contrast, Colombia still pursues a migration policy that is favorable to implementing the GCM, amongst others by including the GCM's Objectives in policy guidelines, taking measures to actively promote access to education and other basic services and providing regularization schemes for undocumented migrants. Collazos argues that these differences in the implementation of the GCM can mostly be explained by the specific migration history of the respective countries, and political considerations regarding the bilateral relations between them more generally. Thus, despite a broad and inclusive public discourse about the GCM, the concrete impact of the GCM is to a significant extent shaped and limited by the specific historico-political context in which it operates.

While Arbaoui and Collazos address the role of national governments and civil society actors in the implementation of the GCM, Adriana Sletza Ortega Ramírez and Luis Alonso De Ita García discuss in their co-authored piece how sub-national actors and in particular cities contribute to the implementation of the GCM. The authors ask whether cities can be considered new sites for international compliance given their explicit inclusion in contemporary international soft-law instruments such as the GCM and the Global Compact on Refugees. The article analyzes the role of cities both as local and international actors in migration issues and examines how they have been constructed as actors influencing international migration law. The article links the specific discussion about the implementation of the GCM with a broader academic debate about the changing role of cities as actors in international law. Finally, the authors assess the potential of the migratory “paradiplomacy” increasingly exercised by cities and local governments. They argue that while cities can play an increasingly important role in implementing international migration instruments such as the GCM, the limited competences of local actors in migration matters under domestic law may significantly limit their capacities in doing so. In particular where their position on migration differs from that of the national government, competition and contradiction are likely to limit the effects of cities’ involvement in the implementation process.

Whereas the first three contributions illustrate how much the impact of the GCM depends on the political context and the structures in which it is implemented, the contribution by Alan Desmond is more interested in the substance of the GCM. In his contribution Desmond asks to what extent the GCM is actually aligned with binding instruments regarding migrants’ human rights that predate the Compact. More specifically, he analyzes in how far the GCM might contribute to diluting the level of protection offered by the UN Migrant Workers Convention (ICRMW). His analysis is based on the premise that the ICRMW has gained in importance over the last years despite the fact that it is mostly countries from the Global South that have ratified the convention. The reason for its increasing significance is that South-South migration itself has gained more relevance over last decades and is contin-

uing to do so. Under these conditions the ICRMW and its interpretation by the Committee on the Rights of Migrant Workers (CMW) also gain in significance for the interpretation of migrants' human rights more generally. Desmond's analysis reveals that the GCM still lags behind the relevant guarantees in the ICMRW when it comes to regularization, firewalls, criminalization and protection against detention. Desmond demonstrates that there are, however, ways how the strong human rights commitment favored by the CMW could also inform the future interpretation of the GCM. To this end, he argues in favor of a more systematic integration and a stronger role of the CMW in the implementation of the GCM.

Overall, the four contributions to this special issue show that the concrete impact of the GCM strongly depends on the architecture of the implementation process and the posture of the respective actors towards the GCM. While historical and political context may often further complicate the conditions for a bona fide interpretation and implementation of the GCM, the systematic involvement of cities and civil society actors may help to build a strong justificatory discourse around the GCM. In terms of substance, it seems crucial that the implementation of the GCM is more systematically and institutionally linked with the interpretation of migrants' human rights predating the Compact – in order to ensure that the GCM reinforces migrants' rights rather than diluting them.