“We are tidying up”: The Global Compact on Migration and its Interaction with International Human Rights Law

“We are tidying up”: The Global Compact on Migration and its Interaction with International Human Rights Law

ejiltalk.org/we-are-tidying-up-the-global-compact-on-migration-and-its-interaction-with-international-human-rights-law/

Andrea Spagnolo

Published on March 1, 2019

> **Editor’s note:** This post is part of the ESIL Interest Group on Migration and Refugee Law symposium on *The UN Global Compacts on Migration and Refugees: The Twin Peaks?*

“We are not talking about anything new […] Rather we are tidying up” – said El Salvador’s Representative before the vote at the United Nations General Assembly (UNGA) on the adoption of the Global Compact on Migration (GCM), also known as the Marrakech Compact (GA/12113). Other similar declarations joined the chorus of States in three clear directions: 1) the Compact is not legally binding; 2) the Compact does not create any new international obligations in the form of new customary rules; and 3) the Compact reaffirms States’ sovereignty.

Be that as it may, one cannot but agree with Maria Gavouneli that the GCM, at this stage, will not have a huge impact on the existing legal framework applicable to the mass movements of individuals. However, it is possible to move the critique one step forward looking at some contents of the GCM that might have some normative effects on the sources of international law governing the management of migration.

The GCM and its Legal Nature

As Anne Peters put it on this blog, the GCM is part of the borderless category of international soft law instruments, as States’ will clearly excludes the legal bindingness of its objectives and actions. However, it is no mystery that soft law instruments might have, under certain conditions, normative effects.

First, States, through non-legally binding instruments, commit themselves on a political rather than on a legal plane. The GCM language indicates that States accepted to abide by some sort of political commitments: the words “commit” (“*engageons*” in French) employed in the text seem to support this view.

Secondly, soft law might influence the hermeneutic activities of domestic and international judges. In this regard, the GCM presents some peculiarities. Being endorsed by the UNGA, and included in a UNGA Resolution, it presents some features of previous similar acts, such as the 1972 Stockholm Declaration on Human Environment and the 1992 Rio Declaration on Environment and Development. With one important difference. The GCM was not adopted in a legal vacuum, as its distinguished predecessors were. It came into existence within the

realm of the international treaties applicable to migrants: human rights treaties, specific conventions on labour and criminal issues, regional and bilateral cooperation agreements between States etc.

Against this background, the GCM could serve as an aggregator of the kaleidoscopic and fragmented ensemble of rules that limits the exercise of States' sovereignty over the presence of aliens on their territories. This was precisely the intention of the UN Secretary General's Special Rapporteur on Migration Sutherland: "The global compact on migration could bundle agreed norms and principles into a global framework agreement". This means that the GCM is not akin to create any new rule of international law related to the management of migration flows. Accordingly, both those States that voted against the adoption of the GCM at the UNGA and the ones that endorsed it declared that the outcome of the Marrakech Conference could have been intended as the first step in the process of developing new rules of customary international law. Recalling El Salvador's Representative: they were tidying up.

When one tidies up things, the risk is to forget something or, maybe, to throw away something that is indeed useful. In drafting the GCM, such a risk was very high. In fact, international migration law, in particular the rights of migrants, rapidly evolved through the jurisprudence of international human rights courts and monitoring bodies. More generally, indeed, the multifaceted nature of the various sources of international law related to migration exposes the GCM to such risk. There is no space here to scrutinize all the objectives of the GCM in order to see whether States were really able to tidy up. Therefore, I selected two principles that in my view are quite telling.

The Principle of *Non-refoulement*

One important thing that is missing from the GCM is a reference to the principle of *non-refoulement*, which is horizontal to many of the stages of the so-called "migration cycle" and applies beyond refugee law. First, it is relevant when search and rescue (SAR) operations are performed by States, and individuals rescued need to be disembarked in a "place of safety" pursuant to the SAR Convention. The Guidelines on the treatment of persons rescued at sea and the Principles relating to procedures for disembarking people rescued at sea, both issued by the International Maritime Organization, confirm that the safety of the place must be evaluated in the light of human rights and needs of each individuals. Under human rights law, migrants rescued at sea fall under the jurisdiction of the rescuing State, if the latter exercises control over them. Accordingly, the ECtHR upheld this view affirming that once saved in the Mediterranean Sea, migrants under the control of a State party to the ECHR cannot be disembarked in Libya without any prior individual evaluation. This is part of the broader prohibition not to expel or return individuals towards a country where they risk being subject to torture or other forms of inhumane and degrading treatment, which is firmly established in international human rights jurisprudence (see ECtHR, *Hirsi and Jamaa v. Italy*). This principle of *non-refoulement* is also relevant for the conclusion of bilateral

readmission agreements. Practice reveals that States and international organizations (in particular the European Union (EU)) tend to conclude agreements of this kind with countries that have questionable human rights records, such as Turkey, Sudan, and Libya. Since diplomatic assurances might not be sufficient in light human rights case law (see ECtHR, *Saadi v. Italy*), States must agree on effective procedures to guarantee respect for human rights.

Despite the unequivocal status of the notion of the principle of *non-refoulement* in international law, it is surprising that the GCM does not mention it in any objectives. It could have done so in the objective related to SAR at sea (no. 8), the one related to border controls (no. 11), or the one related to the strengthening of international cooperation (no. 23). The absence of specific references to the principle of *non-refoulement* in the aforementioned objectives leaves open the possibility to cooperate with countries that do not fall into this category, undermining human rights' protection. This might be justified, as it was noted, for the sake of 'notional purity', to keep refugee law outside the scope of the GCM but nonetheless the silence of the GCM on this principle is loud.

In the objective related to the readmission of migrants (no. 21), albeit there is no mention of the principle of *non-refoulement* due attention is paid to guarantee that the prohibitions of collective expulsion, torture and other inhumane and degrading treatment are upheld in the whole process. So far so good, but it is not enough, as we will see below.

Access to Justice

Another crucial principle in securing the rights of migrants is the access to justice. It is of paramount importance, in fact, to guarantee that human rights' protection is not abstract, but effective. The various statements included in the GCM in favor of human rights need to be coupled with effective and accessible judicial remedies that allow individuals to challenge decisions made in their regard. States have mentioned the access to justice in the guiding principles of the GCM and then reaffirmed it in various objectives.

In the EU context, the right to be heard by a judge, which is part of customary international law, and affirmed in many human rights treaties, has recently been put in crisis by the States' and international organization (in particular the EU) aforementioned practice to conclude bilateral agreements. This practice reveals that both the EU and its Member States are increasingly making recourse to the conclusion of technical agreements (Memoranda of Understanding – MoU) with States where the flows originate from to regulate a huge variety of aspects related to the management of migration: from the repatriation of irregular migrants to the exchange of information. Agreements of this kind are not labelled as proper treaties, rather they are referred to as MoUs, technical agreements, declarations, etc. This appears to be done on purpose, to avoid the complexity and the length of international and domestic constitutional procedures for the conclusion of international treaties. Although this practice might help in speeding-up the management of migration flows, especially when

a State is confronted with a migrant crisis, it lacks any parliamentary control and it can hardly be the object of a judicial review, as it was demonstrated in the case of the EU-Turkey statement.

There is nothing in the GCM that suggests that such a practice should be abandoned or at least tempered through the establishment of effective procedural safeguards against human rights abuses. It would perhaps have been useful to just include a reference to the access to justice in the objectives.

Farewell

The two examples above show in a non-exhaustive manner the (calculated?) risks linked to the very idea of establishing common principles on the management of migration flows in an historical period which does not favor an approach entirely based on human rights. States really tidied up their practice, but this does not necessarily mean that they also considered the many results already achieved and the challenges which are still open in the field of human rights protection.

Should the GCM be used as an interpretive tool of the aggregated international rules on migration, there will be the concrete risk of diluting human rights protection in favour of preserving States' sovereignty over the management of migration flows. Although this risk is often (if not always) present in the interaction between hard law and soft law, the impression remains that States have chosen a precise method for tidying up.