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The Global Compact for Migration

Towards Global Governance of International Migration?

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February 2019

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ifri 1979 2019
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This study has been carried out within the partnership between the French Institute of International Relations (Ifri) and Policy Center for the New South.

ISBN: 979-10-373-0029-4

How to quote this document:

Matthieu Tardis, "The Global Compact for Migration. Towards Global Governance of International Migration?", *Notes de l'Ifri*, Ifri, February 2019.

Ifri

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Abstract

The “Global Compact for Safe, Orderly and Regular Migration” was adopted in Marrakesh on 10 and 11 December 2018, after 18 months of consultation and negotiation. It is presented as the first United Nations’ agreement on a comprehensive approach to international migration in all its aspects. Although it aims to become the cornerstone of global governance of international migration, sought by the international community, it is however coming up against contradicting national priorities. They are depending on each State’s migration issues; at the mercy of opposition between North and South, the countries of origin and countries of destination.

Furthermore, the Compact illustrates a change in the objectives of global governance of migration, which were originally placed in the post-War context, under the human rights label. At the beginning of the 1990s and the end of communist regimes, migration was perceived as a risk for the stability and security of States. The United Nations then renewed its approach by rather emphasising the positive contribution of migration as a development factor. By highlighting the costs and benefits of migration flows, this approach can reconcile border control policies and the fight against irregular immigration in Northern countries.

The instruments of global governance of migration illustrate this change. The rights-based approach resulted in the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. This approach was limited by the refusal of Northern countries to ratify it. Nearly 30 years later, the Global Compact for Migration is pursuing a more pragmatic approach. The agreement is non-legally binding. It reflects a preference for *soft law* instruments that are able to respond to issues in a more targeted and flexible manner.

The challenge of the Compact goes beyond mere migration issues and affects the role of the United Nations’ (UN) against a background of questioning multilateralism. The managerial approach to migration promoted by the Compact allows the UN to play a technical support role to States on a voluntary basis. This also leads to a development of different agencies, giving a key role to the International Organisation for Migration (IOM).

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Introduction

The "Global Compact for Safe, Orderly and Regular Migration" was signed at an intergovernmental conference held in Marrakesh on 10 and 11 December 2018. Its signature gave rise to a misinformation campaign, regarding its objectives (it had been set up to promote open borders for migration), its content and its legal scope (it would be binding and force States to renounce their sovereignty).

However, the Compact was adopted after a long process which should have prevented the controversy. Its final version was adopted in July 2018. With the Declaration for Refugees and Migrants, the Compact for Migration was launched at the United Nations' conference in New York in September 2016. It was subject to a consultation process with State and non-State actors from April 2017 to January 2018, and then to government negotiation processes up to July 2018, or 18 months of discussion according to a timetable set by a United Nations' General Assembly resolution[1] and whose main conclusions were made public[2].

Finally, 164 Heads of State and government or their representative signed the agreement now called the "Marrakesh Compact." About a dozen rejected it or abstained in Marrakesh[3]. So, the Compact became the "first UN global agreement on a comprehensive approach to international migration in all its dimensions[4]."

The main objective of the Marrakesh Compact was to strengthen the foundations of global governance of migration issues. This governance could be defined as the more or less formal establishment of standards and rules to regulate States' behaviour regarding population movements across

1. United Nations General Assembly, *Modalities for the Intergovernmental Negotiations of the Global Compact for Safe, Orderly and Regular Migration*, Resolution 71/280, 6 April 2017.
2. See the website where the working documents of the various adoption stages of the Compact are available at: https://refugeesmigrants.un.org.
3. The Compact was officially adopted at the UN General Assembly's meeting on 18 December 2018: 152 countries voted in favour of the agreement, 5 against (the United States, Hungary, Czech Republic, Poland and Israel), 12 abstained. It should be emphasised, that with the exception of the United States, all these countries were in favour of the Compact, without making any public criticism when they agreed on the final version of the document in July 2018. See K. Newland, *An Overheated Narrative Unanswered: How the Global Compact for Migration Became Controversial*, Commentary, Migration Policy Institute, December 2018.
4. See the Marrakesh intergovernmental conference's website available at: www.un.org.

international borders[5]. Ironically, migration was not subject to a unified framework internationally, even though it was a transnational phenomenon in nature. Unlike other subjects, such as trade, finance, or more recently climate change, there was no global multilateral agreement setting the common rules for the international community when dealing with population movement. Migration was traditionally seen as a national problem coming under States' sovereignty.

Awareness of the need to break with this unilateralism is recent in the history of international relations, even if the management of displaced people in Europe was a post-World War II priority. Nevertheless, up to the fall of the communist regimes, the international community's attention, more specifically the Western bloc's, was mainly focused on the refugee situation. So, during the 1990s, when migration issues became a sensitive subject, the idea of increased international co-operation on this topic emerged. Awareness, however, was slow in changing attitudes in the international system[6].

For the first time, the 1994 Cairo Conference on Population and Development suggested an action plan for people on the move. In the early 2000s, the UN Secretary General tried to put the migration issue at the centre of the UN and its members' concerns. In 2004, Kofi Annan launched the Global Commission on International Migration, a group of experts whose mission was to determine global policy in this area and to put international migration at the centre of global agenda. In 2006 and 2013, the UN High-Level Dialogues on International Migration and Development were organised. In 2007, the first meeting of the Global Forum on Migration and Development was held. At the same time, regional consultations and bilateral dialogues were established. In other words, migration was no longer missing from the international agenda, but these conferences, forums and dialogues struggled to determine a comprehensive and global framework, beyond thematic (migration and development, human trafficking, etc.) or regional approaches.

Does the Global Compact for Migration constitute this qualitative step that the UN Secretary General so desired in the early 2000s? It is possible since it specifically tries to clarify what greater international co-operation on migration is, what it should accomplish and the concrete forms it should take. In other words, the Compact proposes a global framework intended to answer the three questions that two decades of international dialogue could

5. D. G. Papademetriou, *Council Statement for the 6th Plenary Meeting of the Transatlantic Council on Migration,* Migration Policy Institute, 2011.
6. C. Wihtol de Wenden, *La Question migratoire au 21e siècle*, Paris, Presses de la Fondation nationale des sciences politiques, 2010.

not solve: the objectives of global migration governance, the tools of this governance, as well as the distribution of roles between the UN agencies, States and non-State actors.

However, do the solutions provided by the Compact build consensus among the international community? Nothing is less certain. Although, the small number of countries that did not join the Compact was mentioned above, the fact remains that this illustrates an international fault line on migration issues. Indeed, with the exception of the Dominican Republic, all the countries that refused to sign the Compact are members of the Organisation for Economic Co-operation and Development (OECD), including the United States, which remains the largest country of immigration in the world. More surprisingly, seven of these countries are European Union (EU) Member States. These European stances, which however do not represent the official position of European institutions, are ironic since it is precisely the Europeans who initiated the process of adopting a global political framework on migration within the UN system after the 2015 "refugee crisis". Above all, the Compact's objectives are fully in line with the stated objectives of the EU's Partnership Framework with Third Countries on Migration, which unlike the internal dimension of immigration and asylum policies, is not disputed between the Member States[7]. Finally, this reservation with regard to multilateralism may seem contradictory to the Europeans' traditional position on this method of international governance.

Nevertheless, and without under-estimating the influence of domestic political issues in government choices to sign or not sign the Compact, this situation emphasises that international dialogue on migration is still structured around a North-South paradigm, or in other words, the perception of opposition between country of destination and origin. The purpose of this paper is to analyse to what extent this paradigm affects the construction of global governance of migration. More specifically, the first part will focus on the impact of this opposition to the objectives of global migration governance or how the balance of power between the country of destination and origin defines international co-operation priorities. Naturally, these objectives are translated into instruments and governance frameworks which will be dealt with in the second part. Finally, the third part will refer back to the actors in this governance by emphasising the role that the UN tries to play to co-ordinate and lead co-operation between States.

7. M. Tardis, "European Union Partnerships with African Countries on Migration. A Common Issue with Conflicting Interests", *Notes de l'Ifri*, Ifri, March 2018, available at: www.ifri.org.

A managerial approach to migration flows

Although the UN focused on developing human rights instruments after the Second World War, these have only met migrants' needs imperfectly. From the 1990s, but especially during the 2000s, the UN tried to overcome this impasse by emphasising the positive aspects of migration and by promoting a managerial approach to migration flows.

The North-South opposition to migrants' human rights

Although the 1990s marked the beginning of the realisation of the need for international co-operation on migration, the development of an international human rights' corpus was not without impact on the situation of people on the move. Since 1919, the International Labour Organisation (ILO) was mandated to strengthen the protection of migrant workers' rights. After the Second World War, the international community focused on establishing international human rights law. From the Universal Declaration of Human Rights in 1948 onwards, the UN became the place where international standards protecting individuals and overseeing States' sovereign power were produced. The most iconic agreements from this period are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which were adopted in 1966. Together with the 1948 Declaration, they formed the International Bill of Human Rights.

The situation of migrants was dealt with internationally from the perspective of human rights. However, it has been done so tentatively. Some agreements and provisions relate directly to them. This is particularly the case for the 1951 Geneva Convention relating to the Status of Refugees[8] and the right to leave their country[9]. The recognition of these rights must be placed in the context of the Cold War during which Western liberal

8. However, until the 1967 protocol, the Geneva Convention only applied to European refugees.
9. Article 12-2 of the International Covenant on Civil and Political Rights. Furthermore, it is interesting to emphasise that the right of asylum, recognised in Article 14 of the Universal Declaration of Human Rights, which only has the legal value of a UN General Assembly resolution, was not confirmed in the Covenant.

democracies expected to oppose the Communist Bloc with their values. In other words, receiving opponents to communist regimes was an international relations issue. Decolonisation, the other important deed of the period, for which the United Nations was the go-between for people's right to self-determination, did not generate a major debate on migration. However, population movements followed decolonisation, particularly to the former colonial powers. But, the need for foreign labour in Western countries evaded questions about the impact of migration flows and the treatment of migrant workers.

Besides these rights, which only specifically apply to people crossing an international border, all human rights apply to all individuals and hence potentially to migrants. Although, there are limitations on nationality or legal residency, migrants enjoy the protection of their basic human rights. We can mention the prohibition of torture or inhumane and degrading treatment and the right to a normal family life, which have served as the basis for precedents and interpretations favourable to non-nationals. The principle of non-discrimination was the main vector through which the UN bodies dealt with the situation of foreigners[10].

Nonetheless, it gradually became clear that non-nationals were not systematically perceived as beneficiaries of human rights by governments[11]. That was when the idea of an international treaty to protect migrants' human rights emerged. It led to the adoption in 1990 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. This Convention did not really create any new rights compared to those guaranteed in previously adopted treaties. However, it has not had a great fate[12]. It highlights the confrontation between the North and South countries, or in other words, between the countries of destination and origin on the recognition of migrants' rights.

Indeed, the issue of migrant's human rights is driven by the countries of origin, concerned about the treatment of their nationals abroad. Countries, such as Mexico and Morocco, have been at the forefront of this fight within UN bodies. Ironically, Western democracies, although they support the international promotion of human rights and their universal nature, have refused to go down this road. The recognition of the rights of undocumented migrants is one of the most disputed points by the countries

10. E. Decaux, "Droits des travailleurs migrants et droit international des droits de l'homme", *Migrations société*, No. 117-118, 2008, p. 185-198.
11. A. Pécoud, "The Politics of the UN Convention on Migrant Workers' Rights", *Groningen Journal of International Law*, vol. 5, No. 1, 2017, p. 57-72.
12. See the second part of this paper.

of destination. States perceive the difficulty in respecting migrants' rights in deportation procedures[13].

More generally, this North-South opposition to ensuring migrants' human rights is the consequence of fundamentally unbalanced migration dynamics. Because of the asymmetry between the countries of origin and countries of destination, recognition of migrants' human rights has unequal implications for both parties. It is clearly beneficial for the countries of origin, but it has a cost for the countries of destination. The cost is political, since recognition of non-nationals' rights is not generally a measure of great electoral gain. Similarly, and despite the fact that domestic legal systems – and in the case of European countries, regional conventions – provide levels of protection to migrants, equivalent to international law, the countries of destination have no interest in recognising their rights. In the event of a need for foreign labour, the countries of destination have access to an almost unlimited supply of migrant workers who will come without much consideration of the legal framework affecting them. So, migrant's rights must be understood as an economic variable in immigration policies[14].

This cost-benefit perspective explains the failure of the human rights approach for migrants. Furthermore, it is interesting to highlight that the International Convention on the Rights of Migrant Workers, is the last major international treaty to promote human rights adopted within the United Nations. It ends a period begun after the Second World War. Human rights are no longer the priority for the international community in a world where communist regimes have practically disappeared. In the 1990s, migration issues re-emerged internationally in a more security and socio-economic than legal perspective. Population movement was perceived as a threat to States' stability. They led to tighter migration controls and the search for policies that tackled the underlying causes of migration. This context naturally influences the objectives of global governance of migration.

Maximising the positive effects of migration

In order to overcome the impasse of asymmetry between countries of origin and countries of destination and to take the costs and benefit perspective into account, international discourse on migration tends to emphasise the positive effects of this phenomenon for the countries of departure, the countries of destination, and *in fine* for the migrants themselves. This

13. The recognition of undocumented migrants' rights is also an issue which has been debated during the negotiations of the Global Compact for Migration.
14. A. Pécoud, "The Politics of the UN Convention on Migrant Workers' Rights", *op. cit* [11].

"triple-win" approach has permeated the actions of the UN agencies and the International Organisation for Migration (IOM) since the early 2000s. It contrasts with the national political debates which are often dominated by the desire to restrict migration flows and by scepticism about their effects. Conversely, on the face of it international debates are characterised by a rather pro-immigration tone. Migration is presented as a normal, even commonplace, phenomenon which must be supervised and serve the objectives set by States: to fight the ageing of developed countries, solve the lack of labour, improve the skills of nationals in the countries of origin, participate in the material well-being of family members in the countries of origin, etc. It is also a strategy to minimise the political sensitivity of migration issues by highlighting that they can be dealt with in a manner that benefits everyone.

Over the past two decades, the prevailing approach in the United Nations has hence been focused on the economic benefits of migration. The migration and development *nexus* occupies a key place in UN reports and the global dialogue on migration. The 2006 UN Secretary-General's Report on International Migration and Development emphasised that, "international migration constitutes an ideal means of promoting co-development[15]." It would be followed by the High-Level Dialogue on International Migration and Development which was held at the UN headquarters in September 2006. Finally, the Global Forum on Migration and Development was launched in 2007. Every year, it brings State and non-State actors together to promote shared experiences and good practice with a view to improving synergies between migration and development policies at national and international levels[16].

Hence, international co-operation became a factor in maximising the positive effects of migration on the development of the countries of origin. Therefore, the issue is not just simply whether there should be more or less migration, more or less open policies, but above all how to manage migration so that it benefits everyone and is part of the States' demographic and economic objectives[17]. So, migration policies are presented as a part of development policies, and more specifically, as a factor in achieving the Agenda 2030 Sustainable Development Goals[18].

15. Secretary-General of the United Nations, *International Migration and Development*, 18 May 2006.
16. C. Wihtol de Wenden, *La Question migratoire au 21e siècle, op. cit* [6].
17. A. Pécoud, "Liberté de circulation et gouvernance mondiale des migrations", *Revue internationale d'éthique sociétale et gouvernementale*, vol. 17, No. 1, 2015.
18. For a presentation of the 17 goals of the Sustainable Development Programme, see: www.un.org.

The Global Compact for Migration is imbued with this philosophy. It states that "migration has always been part of the human experience throughout history." It acknowledges that it "is a s source of prosperity, innovation and sustainable development and better governance can help to maximise its positive effects." Actually, it is the approach supported by the UN[19]. Hence, it calls for the respect of migrants' social rights, particularly in the labour market and the promotion of regular immigration routes.

However, it quickly turned to the idea, particularly backed by the EU[20] that development policies are a part of migration policies, or more accurately, that development helps to curb migration flows. The Compact's second objective is simply to "fight against negative factors and structural problems which force people to leave their country of origin." Although, migration is a historical fact and a development factor, the Compact does not go so far as to promote it.

The management of migration flows as a guideline for global governance

The Compact for Migration assumes that States have a shared interest in effectively managing migration, even if they do not agree on priorities[21]. The Western countries are not opposed in principle to any international co-operation on these issues, but according to them, it must focus on the return of undocumented migrants[22]. Conversely, most of the countries of origin have been wanting a dialogue enabling a greater openness on migration for a long time.

Emphasising the positive effects of migration is a means to overcome these competing interests. But this approach does not challenge the policies to control migration flows. Conversely, it presupposes States' ability to control their borders in order to distinguish between "profitable" migration and that whose costs exceed the benefits. In other words, migration flows can – and must – be managed so that they provide the economic benefits which have been attributed to them. The concept of migration management is the dominant paradigm internationally and provides a legitimacy to Western countries of destinations' control policies. The Global Compact fits

19. Secretary-General of the United Nations, *Making Migration Work for All*, 12 December 2017.
20. M. Tardis, M. Tardis, "European Union Partnerships with African Countries on Migration. A Common Issue with Conflicting Interests", *op. cit* [7].
21. K. Newland, *Global Compact Lays the Groundwork for International Cooperation on Migration*, Migration Policy Institute, July 2018.
22. The new EU Partnership Framework with Third Countries on migration issues mainly targets these objectives in accordance with the European Council in Bratislava in September 2016. See M. Tardis, M. Tardis, "European Union Partnerships with African Countries on Migration. A Common Issue with Conflicting Interests", *op. cit*. [7].

perfectly into this managerial approach. More specifically, it is dedicated to it, as shown by its official title: The Global Compact for *Safe, Orderly and Regular Migration*.

Migration management appears as a means to export Western countries' security and economic concerns, while presenting them in a way that makes them correspond to all parties' interests[23]. It tackles issues internationally, such as assisted voluntary return and border management, including promoting States' capacity-building activities to control their borders whereby Western countries transfer their border control skills.

The managerial approach does not exclude any reference to the migrants' situation, since border control must make it possible to fight irregular migration, as well as situations of vulnerability and the resulting human rights violations. However, although the Global Compact refers to international human rights instruments, the emphasis is more focused on the humanitarian effects of irregular migration than on the abuse of migrants' human rights. This justifies policies to combat smugglers and human trafficking, while avoiding sensitive debates about the collective effects of migration policies on migrants' rights.

As the advantage of this managerial approach is that it helps to depoliticise migration issues, its goals can only be consensual and therefore difficult to question. Technical expertise takes precedence over values and principles. Migration management has become the new standard of action internationally[24] where conventional instruments of international law are not suitable. Therefore, it is not surprising that the negotiation process that led to the adoption of the Global Compact for Migration never considered drawing up a legally binding international treaty. The Global Compact is a flexible working framework, an "à la carte" menu, which States can choose from without fear of limiting their sovereignty.

23. A. Pécoud, "De la 'gestion' au contrôle des migrations ? Discours et pratiques de l'organisation internationale pour les migrations", *Critique internationale*, No. 76, July-September 2017, p. 81-99.
24. *Ibid*.

What framework for global governance of migration?

How to translate the objectives of global migration governance into a legal instrument of co-operation? The shift from a human-rights based approach to a managerial approach of migration flows has had an impact on the legal framework for global migration governance. Although, the instrument of the international treaty was the tool preferred by the United Nations and the countries of origin, its failure has led to the search for a more flexible and less restrictive legal framework.

The failure of the International Convention on the Rights of Migrant Workers

In the first part of this paper, the migration issue was addressed within the UN through human rights instruments. The 1990 International Convention on the Rights of Migrant Workers and Members of Their Families forms the reference treaty on this subject. However, the Convention is one of the most overlooked agreements in international human rights law. In late 2018, only 54 countries had ratified this treaty[25]. None of the major Western countries of destination are on this list.

It also acknowledged to what extent the recognition of migrants' human rights was a fault line between the North and South countries. The issue is more political than legal, since the Convention does not create additional rights compared to already existing treaties – which are ratified by Western States – and above all, because the standards in force in liberal democracies are generally equivalent to the standards provided for in the Convention. According to Antoine Pécoud, the Convention is the subject of much misunderstanding[26], particularly due to its length and complexity which make it an instrument that few are familiar with, including within non-governmental organisations and trade unions. The Western States see the Convention as a pro-immigration tool which infringes on their sovereignty.

25. See the status of ratifications available at: https://treaties.un.org.
26. A. Pécoud, "The Politics of the UN Convention on Migrant Workers' Rights", *op. cit* . [11], p. 57-72.

The inclusion of undocumented foreigners, which it is not possible to express reservations about, focuses on the Northern States' reluctance.

The Convention may recognise too many rights for too many people. It is nonetheless a reference point for global governance of migration. Even though it has a low ratification record, it sets standards and goals for international co-operation in immigration. So, it is possible to ask if it is not a too precursory agreement, adopted too early by an international community, which was not ready to commit to an international regime to protect migrants, like the international refugee protection regime. The UN bodies, like non-governmental organisations (NGOs) and trade unions, are still calling for the ratification of the Convention, which highlights its relevance.

Nonetheless, although it is recognised that a large range of international and non-governmental actors have an important role to play in migration issues, including the establishment of global governance, the States continue to dominate migration policies at national, regional, bilateral and hence international levels. This domination is fuelled by rising anti-immigration sentiment in many countries, but also by the growing questioning of multilateralism as a means of settling international issues. In this context, the UN's room for manoeuvre to impose an international agreement on migration is tight.

Global Compact for Migration: regression or progress?

The adoption of a Global Compact for Migration was presented as a historical moment. It could be compared to the Paris Agreement adopted at COP21. However, the objectives are different. Although the challenge of COP21 was the adoption of binding commitments to fight against global warming, it was clearly stated from the start of the process which led to the adoption of the pact that this agreement would not be an international treaty legally binding States. Therefore, can we consider the Compact as a major step forward for global migration governance, when a treaty has been in existence for nearly 30 years? Is the Compact the lowest common denominator, a pragmatic tool, given the international context and the tension around migration issues?

Indeed, it is likely that in the current political climate, the majority of States are reluctant to commit to formal multilateral agreements on

migration[27]. Although it is presented as a series of commitments, the Compact has taken care to specify that it establishes "a non-legally binding co-operation framework" and that it reaffirms "the sovereign right of States to determine their national migration policies and their prerogative to govern migration within their jurisdiction." These precautions could not prevent criticism by countries about the attacks on their sovereignty[28]. We now understand that the United Nations had no other options than a non-legally, binding agreement.

Presenting the Global Compact for Migration as a backward step compared to the International Convention on the Rights of Migrant Workers, however, ignores the different goals of both these agreements. Admittedly, each one proposes guidelines for applying existing standards to migrants. But, like we emphasised in the first part, the Convention aims to guarantee migrants' human rights, while the Compact intends to support the effective and humane management of migration flows. It is probable that an international treaty is not the most appropriate instrument, for this purpose.

The scope of the Compact is both broader and more precise than that of the 1990 Convention. The 23 objectives of the Compact are a combination of general and ambitious measures – for example, tackling and reducing vulnerability factors related to migration – and very specific measures – for example, setting up portability mechanisms for social security rights and acquired benefits[29]. Above all, it proposes a series of actions which States can choose from to achieve the objectives which appear to be priorities for them. In this respect, it is closer to other programme-based agreements adopted in recent decades within the United Nations, in particular the Millennium Development Goals and the 2030 Agenda.

Although, the Compact does not create legally binding obligations, this does not mean that it does not have legal relevance. In fact, its leverage may result from the formality of its drafting and its adoption. Indeed, the Compact was adopted after 18 months of intense discussions according to rules determined by the UN General Assembly[30]. They scheduled an initial round of consultations with international and national actors, academics, NGOs and diasporas from April to November 2017. This round was followed by an assessment of contributions received prior to the intergovernmental negotiations held from February to July 2018. Similarly, the Compact was

27. A. Betts, *Towards a 'Soft Law' Framework for the Protection of Vulnerable Migrants*, new issues in refugee research, Research Paper No. 162, August 2018.
28. This is particularly the case of the United States.
29. K. Newland, *Global Compact Lays the Groundwork for International Cooperation on Migration, op. cit.* [21].
30. United Nations General Assembly, *Modalities for the Intergovernmental Negotiations of the Global Compact for Safe, Orderly and Regular Migration*, Resolution 71/280, 6 April 2017.

formally signed at the Intergovernmental Conference in Marrakesh, which gives it greater authority than a mere UN Assembly General resolution[31]. Finally, the Compact provides for a monitoring mechanism which is not far removed from the control mechanism of a treaty[32]. Subsequently, the strategy is to bypass the lack of legally binding value by emphasising the importance of the States' moral commitment.

The usefulness of *soft law*

The Global Pact for Migration can be qualified as *soft law* – as opposed to *hard law* – which legally binds the parties. *Soft law* is in a grey area between law and politics, but is playing an increasing role in the international system. *Soft law* agreements have increased in recent decades, because of the rise in the numbers of actors and due to the growing number of subjects which require agreements in order to meet specific needs. *Soft law* has several strategic advantages related to its flexibility. These agreements are generally easier to negotiate, since they are seen as less prejudicial to national sovereignty. They allow for the long and politically complicated ratification processes to be bypassed and therefore can produce results relatively quickly. *Soft law* can be implemented by non-State actors, can be changed more easily and therefore adapted to changing dynamics. Finally, *soft law* can be a springboard for establishing a governance framework on a set topic[33]. Although, its negotiation and adoption process is closer to that of hard law due to its intergovernmental character, the Compact also benefits from the advantages usually attributed to *soft law*.

In fact, the Compact can fulfil several functions. It can be used to supplement and fill gaps in binding international instruments. Here is where the complementarity between the Compact and the Convention on the Rights of Migrant Workers is found. However, this link may also originate from the interpretative function of an agreement like the Compact. Indeed, it provides guidelines for interpreting and adapting international treaties and obligations to the specific situation of migrants. In the area of environmental protection, *soft law* is also often used to clarify the principles guaranteed in treaties[34]. The Compact can have a similar function with regard to human rights instruments and other treaties noted in its preamble.

31. A. Peters, *The Global Compact for Migration: To Sign or Not to Sign?*, Blog of the European Journal of international Law, November 2018, available at: www.ejiltalk.org. The Compact was however adopted at the UN General Assembly meeting on 19 December 2018.
32 See the third part of this paper.
33. E. Ferris and J. Bergmann, "Soft Law, Migration and Climate Change Governance", *Journal of Human Rights and the Environment*, vol. 8, No. 1, March 2017, p. 6-29.
34. *Ibid*.

Finally, an instrument like the Compact can have an incremental effect causing States to co-operate constructively and establishing a virtuous circle towards increasingly binding commitments. In this sense, the Compact could become a precursor or a step towards the development of a new migration treaty. This is the method regularly used in the human rights field, where a UN General Assembly Declaration has often preceded negotiations for an international treaty. The most famous example is the 1948 Universal Declaration of Human Rights, which then was broken down into legally binding obligations in two treaties in 1966.

The international community's experience in developing *soft law* to protect internally displaced people provides a particularly relevant precedent. The international community did not aim to create new binding standards for IDPs, but took over the States' commitments in the field of human rights and international humanitarian law. In 1998, they were able to specify clear, concise guidelines which have now become the reference[35]. The Global Compact for Migration is even closer to the Guiding Principles on Internal Displacement and comprehensively tackles the issues in terms of protection, but also, prevention and defines the responsibilities of different international actors. Finally, it is interesting to highlight that the Guiding Principles on Internal Displacement served as a base in 2009 for the adoption of the African Union Convention on the Protection and Assistance of Displaced People in Africa[36]. As the first binding instrument on this topic, the Convention also emphasises that the multilateral framework is not the only prospect possible. Indeed, the regional or bilateral framework may be more appropriate and realistic to encourage States to turn the political and moral commitments, which they made on signing the Global Compact for Migration, into legal obligations. Subsequently, the impact of the Compact on the development of global governance of migration lies more in its implementation than in its legal status. This is the challenge which now awaits international institutions in order to confirm the historical moment of the Marrakesh Conference.

35. Guiding Principles on Internal Displacement. Available at: www.unhcr.org.
36. A. Bilak, "L'Afrique face à ses déplacés internes", *Politique étrangère*, vol. 81, No. 1, March 2016, p. 39-51, available at: www.cairn.info.

Actors of global governance of migration

Besides the objectives and legal tools, global governance is a dynamic process which requires leadership. The UN should be the obvious institution to lead this dialogue and international co-operation. However, in a period of challenging multilateralism, States are not ready to give too large a role to an international body, particularly on a subject as sensitive as migration. This leaves little room for non-governmental actors in this global migration governance.

The role of the United Nations in implementing the Global Compact for Migration

Everyone agrees that adopting the Global Compact for Migration is only one, admittedly important, step in establishing true global governance of migration. Its effectiveness will only be really analysed with regard to its implementation. It raises the question of the bodies responsible for monitoring and controlling the commitments made by States on 10 December 2018. However, one of the obstacles to global migration governance is the lack of a United Nations' agency with the mandate to manage migration flows or protect migrants' human rights. Similarly, there is a lack of clear division of responsibilities between international organisations, particularly at operational level[37]. Although the United Nationals Special Rapporteur on the Human Rights of Migrants, as well as the Special Representative of the Secretary-General on Migration, have more or less become the visible UN voices, depending on the holder of these positions, the UN does not have an agency which deals with the migrant situation on the ground, apart from the United Nations High Commissioner for Refugees (UNHCR).

The Global Compact for Migration does not establish such an organisation, but nevertheless provides for measures to ensure its implementation and monitoring. It creates a capacity-building mechanism within the United Nations system, "whose role will be to support Member

37. A. Betts, *op. cit.* [27].

States' efforts to implement the Compact." This mechanism will be made up of several clusters of activities: a focal point "where tailor-made solutions will be developed, meeting demand [from States which will be able to consult the mechanism] and incorporated; "a start-up fund which will cover the initial funding of projects"; and a "global knowledge platform which will serve as a public source of online data." So, this mechanism is presented with a project and service-oriented approach which contrasts with the usual approach of international organisations. It will be open to participation and financial contributions from Member States, but also the private sector and philanthropic foundations.

Although, the Compact does not provide for the establishment of an agency dedicated to international migration, the UN Secretary-General nevertheless initiated an organisational reform aimed at better preparing for migration issues and responding to requests from Member States in this area[38]. The United Nations Network on Migration was created, whose objective is, amongst others, to ensure its effectiveness and co-ordinate the UN system's support to Member States in implementing the Compact, to enable consistent action of the UN system at national, regional and global levels, to act as a centre for resources, ideas, information, analysis and data on migration issues and to provide reports to the Secretary-General on the implementation of the Compact and activities in the UN system[39]. Therefore, this network aims to give greater consistency and visibility to the different UN agencies' actions which are directly or indirectly involved in migration issues.

The Network will be the key body for implementing the Global Compact for Migration. It is an important step in the wide-ranging structuring of the UN system on migration issues in order to have a greater impact on international debates, and *in fine*, influence global governance. It illustrates the qualitative step overcome in 2018, since its establishment occurred at the same time as the negotiation of the Compact. It is the result of international discussions about the UN's ability to support States in implementing the Compact rather than on monitoring compliance of States' commitments. It follows the Global Migration Group, a co-operation committee set up by the Secretary-General in 2013 around four organisations (IOM, UNHCR, ILO and OHCHR) and which brought 22 member organisations together in 2017. The Network has 37 members, but above all it demonstrates the key place now occupied by the IOM in global governance of migration. This organisation, which joined the UN system in 2016, is responsible for co-ordination and the Network's secretariat, which

38. Secretary-General of the United Nations, *Making Migration Work for All*, 12 December 2017.
39. Terms of Reference of the UN Network on Migration.

gives it significant influence on the UN's priorities and guidelines on migration issues.

This organisational reform is part of the broader context to reform the UN's development system. It intends to review UN representation in the field and with Member States. It is planned to introduce UN country teams which will have to establish development assistance frameworks under the control of a resident co-ordinator. This resident co-ordinator will also ensure consistency of action by UN agencies in the field and avoid competition between them, including access to funding.

We also understand that the UN intends to streamline and reinforce the effectiveness of its action, both in agency headquarters and in Member States. So, it is the UN's position with regard to States which is evolving, undoubtedly in order to affirm its usefulness and credibility. The capacity-building mechanism provided by the Global Compact for Migration is a prime example of this trend, which aims to provide services to States and support them in implementing their migration and more broadly, development commitments. *Conversely*, this means that States remain the main actors in migration policies and *in fine* in global governance of migration.

Global governance of migration under the supervision of States

Although, successive Secretary-Generals of the United Nations have tried to put the migration issue at the centre of the international agenda since the early 2000s, the States, particularly countries of destination, remain reluctant to entrust too important a role to the United Nations. The informal co-operation mechanisms, like regional co-operation processes and the Global Forum on Migration and Development, are places of exchange where UN agencies have a place but remain under the auspices of States.

The negotiation phase of the Global Compact for Migration took place between governments. Admittedly, this confers significant authority on the agreement despite its non-binding nature. However, this illustrates States' reluctance to involve other actors in the decision-making process on migration issues. Similarly, the mechanism for monitoring and reviewing the implementation of the Compact is closer to control mechanisms for international human rights treaties. The International Migration Review Forum created by the Compact aims to review the progress of implementation of States' commitments every four years. However, this forum will be an "intergovernmental area where Member States can mutually debate and update each other on progress made." Although, other

actors can intervene at these meetings, the mechanism remains under the States' control.

Here, it is an obstacle to the development of global governance of migration since the States' interests take precedence over any other consideration. Yet, international migration, by its very nature, involves a variety of actors, primarily migrants and diasporas, but also civil society organisations and international communities. The involvement of civil society was a feature of global governance of environmental issues. Its involvement at the 1992 Rio Summit, where more than 1,400 NGOs were accredited for the negotiations, was a turning point in this governance[40]. Conversely, civil society's role in influencing migration policies was rather limited. The NGOs are traditionally kept in a position of service provider, rather than policy decision-making actors. At a time when international migration is increasingly present in national and international agendas, States want to maintain their control over these issues. The risk is not meeting migrants' needs on the ground and not being able to overcome the stalemate in the North-South confrontation on these issues.

41. J.-F. Green and C. Thouez, "Global Governance for Migration and the Environment: What Can We Learn from Each Other?", *Global Migration Perspectives*, No. 46, August 2005.

Conclusion

The Global Compact for Migration is an important stage in building global governance of migration. It specifies goals and provides the framework and monitoring mechanisms. But the two main challenges are yet to come. Indeed, the Compact's success will be measured by the degree of implementation of its goals, which primarily come under the States' jurisdiction. Admittedly, the United Nations must prove its ability to influence the direction of migration policies, but it will do so through a technical support role to States on a voluntary basis. By its flexibility, the Global Compact for Migration can unleash a virtuous circle of international co-operation, but it remains subject to Member States' domestic political uncertainties.

Indeed, debates on migration issues in major Western countries of destination cast doubt on the Compact's success. The largest country of immigration in the world – the United States – has stated its extreme hostility to the Compact. The European Union is divided. One part of the EU refused to sign the agreement while the other part has shown no enthusiasm. The European States which joined the Compact have minimised its impact and insisted on co-operation in returning undocumented foreigners for fear of the controversies which broke out in autumn 2018. In other words, we can see that the Compact does not have strong support from Western countries. Ironically, it is the EU that wanted this agreement enshrining the managerial approach of migration flows promoted by the West.

The Europeans' contradictions, whose credibility on migration is tarnished by their inability to define a common immigration and asylum policy, must not convey the idea that the Compact is a project without a future. Just like the domestic tensions in the United States on the migration issue, they are impelled to focus on other parts of the world. It is possible that the Compact's future lies elsewhere. Yet, perhaps it is in these regions where the requirement for international co-operation is the most pressing. Although, North America and Europe are major attraction poles, there is an increase in South-South migration flows. Some countries of origin, like Morocco and Mexico, are becoming countries of transit and increasingly countries of destination for migrants. It is in the regional co-operation frameworks that the Compact can produce its most positive effects. It is interesting to highlight the co-operation dynamics which are developing in continents like Africa and Latin America. The African Union has just

reviewed its Migration Policy Framework and Action Plan for 2030. At the same time that the Marrakesh Compact was signed, the headquarters of an African Observatory for Migration and Development was set up in Morocco, which aims to standardise African countries' national strategies and improve interactions with their partners, that is mainly the Europeans. On the other side of the Atlantic, Latin American countries faced with the exile of more than three million Venezuelans are trying to co-ordinate their responses, while the UN agencies in co-operation with the continent's civil society actors have adopted a regional response programme for refugees and migrants. The Global Compact for Migration's objectives – as well as those of the Global Compact for Refugees – are hence being tested in these areas. Even though the Western countries still provide the main financial resources necessary for this co-operation, the migration issue can become a marginalisation factor of these countries on the world stage.

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