

The potential and limitations of the Global Compact for Safe, Orderly and Regular Migration: A comment

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Introduction

On 19 December 2018 the UN General Assembly approved the Global Compact for Safe, Orderly and Regular Migration (GCM), with 152 votes in favor, five against (Czech Republic, Hungary, Israel, Poland, United States), 12 abstentions (Algeria, Australia, Austria, Bulgaria, Chile, Italy, Latvia, Libya, Liechtenstein, Romania, Singapore, Switzerland), and 24 countries not voting (UN, 2018). The GCM builds on the 2030 Agenda for Sustainable Development (UN, 2015) and on the New York Declaration for Refugees and Migrants 2016 (of which it aims to implement Annex II) (UN, 2016).

After the preamble, the first part of the GCM contains the vision of the pact with 10 guiding principles: people-centredness; international cooperation; respect for national sovereignty; respect for the rule of law, due process and access to justice as a fundamental element to all aspects of migration governance; sustainable development; human rights; a gender-responsive and child-sensitive approach; and a whole-of-government and whole-of-society approach.

The following part of the document includes 23 objectives that paint a general

picture of regulation for the conditions of migration. Some of them may be useful to prevent and combat torture by: providing accurate and timely information at all stages of migration; ensuring that all migrants have proof of legal identity and adequate documentation; enhancing availability and flexibility of pathways for regular migration; facilitating fair and ethical recruitment and safeguarding conditions that ensure decent work; addressing and reducing vulnerabilities in migration; strengthening the transnational response to the smuggling of migrants; preventing, combating and eradicating trafficking of persons in the context of international migration; managing borders in an integrated, secure and coordinated manner; using migration detention only as a last resort; providing access to basic services for migrants; eliminating all forms of discrimination; and promoting evidence-based public discourse to shape perceptions of migration.

The last part of the GCM identifies, in detail, the commitments and the actions needed to achieve all 23 objectives.

On torture

During the negotiations, Europe emphasized the responsibility of the sending countries in the ambit of returns and readmissions, with the legal obligation for States to take back their nationals. This

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element was incorporated into Objective 21: “Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration.” This is a very important point regarding (the risk of) torture that must be treated carefully.¹ For this reason, within Objective 21 the following sentence was inserted:

“We commit to facilitate and cooperate for safe and dignified return and to guarantee due process, individual assessment and effective remedy, by upholding the prohibition of collective expulsion and of returning migrants when there is a real and foreseeable risk of death, torture, and other cruel, inhuman, and degrading treatment or punishment, or other irreparable harm, in accordance with our obligations under international human rights law.”

If this is the only point in the GCM where torture is mentioned, the situation is somewhat different in the case of Global Compact on Refugees (GCR), issued by the UNHCR and approved on December 17th 2018 (UN, 2018). In the GCR the use of torture and inhuman treatment is explicitly called into question. It calls for a greater capacity to address the specific needs of people as survivors of torture and contains important provisions on the support provided to torture victims. In the chapter on reception (section «Addressing Specific Needs»), the GCR urges:

“The capacity to address specific needs is a particular challenge, requiring additional resources and targeted assistance. Persons

with specific needs include: children, including those who are unaccompanied or separated; women at risk; survivors of torture, trauma, trafficking in persons, sexual and gender-based violence, sexual exploitation and abuse or harmful practices”.

Torture victims are qualified as persons with specific needs, which means that States will establish “mechanisms for identification, screening and referral of those with specific needs to appropriate and accessible processes and procedures.” In the chapter on meeting needs and supporting communities (section «Health»), the GCR urges States and relevant stakeholders “to contribute with resources and expertise to expand and enhance the quality of national health systems to facilitate access by refugees and host communities, including (...) survivors of trafficking in persons, torture, trauma or violence, sexual and gender-based violence (...)”. Thus, in the GCR torture victims are a specific beneficiary within the public policies towards refugees.

Potential and positive aspects of the GCM

The GCM acknowledges international migration as a structural and global phenomenon and as one of the most significant social issues of our time, which should be tackled using a global approach. It is the first world pact on migration and aims, through multilateralism, to build a collective and shared response. It aims to tackle migration in a dynamic way, with a consideration of the different steps of the migration process (e.g., emigration and immigration). It adopts a multi-dimensional perspective, which considers the different aspects of the migration phenomenon (e.g., work, health, access to services, family, rights, and remittances) and of the social life of emigrants and immigrants (hereafter “migrants”).

¹ Maijcher proposes six indicators which can help assess the human rights compliant implementation of commitments under Objective 21; available at <https://rli.blogs.sas.ac.uk/2019/04/16/gcm-indicators-objective-21-cooperate-in-facilitating-safe-and-dignified-return-and-readmission-as-well-as-sustainable-reintegration>

In times of globalizing anti-immigration policies and discourses, the GCM recognizes the right to emigrate and be welcomed to another country with decent treatment. It discusses respect for migrants and their rights and the fact that they deserve to see their dignity recognized in any situation or context. This point is important as it entails a political commitment and legal influence. The resolutions by the UN General Assembly are not legally binding as they invite States to adopt them, yet they may have (limited) legal force as, in specific matters, they may be considered sources of international customary law. Moreover, the GCM includes specific organizational rules, procedures, management and control bodies, along with specific goals with corresponding concrete actions. Consequently, courts and civil society have a further tool for progressing the rights of migrants. The “war on migrants” is a factor in the increasing use of torture towards them. The GCM’s concept of migration, whereby migrants are given full dignity and social citizenship, may facilitate the prevention of torture and inhuman or degrading abuse.

Limitations and issues

Although the GCM provides some precise instructions and indicators for implementing and monitoring progress, some of the principles it presents, although grounded in admirable values, already have their own operational tools in international conventions and fundamental charters. This presents two issues.

Firstly, the GCM confirms, even in its title, the distinction between “regular” and “irregular” migration, from which the difference in rights for the two categories of migrants is drawn. There is no rejection of the socially created category of undocumented, “irregular,” “illegal”

migrants. Instead, there are traces of criminalization of migrants, as shown by the points on the detention of undocumented migrants and on the standardization or sharing of the biometric data of migrants. Article thirteen states that detention should be a last-resort measure but it is not explicitly forbidden, even for minors.

Secondly, the GCM erred in their presentation of “regular migration” and “irregular migration.” Documented migration contains in itself the full protection of “regular” migrants. A rationale is not provided as to why a further framework for their protection is needed. Thus the issue here is undocumented migration in a context of deep global inequalities, a structural economic crisis, and repressive policies against migrants taking place in several parts of the world.

As for undocumented migration, the GCM states that Member States shall promote legal channels for migration and, to this end, it encourages the identification of specific political goals and good practices. However, States’ commitment remains somewhat vague. At the same time, the GCM establishes, as a priority, the prevention (also in the sense of struggle and countering) of “irregular” migration. In this way, many States will have the possibility to reinforce their borders, to encourage “border cooperation,” to enter into agreements on the externalization of borders, closing borders, repatriations, and readmissions. In the balance between “States’ prerogatives and economic interests” and “human rights,” the former prevails on the latter.

The issue of undocumented migration has raised opposition, especially among countries against the GCM. And it remains unresolved in practice. Article 25 (Objective 9 «Strengthen the transnational response

to smuggling of migrants») binds States “to ensure that migrants shall not become liable to criminal prosecution for the fact of having been the object of smuggling, notwithstanding potential prosecution for other violations of national law”: it provides the possibility of enlarged reception and rights to all migrants, irrespective of the differences in migration status and legal condition. Article 31 (Objective 15 «Provide access to basic services for migrants») confirms this concept: “We commit to ensure that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services,” while article 20 (Objective 4 «Ensure that all migrants have proof of legal identity and adequate documentation») entails the commitment by States “to fulfil the right of all individuals to a legal identity by providing all our nationals with proof of nationality and relevant documentation” without distinction between regular and irregular migrants. However, it is not clear how the GCM would promote “regular” migration versus “irregular” migration, which does not have an international legal definition. Considering that such topics and distinctions remain a prerogative of States as provided for by article 15 (Section «Unity of purpose»): “Within their sovereign jurisdiction, States may distinguish between regular and irregular migration status, including as they determine their legislative and policy measures for the implementation of the Global Compact, taking into account different national realities, policies, priorities and requirements for entry, residence and work, in accordance with international law.”

The GCM, therefore, fails to address the crucial matter—the regulation and normalization of undocumented and under-documented migration—in a clear and straightforward fashion. The opposition

of several Western countries, mainly from Europe, has entailed the downsizing of the initial drafts. The opening on family reunification was limited (it would entail a social rooting of migrant populations, which increases their social value and creates social transformations in receiving countries); the reference to the flexible conversion of visas was eliminated as it would make migration and migrant workers less constrained and bonded. In essence, several aspects have been downsized, so much so, that according to Groenendijk, “the level of aspiration of the text is clearly below the level of rights granted in the current EU migration directives to migrants from outside the EU. Hence, the Compact could be used to legitimize restrictive immigration policies in the EU.”²

Furthermore, the GCM does not tackle two other crucial points. Firstly, it should be considered how migration policies are tightly connected with national economic growth—developing welcoming inward migration policies, for example, is often a function of a need for labor market; in this function, they influence the conditions of migration and of migrants. Secondly, there is a lack of attention to the structural determinants of contemporary migrations from the Global South to the North of the world, including: global inequalities and polarized development; industrialization and mechanization of agriculture in Asia, South America and Africa; land grabbing; external debt, mass privatization and restructuring plans; wars, civil wars, and local conflicts; and environmental degradation. Although article two states that it is necessary to minimize the adverse drivers and structural

² See <https://rli.blogs.sas.ac.uk/2018/11/26/gcm-commentary-objective-5> (5.12.2018)

factors that compel people to leave their country of origin, the causes—which are becoming increasingly acute—are not considered seriously enough.

A global migration policy needs to consider the world labor market, global capital and the deeper causes of migration. The notion that a global migration policy, the criteria for which are innately subjective, could be successful without this is perplexing. One could argue that the convergence of national migration policies into one global migration policy could still be positive, but it depends on its features and orientation. Currently, it seems to be within the paradigm of the traditional governance of migrations and its tools (i.e., soft law, international agencies, control, privatization of international law).

Finally, the GCM is not legally binding and it has very limited legal power. It recognizes and confirms the primacy of individual States in the control of migrations, implying that it does not attempt to weaken national sovereignty. The point of interests for States (e.g., control and security) seeks to continue the primacy of national sovereignty, whilst also retaining the protection of migrants. Why, then, did some States, which do not lack influence, abstain or vote against the GCM for the sake of national sovereignty?

Supporters and detractors

States' reservations about the GCM are manifold. They particularly include the following: it favors uncontrolled migration; there are fears that there will be an invasion from Global South to North of the world, as it provides that migration shall be considered a fundamental right, so that States cannot curb arrivals by law; the right to migration and to receiving decent treatment will lead to mass migrations from poor countries

(i.e., the brain and brawn drain); it limits national sovereignty; and it cancels the distinction between economic migrants and political refugees by considering them at the same level. Among countries against the GCM, we see the sovereigntist bloc (the Visegrad group—Poland, Czech Republic, Hungary, Slovakia—along with Austria and Bulgaria)³ together with the USA,⁴ Australia,⁵ and Israel.⁶ Considerable doubts were also expressed by Italy, Switzerland (where a parliamentary debate is in progress), Belgium, and Brazil (uncertain on the appropriate decision to take). These countries—currently the champions of the “stop migration” discourse and policies—want migration policies to be the exclusive competence of national States; they are not against neo-liberal globalization, but would rather have a new nationalization of the State to compete in the world economy and redefine the hierarchies of the international division of labor. Regarding migration, for several States, this does not mean completely stopping migration as such, but rather making a strict (i.e., professional, political, social) selection of migration movements, to achieve restrictive and punishing politics in the name of utilitarianism and criminalization, to pursue a model of subordinate integration of migrants in the name of social and symbolic inferiority. Many of those who oppose the

³ See <http://eumigrationlawblog.eu/eu-states-exit-from-the-global-compact-on-migration-a-breach-of-loyalty> (7.3.2019)

⁴ See <https://usun.state.gov/remarks/8841> (7.1.2019).

⁵ See <https://www.ft.com/content/88a475c6-ed37-11e8-89c8-d36339d835c0> (7.1.2019).

⁶ See <https://www.middleeastmonitor.com/20181121-israel-refuses-to-sign-international-migration-pact/> (7.1.2019).

GCM fear that the decent treatment of *all* migrants (documented, undocumented, under-documented) will not protect their real interests, *inter alia* possessing a cheap labor force with limited rights, thus allowing them to define the conditions of migration in accordance with market demands.

The GCM has also attracted some left-wing criticism, which views the GCM as a symptom of neo-liberal globalization that opportunistic capitalists can exploit, and implicitly calls for the closure of borders and the halt of migrations.

Among the supporters, international institutions and multilateral organizations have underlined several benefits for economic growth and social development, deriving from organized migration, while groups belonging to the no-border movement finally see the beginnings of an acknowledgment of free movement. Yet, the real issue is not the free movement or the right to circulate, but rather a two-fold matter. Firstly, the deep and structural causes of migration (forcing people to leave their country, thus not “the right to flee” but rather “the duty to flee”). Secondly, the unequal conditions and rights of migrants in the receiving countries, despite open borders and free movement.

Conclusion

The GCM appears to represent a tool to manage migration in the context of a globalized economy and international migrations taking place across the world in an era of structural crisis. Despite this complex milieu, it endeavors to balance two social forces. On one hand, the interests of the market and of national States, and on the other, the rights and interests of migrants. The section on the rights of migrants is mainly the result of the mobilization, resistance and the struggle of migrants,

associations, and social movements. It attempts to extend equality, rights and the protection of migrants as much as possible. The section on economic and State interests is limited, due to structural factors, in the extension of rights and equality because of the central role of the market. In the next few months and years, when the GCM will be implemented, we will have a chance to observe how such matters will develop.

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