The UN Global Compact for Safe, Orderly and Regular Migration: What does it mean in International Law?

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Abstract: Between 2016-2018 the international community under the auspices of the UN adopted two new instruments, both entitled Compacts, one for refugees, the other for safe, orderly and regular migration. In this contribution we examine the consequences of the adoption of the migration compact in international law. The issue has been much disputed, not least by the US authorities which encouraged (unsuccessfully) states not to adopt the instrument because of its capacity to contribute to the establishment of new international law norms. In our view the Compact is capable of aiding the interpretation of existing international human rights conventions as regards their application to migrants.

Keywords: migrants, human rights, international law, opinion juris, customary international law

Global Compact on Migration: Paragraph 7: "This Global Compact presents a non-legally binding, cooperative framework that builds on the commitments agreed upon by Member States in the New York Declaration for Refugees and Migrants. It fosters international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone, and upholds the sovereignty of States and their obligations under international law."

Global Compact on Migration: Paragraph 15(f) "The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect for and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle. We also reaffirm the commitment to eliminate all forms of discrimination, including racism, xenophobia and intolerance, against migrants and their families;"

US Mission to the UN: Statement 7 December 2018 "We believe the Compact and the process that led to its adoption, including the New York Declaration, represent an effort by the United Nations to advance global governance at the expense of the sovereign right of States to manage their immigration systems in accordance with their national laws, policies, and interests... Unlike standard titles for international instruments, 'compact' has no settled meaning in international law, but it implies legal obligation. Hence, the Compact is amenable to claims that its commitments are legal obligations or at least evidence of international consensus on universal legal principles. The United States objects to any such claims and holds that neither the Compact nor any commitments by States to implement its objectives

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create any legal obligations on UN Member States or create new rights or protections for foreign nationals as a matter of conventional or customary international law."

I. Introduction

The UN General Assembly on 19 September 2016 adopted unanimously a resolution entitled the New York Declaration which called for the negotiation and adoption of two Compacts, one for Safe, Orderly and Regular Migration (Compact) and one on Refugees. As a consequence, between 2016 and 2018, the UN initiated, examined, negotiated and adopted two Global Compacts. The USA participated in the adoption of the New York Declaration. As regards the Migration Compact, it remained a participant in the process until the end of the first phase, stock taking, in December 2017. At that point, dissatisfied with the process it rather flamboyantly withdrew at the Mexico conference which initiated the second phase, the negotiations. It voted against the Migration Compact at the UN General Assembly on 19 December 2018. The USA remained part of the negotiation of the Refugee Compact until the very end but voted against it too on 16 December 2018. Quite rightly, according to the US Mission statement, the term 'compact' was new to the UN and its meaning unclear, though this is not to imply that there is greater clarity at the time of writing. We only consider the position of the first Compact here.

The Compact is the result of an extensive and multi-phased deliberative process involving states, non-governmental organizations, and civil society. Following the 2016 action plan, the Compact was adopted at the Marrakesh Intergovernmental Conference by 164 UN Member States and then endorsed on 19 December 2018 (not adopted or affirmed) by the UN General Assembly by majority, with 152 votes in favour, 5 against (Czech Republic, Hungary, Israel, Poland, and the USA) and 12 abstentions. The Compact is a response "to the growing global phenomenon of large movements of refugees and migrants"[2] and the fragmentation of the sources of international migration law.[3] As the UN Special Representative of the Secretary

[2] UN. New York Declaration for Refugees and Migrants, UN Doc A/RES/71/1, para. 2 (6 October 2016). The framing of the Migration Compact stems also from the UN development arena, in particular, Goal 10.7 of the 2030 Agenda for Sustainable Development to "[f]acilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well managed migration policies," available at: <https://sustainabledevelopment.un.org/post2015/transformingourworld>; see also Michele Klein Solomon & Suzanne Sheldon, *The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly and Regular Migration,*30:4 INTERNATIONAL JOURNAL OF REFUGEE LA 584 (2018).

[3] See eg. ALEXANDER BETTS, GLOBAL MIGRATION GOVERNANCE (2011); Vincent Chetail, *Conceptualizing International Migration Law*, 110 ASIL. PROC. 201 (2017); Vincent Chetail, *The Architecture of International Migration Law: A Deconstructivist Design of Complexity and Contradiction*, 111 AMERICAN JOURNAL OF INTERNATIONAL LAW 18 (2017); Susan Martin, *The legal and normative framework of international migration*, A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, (September 2005), available at: <https://www.peacepalacelibrary.nl/ebooks/files/GCIM_TP9.pdf>. See also, Elspeth Guild et al, *What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration*, RAOUL WALLENBERG INSTITUTE, (2017) available at: <https://rwi.lu.se/publications/compact-migrants-rights-state-responsibilities-regarding-design-un-global-compact-safe-orderly-regular-migration/>: the authors note that in the absence of an instrument similar to the 1951 Refugee Convention, "international migration law relies, on the one hand, on international labour law and general human rights law and, on the other hand, the growing network of bilateral and regional agreement in

General on Migration stated, "[t]he global compact on migration could bundle agreed norms and principles into a global framework agreement with both binding and non-binding elements and identify areas in which States may work together towards the conclusion of new international norms and treaties."[4] El Salvador's representative was more succinct, stating at the end of the process by which time aspirations towards legally binding elements had receded, that "[w]e are not talking about anything new … Rather we are tidying up."[5]

In this debate about the legal status of the Compact it is important to bear in mind that international law is not stagnant, it develops to meet the needs of the international community. As such instruments which have been adopted in non-legally binding forms do change their status through usage. This is most evident in respect of the Universal Declaration of Human Rights adopted as a UN resolution in 1948. Its relatively weak legal status as a resolution has not impeded its impact on international human rights law. While the UN human rights conventions are derived from it, the Declaration in itself is frequently treated as a source of international law in itself in many jurisdictions.

The Compact, with its 45 references to human rights, thus aggregates existing international law with respect to migrants.[6] But is it an authoritative comment on existing State obligations with respect to the human rights of migrants? The first step to understanding this question is to examine the non-legally binding nature of the Compact.

II. Non-Legally Binding

The Preamble of the Compact states that the Compact represents a "non-legally binding, cooperative framework." But as the UN Special Representative stated at the start of the process, the outcome was initially expected to be a mix of binding and non-binding elements. At the commencement of the negotiations, it was not apparent that the Compact would be so strenuously 'non-legally' binding. Among the actors who argued most forcefully for this characteristic was the European Commission (an institution of the European Union). As a result of the EU's internal constitutional order, the Commission could only mount a claim to exclusivity in the negotiation and adoption of the Compact if it was non-legally binding.[7] Notwithstanding the success of the 'non-binding' campaign at the UN to which the Commission contributed substantially, it failed to obtain the necessary approval from its own Member States for exclusivity and so the whole effort was pointless from an EU

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regard to different aspects of migration management, governing in particular readmission, border control and labour migration quotas" (7).

[4] UN, Report of the Special Representative of the Secretary-General on Migration, UN Doc A/71/728, para. 87 (3 February 2017).

[5] United Nations, General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants, (19 December 2018), available at: <https://www.un.org/press/en/2018/ga12113.doc.htm>.

[6] As the Compact states at para 15, it is "based on international human rights law and upholds the principles of non-regression and non-discrimination;" see also Elspeth Guild, *The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?* 30:4 INTERNATIONAL JOURNAL OF REFUGEE LAW 661 (2018).

[7] Paula García Andrade, *The role of the European Parliament in the adoption of non-legally binding agreements with third countries* in THE DEMOCRATISATION OF EU INTERNATIONAL RELATIONS THROUGH EU LAW 115-131(Juan Santos Vara, Soledad Rodríguez & Sánchez-Tabernero, eds., 2018)

constitutional perspective.[8] Also, the statements of non-legally binding effect did not unite European states behind the Compact, as the vote revealed. However, it contributed to the oddity of the Compact's status as non-legally binding but based on binding international human rights treaties.

A well co-ordinated social media campaign in the autumn of 2018 against the Compact demonised the process, contents and actors. The campaign claimed, among other things, that the Compact would create a right to migrate – something of a surprise to everyone involved in the process.[9] However, the campaign was sufficiently powerful to result in the fall of the Belgian Government,[10] to influence a number of Central and Eastern European countries to abandon it and to require the British Government to prepare an official justification for supporting the Compact.[11] The impact of the campaign was greatest in Europe and North America, as the final vote indicates.[12]

Yet the blanket statement of non-legally binding effect does not do justice to the "composite" nature of the Compact, which amalgamates pre-existing hard and soft law commitments contained in some international human rights treaties, in addition to laying out a diverse set of principles that can be used to interpret legislation, and open-ended aspirational statements. This is a classic example of 'hard' law deriving from binding commitments being mixed with 'soft' law arising from instruments without that effect. The Compact arrived on the international scene at a time when legal scholarship has been reassessing the meaning of 'hard' and 'soft' law. The division of international instruments into these groups was becoming increasingly unsatisfactory. The international legal shorthand of 'hard' and 'soft' law harkens back to Article 38 of the Statute of the International Court of Justice (ICJ) which sets out what the sources of law are for the purposes of the deliberations of the ICJ in the settlement of disputes among states.[13] In this context 'hard' law consists of what is set out in that provision: (a) international conventions; (b) international custom; (c) general principles of international law and (d) possibly (but not automatically) judicial decisions and the

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[8] Melin, Pauline,*The Global Compact for Migration: Lessons for the Unity of EU Representation*, 21:2 EUROPEAN JOURNAL OF MIGRATION AND LAW 194 (2019)

[9] Laurens Cerulus & Eline Schaart, How the UN Migration pact got trolled, Politico, 3 January 2019 updated 19 April 2019, available at: < https://www.politico.eu/article/united-nations-migration-pact-how-got-trolled/>.

[10] Elspeth Guild, Tugba Basaran & Kathryn Allinson,*From Zero to Hero? An analysis of the human rights protections within the Global Compact for Safe, Orderly and Regular Migration (GCM)*, INTERNATIONAL MIGRATION (2019)

[11] The consequence of over 100,000 signatures to a petition that the UK should not agree to the UN's Compact for Migration, available at: <https://petition.parliament.uk/petitions/232698>.

[12] Kathleen Newland, *The Global Compact for Safe, Orderly and Regular Migration: An Unlikely Achievement*, 30:4 INTERNATIONAL JOURNAL OF REFUGEE LAW 657 (2019).

[13] Article 38: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

teachings of the most highly qualified publicists – but this is a subsidiary means of determining rules of law (opinion juris). The Court can only take enumerated sources into account, though the solidity of sources (b) (c) and (d) is rather variable. There is nothing surprising about this as states are particularly concerned about what counts as law for the purposes of dispute resolution. In the Statute they wished to be very clear on the basis of what instruments the Court would be entitled to determine cases (in which they themselves were parties). We will return to Article 38(1)(b) – international custom which constitutes the basis of customary international law (CIL) shortly.

The other main provision dealing with what international law is, and therefore what counts as hard law, is Article 31 of the Vienna Convention on the Law of Treaties (VLCT).[14] The same concern informed this provision as Article 38 of the ICJ Statute – states wished to be very clear about what constitutes law for the purposes of determining how treaties should be interpreted (also ultimately by courts, including the ICJ). Some semblance of a definition of what a treaty is emerges from the provision – this (this what?) is the foundation of international law according to the VCLT. But the definition of a treaty is qualified by the possibility to take into account a number of subsidiary instruments or actions: (a) any agreement relating to a treaty made by the parties in connexion (or connection?) with it and accepted by the other parties; (b) any instrument made in connection with the conclusion of a treaty and accepted; and further, account shall be taken of (c) any subsequent agreement of the parties; (d) subsequent practice in a treaty's application and (e) any relevant rules of international law. Article 31(3)(b) permitting the inclusion of "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" permits the possibility that instruments which are not 'hard' law can be taken into consideration in the interpretation of treaties including by the courts where states themselves use those instruments for this purpose and that usage has become evidence of agreement by the parties in this regard.[15]

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[14] Article 31 VCLT: Article 31 (3)(b)
Article 31: "General rule of interpretation
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.4. A special meaning shall be given to a term if it is established that the parties so intended."

[15] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2009); OLIVER DÖRR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES (2011).

Soft law, is everything else, in the sense of delineating "goals to be achieved in the future rather than actual duties, programs rather than prescriptions, guidelines rather than strict obligations."[16] These so called soft law instruments are supposed to be excluded from being possible (direct) sources of law which the ICJ can use in determining disputes before it or in respect of which states could claim VCLT applicability. But the existence of practice as part of the means to determine state obligations brings evidence, which can include soft law, into the equation. The separation of law and evidence is qualified as evidence of practice. This evidence is a means of determining what is law.[17] So, even strict adherence to a restrictive interpretation of these rules permits evidence to creep in. The legal passerelle (what does this word mean?) for soft law into hard law, according to the ICJ Statute and the VCLT is through international custom and subsequent practice (bundled together as *opinio juris*) which has become another venue of intense academic debate. We will examine this in more depth below in particular when looking at the role of the International Law Commission. This is part of the process which Chinkin has described as the continuum between jus cogens and non-law.[18]

The Principles of Non-Regression and Non-Discrimination

The Compact states that it is based on the principles of non-regression and non-discrimination. Non-regression is a term which is infrequently used in international human rights law. It is used in environmental law and appears in labour law. The principle is that a state's commitment towards a particular objective prohibits it from taking action which diverges from the objective. In legal terms it resembles a standstill provision where the law at the time of the entry into force of the commitment must be maintained or changed only in the direction of the political commitment which has been undertaken. In human rights law terms, this means that while human rights instruments set a floor of rights below which no state party can fall, where a state has higher standards, these cannot be reduced to the detriment of the individuals enjoying those human rights without offending against the non-regression principle. In the form of a standstill provision, this principle has been the subject of substantial legal analysis in the European Union.

Non-discrimination in the context of border control and immigration governance is equally problematic. There are two main issues which arise – what is the personal scope and what is the material scope of the prohibition. The issue is that if non-discrimination means literally that citizens and foreigners must be treated equally then there is no place for border controls or immigration governance which are founded on the principle of discrimination on the basis of nationality. What citizens are entitled to is part of each state's constitutional settlement

[16] Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICHIGAN JOURNAL OF INTERNATIONAL LAW 420, 428 (1991).
[17] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1995).
[18] See eg. Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 38 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 850 (1989), noting that "[i]t is no longer possible to assume that a proposition is either legally binding norm or not, for that ignores the different status that might be claimed for a proposition according to its context and desired goal," adding that the "international order cannot be viewed on a simple linear scale progressing from non-law at one extreme to *jus cogens* at the other, but rather as a continuum in which there is a constant complex interlocking between *jus cogens* and non-law or soft law" (865).

around rights and duties. What those same citizens are entitled to when abroad, that is when the magic of the border has been played and their status has changed from citizens in their own state to foreigners in another state, depends on the law of that other state where they are seeking to enter.

Generally, courts, both national and regional, have been quick to confirm states' sovereign claims to the right to admit or refuse entry to their territory to foreigners. Their treatment when admitted to the territory of a country of which they are not citizens is also given a wide margin of appreciation when challenged on human rights grounds. There is a creeping disbelief among courts regarding the claims of necessity which some states make about the imperative to treat foreigners particularly harshly. But this concern is rarely couched in the language of non-discrimination. An exception at the international level is the case before the ICJ regarding the threatened collective expulsion of all Qataris from the United Arab Emirates (UAE).[19] The Qatari government's legal basis for its claim that the UAE is acting illegally is the UN Convention for the Elimination of All Forms of Racial Discrimination (ICERD).[20] ICERD was designed to combat racial discrimination except as regards borders and migration controls. It specifically states that nothing in the convention affects states' rights to control their borders, immigration or citizenship decisions.[21] However, so far in the proceedings before the ICJ, the Court has given a preliminary ruling in favour of Qatar, requiring UAE not to expel the Qataris resident there until there has been a full hearing of the case.[22] The question of the scope of ICERD (whether it is actually applicable to the facts of the case or is excluded because the matter is one of immigration) has been reserved to the full hearing.

The implications of the case are obvious for the Compact. If ICERD applies to state decisions on collective expulsion can it apply more widely to the Compact as the embodiment of treaty law regarding the principle of non-discrimination? Is it the international treaty manifestation of the legal principle of non-discrimination which the Compact champions?

The 'Compact' Problem

In "What is a Compact," the authors suggest that the Compact is bound to become an important soft-law instrument despite the reservation of States.[23] They enumerate three principle reasons: 1. Technical and standard-setting norms enumerated in the Compact, while

[19] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates) ICJ 11 June 2018.
[20] UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <https://www.refworld.org/docid/3ae6b3940.html>.
[21] Article 1(3) CERD: "Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."

[22] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates, Preliminary Jugdment 23 July 2018.

[23] See eg. Elspeth Guild et al, *supra* note 3.The authors state that, "[b]etween the hard law commitments of the conventions and the 'soft' instruments of reports and recommendations falls the form of a compact" (6).

not formally binding, may nevertheless have significant impacts on influencing state behaviour;[24] 2. Common principles, commitments, and understandings enumerated in the Compact may come to have a "norm-filling"[25] role as interpretive guides with respect to existing international law; 3. The Compact may, as envisioned by the Sutherland Report, pave the way for binding international law in the form of either custom or treaty. At this point, what may happen in the future, especially within the controversial domain of immigration governance, is bound up with a certain degree of speculation and wishful thinking. What is clear, however, is that the Compact represents, at the very least, a clarified position held by a very large majority of UN Member States with respect to the regulation on the transnational movement of migrants,[26] with the added emphasis of the Compact's non-regressive nature (see above).

According to the UK, the Compact "does not seek to create customary law."[27] Bufalini notes that the declarations of numerous other states were also intended to ensure that *new* international law obligations would not crystalize.[28] He adds that the language of the Compact with respect to commitments is vague and implies broad state discretion in implementing the Compact and/or achieving its goals. Nevertheless, with respect to the customary status of existing human rights obligations, the Compact can be said to reflect evidence of states' *opinio juris*; or, as Chimni put it, *opinio juris communis,* engaging the "juridical conscience of humankind." The broad endorsement of the Compact by the UN General Assembly, the participation of a wide range of non-state and civil society actors, and the "unprecedented review of evidence and data gathered during an open, transparent and inclusive process"[29] supports this position, and recalls the importance given to the deliberative/discursive element of determining *opinio juris* as part of an ethical, more

[24] The authors note that the Compact "comes with a host of non-legal implementation mechanisms. These 'design elements' form an implementation framework that use non-binding norms based on technical and professional know-how to find the optimal mode of implementation. This sort of norm can be characterised as a hybrid norm, poised between the legal, the political and the technical" (11) and "could lead to domestic legislation, bilateral treaties, regional agreements and international instruments that contain binding legal norms" (15).

[25] See Thomas Gammeltoft-Hansen, John Cerone & Stephanie Lagoutte, *Tracing the Roles of Soft Law in Human Rights*, in THE ROLE OF SOFT LAW IN HUMAN RIGHTS 1 (Stephanie Lagoutte, Thomas Gammeltoft-Hansen & John Cerone, eds.2016). On this point, see also Alessandro Bufalini, *The Global Compact for Safe, Orderly and Regular Migration: What is its contribution to International Migration Law?* 58 QUESTIONS OF INTERNATIONAL LAW 5 (2019), who argues that "[s]oft law instruments may affect existing law in at least three different ways. First, soft law may confirm the existence of a certain rule, reaffirming and strengthening its normative value. Secondly, soft law may be of some help in construing the meaning of international norms. Lastly, soft law may reduce certainty about the existence of an international rule, thereby softening its legal status" (11).

[26] The Compact includes 23 Objectives for this purpose. For an in-detail analysis of each objective, seeElspeth Guild & Tugba Basaran, *The UN's Global Compact for Safe, Orderly and Regular Migration: Analysis of the Final Draft and Monitoring Implementation*, REFUGEE LAW INITIATIVE (2019) available at: <https://rli.blogs.sas.ac.uk/themed-content/global-compact-for-migration/>.

[27] United Nations, General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants, (19 December 2018), available at: ,https://www.un.org/press/en/2018/ga12113.doc.htm..

[28] Alessandro Bufalini, *supra* note 25.. He adds that this reflects a broader trend towards the decline of multilateralism and States' disengagement from international law more generally. See also, James Crawford, *The Current Political Discourse Concerning International Law*, 81 MODERN LAW REVIEW 1 (2018).

[29] See paragraph 10 of the Compact.

democratic, and progressive (postmodern) doctrine on customary international law. As the text of the Compact itself states, under "Vision and guiding principles," the Compact "sets out our common understanding, shared responsibilities and unity of purpose regarding migration, making it work for all."

As discussed above, it is generally agreed that the statement at paragraph 7 of the Compact means what it says – the Compact is not legally binding on states. 'Non-legally binding' is generally taken as a code for something which is only a political commitment and cannot be relied upon in international law to require a state to do something. However, the Compact is politically binding on those states that have adopted it. But does that mean that those states which have approved, endorsed or voted for it are under no compulsion at all to do anything to ensure that their national law and practice is consistent with it? This of course is a matter for national constitutions – to what extent do political acts of states, (such as endorsing the Compact) have consequences within the state. We will examine this elsewhere using the UK as an example. We contend, however, that there is a legal relationship between political statements of governments made to the international community at the UN General Assembly, including by voting for a human rights related instrument such as the Compact, statements made internally to national Parliaments where the responsible Minister before or after the vote at the UN confirms the state's commitment to the contents of the human rights related instrument and the content and application of national law and practices. But for our purposes here, we will examine how the Compact may affect the interpretation of international human rights obligations which states have (voluntarily chosen to commit themselves to) because the Compact itself is based on those binding international human rights instruments.

Paragraph 15(f) of the Compact is as much a statement of fact as Paragraph 7 – the Compact is based on international human rights law. International human rights law is indeed law and binding on those states which have signed and ratified human rights treaties or conventions. There are two steps which states take to bind themselves to a convention. First, they sign it, often done on the day it is opened for signature to show the support of the state for the convention. Then there is ratification, which takes place subsequently, within the state according to each state's national constitutional rules. This can range from a statement of the head of state to a parliamentary debate in one or two houses of parliament depending on how states have agreed to undertake international commitments. Once a state has ratified a convention it notifies the relevant registry and as a consequence, it is bound by the convention in international law. There are currently 18 international human rights treaties under the UN's aegis. They enjoy differing levels of state ratification from the UN Convention on the Rights of the Child[30] where no state has failed to sign up (though the US is the only state that has not yet ratified it) to the UN Convention on Migrant Workers[31] where

[30] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>.
[31] UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158, available at: <https://www.refworld.org/docid/3ae6b3980.html>.

130 states have taken no action (though 55 have ratified it and an additional 13 have signed it).

The status of a convention, even one which a state has ratified, in the domestic law of the state is a matter for its own constitution. The relationship of national and international law is a field of very substantial legal scholarship which is beyond the scope of this contribution.[32] In a humble oversimplification for our purposes here, it can be summarised generally that some states have dualist systems of law (such as the UK) where any international convention which the state has ratified needs to be incorporated into national law to be legally binding within the state (and most importantly so that people in that state can rely on the convention in disputes before the courts and the courts can take into account the convention as incorporated). Other states have monist systems (such as the Netherlands) where upon ratification of a convention, it becomes part of national law and people can rely on it and courts can interpret national law in accordance with the ratified convention. Many states have systems with elements of each of these, dualist and monist systems.[33] But even the strong proponents of dualism, such as the UK, are finding monism creeping in generally as a result of decision of the highest courts in respect of human rights.[34]

But there is a problem with the national interpretation of international law – how can the international community ensure that the interpretations which nationals courts give to the same instrument are consistent with one another? The most traditional answer to this question is that in the event of divergence which troubles international relations the ICJ is available to give a definitive judgment. This is what will happen in the Qatar v UAE case in due course. The more recent and less established solution for human rights conventions is harmonisation through the Treaty Bodies. All human rights conventions now have a Treaty Body established to ensure their correct application. This takes a variety of forms including, periodic review of state compliance through a highly structured reporting system, the issuing of General Comments on provisions of conventions which are proving sources of controversy among states, and adjudication of individual complaints made by people who claim that a state has violated a human right in a convention to their detriment. This third mechanism of harmonisation is dependent on states formally accepting the jurisdiction of the Treaty Body to consider complaints by individuals against them. States which perceive their state sovereignty to be at risk from the incursions of the international community (such as the USA expressed in its 7 December 2018 statement on the Compact) rarely sign up to jurisdiction. But many other states do – leading to an increasingly rich body of Opinions by the Treaty Bodies on the application of human rights obligations in specific cases. The Treaty Bodies themselves have established mechanisms to enhance the authority of their Opinions through

[32] VEIJO HEISKANEN, INTERNATIONAL LEGAL TOPICS, (1992); Martti Koskenniemi, *International law and hegemony: a reconfiguration*, 17:2 *COLUMBIA JOURNAL OF TRANSNATIONAL LAW* 464, 495-97 (2014);; Violeta Moreno-Lax & Paul Gragl, *Introduction: Beyond Monism, Dualism, Pluralism: The Quest for a (Fully-Fledged) Theoretical Framework: Co-Implication, Embeddedness, and Interdependency between Public International Law and EU Law, 35:1* YEARBOOK OF EUROPEAN LAW 455 (2016).
[33] Lando Kirchmair, *The Theory of the Law Creators' Circle: Re-Conceptualizing the Monism–Dualism–Pluralism Debate*, 17:2 GERMAN LAW JOURNAL 179 (2016).
[34] Melissa A. Waters, *Creeping monism: The judicial trend toward interpretive incorporation of human rights treaties*, 107 COLUMBIA LAW REVIEW 628 (2007).

common interpretation on human rights which are transversal across a number of conventions. This ensures that their Opinions on the same kinds of complaints are internally consistent. Over the past twenty years, the status of these Opinions has been much disputed – are they law and even if they are law, what kind of law are they? However, increasingly national judges are treating these Opinions with the respect applicable to legally binding documents.[35]

What then does the Compact mean in law in so far as it is not legally binding but is based on UN human rights conventions or customary international law? We are particular intrigued by this question because of the vehemence expressed by the US Mission to the UN against the Compact in its statement of 7 December 2018.

The Compact and Human Rights Conventions

One argument is that as the Compact is based on the human rights commitments of states, then while it is not legal binding in itself, many of its component parts are grounded in international human rights conventions. Those parts of the Compact which are so based on international human rights conventions must be read in light of those binding commitments in the conventions. The Compact in this respect is the equivalent of an authoritative commentary providing detail to the human right obligations of states under the relevant human rights convention. So, while the Compact objective does not take on legal characteristics, as a result of being based on a human right obligation contained in a convention, the human right is clarified by the Compact objective. It is the human right which has legal force and that force can extend as well to incorporate the Compact clarification.

For example, the Compact states Objective 7(e), Paragraph 23: "To realize this commitment, [address and reduce vulnerabilities in migration] we will draw from the following actions: … Account for migrant children in national child protection systems by establishing robust procedures for the protection of migrant children in relevant legislative, administrative and judicial proceedings and decisions, as well as in all migration policies and programmes that impact children, including consular protection policies and services, as well as cross-border cooperation frameworks, in order to ensure that the best interests of the child are appropriately integrated, consistently interpreted and applied in coordination and cooperation with child protection authorities;". Article 3(3) UN Convention on the Rights of the Child states "States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision." Article 22 provides for refugee children to "receive appropriate protection and humanitarian assistance." When states are implementing Articles 3 and 22 of the Convention, regard should now be had to Compact Paragraph 23 which

[35] Dana Baldinger, *Vertical Judicial Dialogues in Asylum Cases: Standards on Judicial Scrutiny and Evidence in International and European Asylum Law*, 36 IMMIGRATION AND ASYLUM LAW AND POLICY IN EUROPE (2015) The author is now a judge at the Dutch Raad van State (Supreme Court).

provides an explanation of what steps states should take to achieve the delivery of the Convention human rights to migrant children.

Elsewhere we have set out the international human rights commitments relevant to each of the 23 Objectives in the Compact.[36] While some Objectives have a close link to a human rights obligation of states, others are programmatic in nature and may have no legally related content at all. Further, as the signature and ratification of UN human rights conventions varies among states, so the relevance of the Compact as an interpretative aid to the correct delivery of the obligations varies. For instance, states which have not ratified the UN Convention on Migrant Workers will only be politically engaged by the Compact commitments which are based on that convention. This means that whether there is legal visibility of the Compact political commitment will be exclusively a matter of domestic law. But where a state has ratified the convention, the Compact related political commitments must provide guidance on the correct application of the binding legal commitment in accordance, once again, with national law.

We do not consider this approach to be startling or novel. We will discuss this further below when we examine the state of the art on material sources of international law. But before we do so, we will briefly make an *a contrario* argument on the basis of the rejection by the US Mission of the Compact and even its source, the New York Declaration. Why is the US Mission so exercised about the Compact? At the core of the complaint is the US concern that the Compact might interfere with state sovereignty in the field of immigration. There are at least two relevant angles to this concern. The first is the possible legal effects which we have referred to above which adoption of an international instrument, even one which is ostensibly without binding legal effect, may have on the internal legal order of states. This is a matter of domestic law of the state which we will not investigate here. The second is that the non-legally binding international instrument may have some legal effect in international law. Here the Mission's statement of concern regarding "new rights or protections for foreign nationals as a matter of conventional or customary international law" becomes important. The argument that we put forward here, that those parts of the Compact which elucidate international obligations in international human rights conventions are therefore entitled to some legal recognition (visibility), seems to be justified by the concerns of the Mission. But the antagonism of the Mission to such a consequence is by extension an antagonism towards the application of international human rights conventions to migrants. It is not the Compact which creates the rights, it is the conventions. At best the Compact clarifies what states must do to give effect to their obligations.

For example, Objective 13, Paragraph 29 states "We commit to ensure that any detention in the context of international migration follows due process, is non-arbitrary, is based on law, necessity, proportionality and individual assessments, is carried out by authorized officials and is for the shortest possible period of time, irrespective of whether detention occurs at the moment of entry, in transit or in proceedings of return, and regardless of the type of place where the detention occurs." The International Covenant on Civil and Political Rights

[36] Elspeth Guild & Tugba Basaran, *supra* note 26.

(ICCPR),[37] which has been ratified by 173 states (including the USA) states at Article 9 "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." The Compact Objective takes the content of Article 9 ICCPR and makes it explicit that this human right also applies to migrants. This is not particularly astonishing; the UN Human Rights Committee which is responsible for the correct application of the ICCPR has stated in General Comment 35(2014)[38] on Article 9: "'Everyone' includes, among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity." (emphasis provided). That the Compact makes this evident and develops somewhat on the limits of detention does not go beyond Article 9 ICCPR in accordance with its interpretation by the Human Rights Committee. However, it does provide more detail regarding the ways in which states should implement their obligation.

The USA is already bound by Article 9 ICCPR. The Human Rights Committee, in accordance with Article 40 ICCPR[39] is charged with receiving periodically (usually every four or five years) reports from signatory states on their implementation of the convention. This reporting obligation is formalised in cycles during which specific states are invited to present their reports. The USA is included in the 2019 cycle. In the context of the reporting cycle, the Human Rights Committee provides to states a List of Issues Prior to Reporting (LoIPR) which sets out matters of particular concern to the Committee regarding the state's compliance with the ICCPR. On 18 April 2019 the Human Rights Committee published its LoIPR to the USA (CCPR/C/USA/QPR/5) where it has requested: "21. Please provide information on the conditions within immigrant detention facilities, both publicly and privately owned, including access to health care. Describe the conditions within migration detention facilities specifically for family units, unaccompanied minors, pregnant women and persons with special needs, and comment on the alleged use of "ice boxes" and of forced labour. In addition, provide information on the recently reported use of force by Customs and Border Protection officers at the southern border, including the use of tear gas, smoke and pepper spray on migrants, and describe any oversight mechanisms in place to limit the use of force by such authorities."

Although the USA has expressly rejected the Compact because of what is sees as possible negative implications for its sovereignty in the field of immigration, it remains bound by the underlying human rights commitments to which the Compact is, in some ways, an adjunct.

[37] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>.
[38] UN Human Rights Committee (HRC), General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, available at: <https://www.refworld.org/docid/553e0f984.html>.
[39] Article 40 "1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests."

The questions posed by the Human Rights Committee to the USA provide some interesting background to the statement of the US Mission of 7 December 2018. The state sovereignty in respect of immigration which the US authorities seem so keen to protect appears to be linked to a claim to act in respect of border controls and in pursuit of immigration governance objectives free from international human rights obligations. The US state sovereign objective is to enjoy an unfettered power in the form of violence against persons it classifies as unwanted migrants. This state sovereign claim extends to the choice not to apply rule of law to a number of areas of immigration, such as detention. The limitation of state sovereignty by international instruments is intended to protect states and their people from engaging in human rights abuses and ignoring the rule of law. The limitations are not an enemy of the state, they are evidence of an international consensus on universal legal principles which protect states from unlawful action. As the UN Treaty Bodies exercise their responsibilities, the USA will have to respond to justify its detention of migrants without the assistance of the Compact guidance on agreed state options. If the USA refuses to respond, it will be in breach of its obligations under the ICCPR.

The Compact and Customary International Law

The US Mission is also concerned that the Compact may create customary international law (CIL) outside of a convention framework. CIL, "as evidence of a general practice accepted as law,"[40] is listed as one of the three formal law-creating mechanisms in Article 38 of the Statute of the ICJ. Upon reaching a threshold of consensus among States, custom achieves a normative force that binds states in a significant way.[41] As Article 38(1)(b) lays out, determining custom requires both state practice and the subjective believe by states that they are acting to conform with a legal obligation (*opinio juris*);[42] the frequency or habitual nature of the act is thus insufficient to give rise to CIL.[43] Nevertheless, since elucidating the subjective intention of states is extremely difficult, ascertaining *opinio juris* necessitates looking at the existence of observable state practice,[44] the decisions of national courts being of particular significance.[45] Some writers thus consider that while the psychological element

[40] See Article 38(1)(b) of the Statute of the International Court of Justice.
[41] See eg. JAMES R. CRAWFORD, BROWNLIE'S PRINIPLES OF PUBLIC INTERNATIONAL LAW 20 (8TH ed., 2015).
[42] Brownlie's lists the following material sources of law as indicating evidence of the existence of rules which, when established, are binding and of general application: "diplomatic correspondence, policy statements, press releases, the opinions of government legal advisers, official manuals on legal questions (e.g. manuals of military law), executive decisions and practices, orders to military forces (e.g. rules of engagement), comments by governments on ILC drafts and accompanying commentary, legislation, international and national judicial decisions, recitals in treaties and other international instruments (especially when in 'all states' form), an extensive pattern of treaties in the same terms, the practice of international organs, and resolutions relating to legal questions in UN organs, notably the General Assembly" (24).
[43] See eg. ICJ, North Sea Continental Shelf (Federal Republic of Germany/Denmark), Judgment, (1969) at § 77.
[44] *Ibid,* Dissenting Judge Tanaka at 177 et seq.
[45] ICJ, Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) ICJ REPORT 99 (2012), at § 55.

is not required for custom, "something like it must be necessary."[46] In some cases, however, *opinio juris* has played an important role.[47]

Debates over the relative need for state practice and *opinio juris* aside, some practical questions arise.[48] For instance, how much state practice[49] is required for CIL? Is a single act by a state sufficient to constitute general practice or must there be several acts over a certain period of time? How many states are needed? How much consistency of state practice is required?[50] How to distinguish between mere abstention and protest? Some commentators stress the difficulty of evidence gathering, asking how one can possibly "canvass the virtually

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[46] James R. Crawford, *supra* note 41, at 25. See also Judge Manfred Lachs who, in his dissenting opinion on the *North Sea Continental Shelf Cases*, declared that "to postulate that all states, even those which initiate a given practice, believe themselves to be acting under a legal obligation is to resort to a fiction-and in fact to deny the possibility of developing such rules. For the path may indeed start from voluntary, unilateral acts relying on the confident expectation that they will find acquiescence and be emulated … It is only at a later stage that, by the combined effect of individual or joint action, response and interaction in the fields concerned, i.e., of that reciprocity so essential in international legal relations, there developed the chain reaction productive of international consensus" (231).

[47] In PCIJ, S.S Lotus (France v Turkey), Judgment, 1927 PCIJ Series A no 10, ICGJ 248 (September 7, 1927), a particularly high standard of proof was required for *opinio juris;* continuous practice was insufficient. The judgment of the International Court of Justice reads: "even if the rarity of the judicial decisions to be found among the reported cases were [established] … it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand … there are other circumstances calculated to show that the contrary is true" (28). See also Emily Kadens & Ernest A. Young, *How Customary is Customary International Law?*, 54 WILLIAM & MARY LAW REVIEW 885 (2013). the authors conclude that "no settled customary practice governing how to define customary rules of law" (911) exists. In 2016, the International Law Commission suggested, for instance, that we distinguish between formal and material sources when determining CIL, citing A. Pellet's stance that "the formal sources of international law are 'the processes through which international law rules become legally relevant,' while the material sources 'can be defined as the political, sociological, economic, moral or religious origins of the legal rules,'" International Law Commission, First Report on Formation and Evidence of Customary International Law, n. 56, UN Doc. A/CN.4/663 (May 17, 2013) at 12 (prepared by Special Rapporteur Michael Wood).

[48] See eg. Andrew Guzman, *Saving Customary International Law*, 27 MICHIGAN JOURNAL OF INTERNATIONAL LAW 115, 149 (2005), who notes that "the existing literature … offers a wide range of proposals regarding the proper balance between the *opinio juris* and state practice requirements." Guzman's own "rational choice approach" to CIL, for instance, does not require state practice for the establishment of a CIL rule. Practice is relevant to the extent that it affects the perception of states regarding the existence of a legal rule. See furthermore, Laszlo Blutman, *Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories of Customary International Law Fail*, 25 EUROPEAN JOURNAL OF INTERNATIONAL LAW 529 (2014).

[49] According to Anthony Carty, the notion of "state practice" was developed as a positivist method in the 19th century, prior to which natural law thinking dominated international law; Anthony Carty, *Doctrine Versus State Practice*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 974 (Bardo Fassbender & Anne Peters, eds., 2012).

[50] See HUGH M. KINDRED ET AL. INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 41 (8TH ed. 2014). In the case of ICJ, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, 1986 ICJREPORTS14 (June 27, 1986) at § 186, the ICJ stated that States' practice with respect to the application of rules need not be perfect, in the sense that practice had to be completely consistent, or be of an absolutely rigorous conformity. Rather, "it is sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule, should generally have been treated as breaches of that rule, not as indicators of the recognition of a new rule." In ICJ, Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) 2012 ICJ Reports 99 , the ICJ used the language of a "settled practice" at § 55.

infinite universe of potential evidence, let alone come to some understanding of the extent to which a practice has been followed."[51] While the most visible evidence of state practice may be statements made by countries or votes at international fora, their reliability is undermined given that states have various politically motivated incentives to misrepresent their beliefs about custom; the statements of some states may also be more readily available than those of others, introducing bias.[52]

Questions also arise with respect to *opinio juris.* How is it to be proved? Can it be presumed from consistent practice? What about instances where states accept partial compliance as "close enough"? Guzman adds that a particularly vexing problem with *opinio juris* is its circularity. If CIL is law only if states believe it to be law, then it would appear that "*opinio juris* is necessary for there to be a rule of law, and a rule of law is necessary for there to be *opinio juris*."[53] In light of debates and difficulties with respect to determining CIL, the International Law Commission's 2018 report[54] on sources of customary law attempted to introduce some clarity. Conclusion 6 enumerates non-exhaustive forms of non-hierarchical state practice—physical and verbal acts and inaction—that include, for instance, "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" and "decisions of national courts." Such practice must be "sufficiently widespread and representative, as well as consistent" (see Conclusion 8). With respect to *opinio juris,* some of the acceptable forms of evidence are enumerated in Conclusion 10, including for instance "public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference." Further, failure to react over time may serve as evidence of *opinio juris* provided states had the capacity to react. As

[51] Andrew Guzman, *supra* note 48, at 126.

[52] See eg. B.S. Chimni, *Customary International Law: A Third World Perspective*, 112:1 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (2018). On the issue of bias, Chimni argues that the "non-availability of the state practice of third world countries, and also the paucity of scholarly writings on the subject, allows the identification of rules of CIL primarily on the basis of state practice of advanced capitalist nations and the opinions of their scholars" (6). Given the difficulty in ascertaining practice for the purpose of CIL, it might be easier to identify cases where practice does not arise. In *Colombian-Peruvian asylum case,* Judgment of 20 November 1950, I.C.J. Reports 1950, the ICJ stated that: "the facts … disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence" (277).

[53] Andrew Guzman, *supra* note 48,at 124. See also ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971).

[54] Report of the International Law Commission seventieth session (30 April–1 June and 2 July–10 August 2018) [UN Doc A/73/10 [2018], Chapter V "Identification of Customary International Law." For an enumeration of evidence to determine CIL, see also James R. Crawford, *supra* note 41, at 24. Material sources of custom may include: diplomatic correspondence, policy statements, press releases, the opinions of government legal advisers, official manuals on legal questions (e.g. manuals of military law), executive decisions and practices, orders to military forces (e.g. rules of engagement), comments by governments on ILC drafts and accompanying commentary, legislation, international and national judicial decisions, recitals in treaties and other international instruments (especially when in 'all states' form), an extensive pattern of treaties in the same terms, the practice of international organs, and resolutions relating to legal questions in UN organs, notably the General Assembly.

Conclusion 3 notes, "regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found." Conclusion 12 turns to resolutions of international organisations and intergovernmental conferences which, while they cannot create a rule of CIL by themselves, "may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development."

While undoubtedly helpful to determining how CIL, as a formal source of international law, is determined, this is certainly insufficient without some state action for the Compact. On 10 December 2018, the British Minister responsible to address Parliament on the Compact stated: "The GCM emphasises that migrants are entitled to the same universal human rights as any human being, and does not create any new "rights" for migrants. As a result, the UK does not interpret the compact as being in conflict with its current domestic policies. At the same time, the compact will help us take important steps to keep migrants around the world safe and to protect the most vulnerable, domestically and overseas, who can become victims of modern slavery."[55] This was not only a public statement made on behalf of the UK but made to Parliament. The essence of the statement is that not only does the UK support the Compact but it considers its national law and practice to be consistent with it. This certainly seems on its face to fulfil the conditions of Conclusion 10 of the ILC. For the purposes of the UK, the Compact has been endorsed in accordance with the principle of *opinio juris* and therefore may be a formal source of international law binding on the UK.

Perhaps Tomuschat's suggestion that "[t]he traditional categorization of sources merely describes the external forms to which the legal will of the community of states so far has been limited"[56] is useful. Beyond Article 38, norm creation reflects a "process of continuous interaction, of continuous demand and response"[57] involving recognition, toleration, simple acceptance, and the dispute of claims and situations. It is perhaps such a perspective that has motivated the "modern" approach to CIL.[58] This approach adopts both an inclusive notion of state practice (including, for instance, resolutions of international organizations) and emphasizes *opinio juris* over state practice.[59] *Opinio juris* is considered a cultural concept changing over time which lends itself to the gradual expansion of the set of norms that are

[55] The Minister for the Middle East (Alistair Burt), Global Compact for Migration, (10 December 2018) House of Commons Hansard, available at: <https://hansard.parliament.uk/Commons/2018-12-10/debates/1812106000015/GlobalCompactForMigration>.
[56] Christian Tomuschat, *Verfassungsgewohnheitsrecht?* (1972), cited in Eibe Riedel, *Standards and Sources: Farewell to the Exclusivity of the Sources Triad in International Law*, 2:1 EUROPEAN JOURNAL OF INTERNATIONAL LAW 58, 64 (1991)..
[57] Eibe Riedel, *supra* note 56, at 64.
[58] See eg. B.S. Chimni, *supra* note 52; and Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95:4 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 757 (2001).
[59] See eg Roozbeh (Rudy) B. Baker, *Customary International Law: A Reconceptualization*, 41 BROOKLYN JOURNAL OF INTERNATIONAL LAW 439 (2016).See also Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*,21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 173 (2010), who states that "the debate over whether consistent state practice and *opinio juris* are the only building blocks of customary international law is over, because clearly, for better or for worse, they no longer are" (175).

considered as CIL,[60] particularly with respect to human rights;[61] the "modern" approach may thus reflect an "ethical turn"[62] in the debate about CIL to address the "deep democratic deficit"[63] of formulating CIL. Chimni's postmodern doctrine of CIL goes further, suggesting that norm creation should foreground the procedural ideal of "deliberative reason," thereby ensuring that CIL rests on "better argument or sounder claims advanced by state and non-state actors [involving] claims and counterclaims, challenges and responses."[64]

A democratic and deliberative process would allow *opinio juris* to represent the "juridical conscience of humankind," an *opinio juris communis.*[65] Given the importance of the discursive element in the postmodern doctrine, resolutions of international organizations—the "outcome of extended negotiations, broad consensus, clear articulation, and subsequent affirmations"[66]—would yield rules of CIL. Special weight is given to the "global common good"[67] in determining whether a resolution has binding effect as CIL. Furthermore, the views of transnational and non-governmental groups, those of trade unions and peasant organizations or the World Social Forum (WSF), might be considered in the emergence of norms of CIL.[68] Such a development of CIL might well startle the US Mission to the UN and incite it to denounce the Compact. Yet, as is clear from the authorities, there is plenty of room for dispute in the areas of CIL and its formulation.

Conclusions

[60] B.S. Chimni, *supra* note 52,at 3. He also writes that "the genesis of the doctrine of CIL can be traced to the emergence of Europe as a legal community, common European values, the positivist method, and the needs of nineteenth century imperialism" (20).
[61] See eg. Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31:2 VIRGINIA JOURNAL OF INTERNATIONAL LAW 211 (1991).
[62] B.S. Chimni, *supra* note 52, at 3. According to Chimni, "[t]he turn to *opinio juris* among proponents of modern CIL is in many ways a response to the expanded community of states which makes dependence on state practice problematic, necessitating reliance on ethical reasoning" (18). He contends also, however, that "the distinction between "traditional" and "modern" CIL has been advanced to allow its rapid development to fill critical gaps in the international legal system in the era of neoliberal capitalist globalization … "Modern" CIL rules embody "hegemonic" ideas and beliefs that are critical to realizing the systemic interests of the global capitalist system. These ideas and beliefs have come to be internalized by third world nations in the postcolonial era." (7).
[63] *Ibid*, at 22.
[64] *Ibid*, at 38.
[65] *Ibid,* at 38. See also dissenting opinion of Judge Cançado Trindade in ICJ, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Judgment, (October 5, 2016).
[66] B.S. Chimni, *supra* note 52, at 41.
[67] *Ibid,* at 42, noting that the "global common good" reflects *opinio juris communis* and furthers the goals of international human rights law and associated jurisprudence.
[68] Chimni refers here to Reisman who argues that, in practice, the makers of CIL are no longer only state governments, and that "many categories of non-State actors in the different social and economic zones of the complex archipelagos of contemporary international law now participate in shaping expectations and demands of right behaviour;" see W. Michael Reisman, *Canute Confronts the Tide: States Versus Tribunals and the Evolution of the Minimum Standard in Customary International Law*, 30:3 ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL 616, 619 (2015).. See also, generally, Laura Pedraza-Farina, *Conceptions of Civil Society in International Lawmaking and Implementation: A Theoretical Framework*, 34 MICHIGAN JOURNAL OF INTERNATIONAL LAW 605 (2013).

In this article we have examined the Global Compact for Safe, Orderly and Regular Migration as an element of international law. In order to do so we first looked at the statement that it is non-legally binding. Our argument is that while the Compact is non-legally binding, the underlying human rights conventions on which it is based are binding. Those parts of the Compact which are clearly linked to legally binding commitments must be read as authoritative guidance on the correct application of those obligations. Secondly, we examined what it means that the Compact is based on the principle of non-regression and non-discrimination. Non-regression expressed a standstill objective which prevents states from reducing the standard of treatment of migrants below what it is at the time of adoption. This may well mean that there are differing standards in neighbouring states which are all protected by the Compact's non-regression principle. Non-discrimination is a more complex principle when applied to border control and migration governance as inherent in both activities is the principle that foreigners can be treated disadvantageously in comparison with citizens. But the extent of that differential treatment is currently subject to judicial consideration by the ICJ. We then turn to the Compact problem – what is a compact in international law – and once again our conclusions draw us back to the inherent relationship of the compact with human rights obligations of states. Finally, we examine the compact as a possible source of CIL. The force of the Compact in this context depends on the commitment which state authorities have made to it.

It is evident that from the commencement of the process substantial changes took place as regards the legal and political importance of the Compact. The political winds which buffeted the negotiations led to a watered-down wording of its legal impact. But the framework of the Compact as an adjunct to international human rights conventions, setting new standards as regards their application to migrants, has remained constant.