

# europa *ethnica*

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# Some Reflections on the Un Global Compact for Safe, Orderly and Regular Migration and Human Rights

Anna Liguori\*

**Summary:** 1. Introduction. – 2. Genesis and Content of the Global Compact on Migration. – 3. Global Compact on Migration and human rights. – 4. Closing remarks.

## 1. Introduction

The *Global Compact for Safe, Orderly and Regular Migration* is one of two documents arising from the negotiation process initiated with the New York Declaration for Refugees and Migrants, unanimously adopted on 19 September 2016 by the United Nations General Assembly<sup>1</sup>). On the one hand, Annex I to this Declaration gave the UNHCR (United Nations High Commissioner for Refugees) the task of drafting a “Global Compact on Refugees” to be presented to the UN General Assembly in the annual report for 2018: this document was effectively approved on 17 December 2018 with 181 votes in favour<sup>2</sup>). On the other hand, Annex II established an intergovernmental negotiation coordinated by the IOM (International Organization for Migration)<sup>3</sup>), in order to draw up a “Global Compact for Safe, Orderly and Regular Migration”, intended to create a “framework for comprehensive international cooperation on migrants and human mobility”, covering all aspects of international migration, including “human rights-related aspects<sup>4</sup>”). This compact had a more complex gestation process and after being adopted on 10 December 2018 at the Intergovernmental Conference held in Marrakech<sup>5</sup>), was endorsed by the UN General Assembly on 19 December 2018<sup>6</sup>), with 152 votes in favour, 5 votes against (the Czech Republic, Hungary, Israel, Poland, United States) and 12 abstentions<sup>7</sup>).

The Preamble to the New York Declaration contains a very important statement, also taken up in the Global Compact on Migration<sup>8</sup>), namely that “refugees and migrants have the same universal human rights and fundamental freedoms<sup>9</sup>)” (while acknowledging however that “their treatment is governed by separate legal frameworks”). Although this seemed to pave the way for overcoming the distinction between migrants and refugees<sup>10</sup>), in practice the decision to produce two distinct pacts accentuates this dichotomy, even if in reality the differences are not so clear-cut. Although this distinction does preserve the peculiarity of the specific protection offered by international law to those who fall within the definition of refugee, pursuant to Art. 1 of the Geneva Convention on the status of refugees, it nevertheless presents certain risks. As noted, “it may fail to engage with the way in which migration control practices bear down particularly heavily on refugees and would-be refugees, who have to cross borders (often many) in search of protection<sup>11</sup>”). The risk is that – for people in need of international protection, but not covered by the definition of refugee – the demand for border control prevails over protection obligations. As pointed out<sup>12</sup>), although both the New York Declaration and the Compact on Migration contain references (implicit or explicit) to the principle of non-refoulement, “yet

they do little to address one of the most pressing problems for many non-removable people – their lack of formal legal status and security of residence”:

\*) Associate Professor of International Law, University of Napoli “L’Orientale”.

1) New York Declaration for Refugees and Migrants, UN Doc. A/RES/71/1.

2) Global Compact on Refugees, UN Doc. A/73/12 (2018). For a critical analysis of this document see T. Alexander Aleinikoff, “The Unfinished Work of the Global Compact on Refugees”, in *International Journal of Refugee Law*, 2018, Vol. 30, pp. 611ff., <https://academic.oup.com/ijrl/article/30/4/611/5258096>.

3) On the role of IOM see in particular Cristina Carletti, Marco Borraccetti, “Il Global Compact sulla migrazione: tra scenari internazionali e realtà europea”, in *Freedom Security and Justice: European Legal Studies*, No. 2/2018, pp. 24ff.

4) See <https://www.iom.int/global-compact-migration>.

5) UNGA, Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, Draft outcome document of the Conference, A/CONF.231/3.

6) Global Compact for Safe, Orderly and Regular Migration, UN Doc. A/RES/73/195.

7) Algeria, Australia, Austria, Bulgaria, Chile, Italy, Latvia, Libya, Liechtenstein, Romania, Singapore, and Switzerland. In addition, 24 UN Member States were not present to take part in the vote (Afghanistan, Antigua and Barbuda, Belize, Benin, Botswana, Brunei Darussalam, Democratic People’s Republic of Korea, Dominican Republic, Guinea, Kiribati, Kyrgyzstan, Micronesia, Panama, Paraguay, Sao Tome and Principe, Seychelles, Slovakia, Somalia, Timor-Leste, Tonga, Trinidad and Tobago, Turkmenistan, Ukraine, and Vanuatu). To sum up, 41 of the 193 UN Member States did not endorse the Compact.

8) Para. 4 GMC. “Refugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times. However, migrants and refugees are distinct groups governed by separate legal frameworks. Only refugees are entitled to the specific international protection defined by international refugee law.”

9) Para. 6 New York Declaration.

10) See on this point Giuseppe Cataldi, “La distinzione tra rifugiato e migrante economico: una dicotomia da superare”, in Giuseppe Nesi (a cura di), *Migrazioni e diritto internazionale: verso il superamento dell'emergenza? Atti del XXII Convegno SIDI*, Napoli, 2018, pp. 585ff., and literature quoted therein.

11) Cathryn Costello, “Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?”, in *International Journal of Refugee Law*, Vol. 30, 2018, p. 644, <https://academic.oup.com/ijrl/advance-article/doi/10.1093/ijrl/eey060/5288417>. See on this point *ex multis* Violeta Moreno-Lax, *Accessing Asylum Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law*, Oxford, 2017 and literature quoted therein.

12) Cathryn Costello, “Refugees and (Other) Migrants”, cit., p. 646.

After a brief analysis of the content and genesis of the Global Compact on Migration, this article intends to focus on its role in the light of human rights, as recognized by the Universal Declaration of Human Rights and other international instruments.

## 2. Genesis and Content of Global Compact on Migration

The process of drafting the Migration Compact involved various phases and was guided by Mexico and Switzerland as co-facilitators. Initial informal consultations, held with numerous stakeholders in order to gather information, were followed by formal intergovernmental negotiations. In December 2017, in a note<sup>13)</sup> addressed to the General Secretariat of the United Nations, the United States announced that they would abandon the negotiations on the Global Compact on Migration, because the global approach in the New York Declaration would not be compatible with its own sovereignty. Following this abandonment, the European Union took a leading role in the process of drawing up the Global Compact, although there were further defections, even among the member countries of the European Union. Indeed, in July 2018, after the withdrawal of Australia, it was the turn of Hungary, which justified its choice because “For the UN migration should be encouraged, while according to Hungary it has to be stopped”. Hungary was followed by the other countries of the Visegrád group (Poland, the Czech Republic and Slovakia) and Austria, Bulgaria and Italy.

The evolution of the Italian attitude is emblematic of the use of a refusal to sign the Global Compact for the sake of propaganda. Indeed, although Italy had taken part in all the negotiation phases and, until 21 November 2018<sup>14)</sup>, had publicly declared its support for the agreement through the Minister for Foreign Affairs in office at that time, in the end it withdrew. In fact, after the stance taken on 27 November 2018 by the then Interior Minister, Matteo Salvini, who declared that he was against the Global compact because it would put so-called economic migrants and political refugees<sup>15)</sup> on the same level, Prime Minister Giuseppe Conte stated that the Government would not take part in the Marrakech summit, and that Parliament would examine the question of Italy’s signing the Compact<sup>16)</sup>. In February 2019 the Italian Parliament decided not to sign the Migration Compact<sup>17)</sup>.

The Migration Compact establishes “a non-legally binding<sup>18)</sup>, cooperative framework<sup>19)</sup> that intends to tackle migration “in all its dimensions”<sup>20)</sup>. It seems particularly important to highlight the Preamble, which states not only that migrations have always been present in the course of history, but explicitly states that they constitute “a source of prosperity, innovation and sustainable development in our globalized world, and that these positive impacts can be optimized by improving migration governance”, adding that “No country can address the challenges and opportunities of this global phenomenon on its own”. As the Special Representative of the Secretary-General for International Migration, Louise Arbour, affirmed, the Migration Compact represents a great achievement for multilateralism<sup>21)</sup>, which is particularly important in the current historical period. Indeed, as pointed out<sup>22)</sup>, “the Compact paves the way for a counter-narrative to the populist rhetoric through a balanced, consensual, and inclusive approach”.

The Global Compact on Migration consists of a Preamble, 10 Guiding Principles (some aspects of which are difficult to balance, *National sovereignty* – lett. C – and *Human rights* – lett. F, to name but two), plus 23 Objectives and, finally, 2 sections dedicated to implementation and follow-up, to be carried out within the International Migration Review Forum, where, every four years from 2022 onwards, the member states of the

United Nations, will be able to discuss the results achieved. The International Organization for Migration (IOM) will act as coordinator and secretariat for all monitoring activities.

The 23 Objectives<sup>23)</sup> include: 1. Collect and utilize accurate and disaggregated data as a basis for evidence-based policies. 2. Minimize the adverse drivers and structural factors that compel people to leave their country of origin. 3. Provide accurate and timely information at all stages of migration; 4. Ensure that all migrants have proof of legal identity and adequate documentation. 5. Enhance availability and flexibility of pathways for regular migration. 6. Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work. 7. Address and reduce vulnerabilities in migration. 8. Save lives and establish coordinated international efforts on missing migrants. 9. Strengthen the transnational response to smuggling of migrants. 10. Prevent, combat and eradicate trafficking in persons in the context of international migration. 11. Manage borders in an integrated, secure and coordinated

13) <https://usun.state.gov/remarks/8197>.

14) [https://www.esteri.it/mae/it/sala\\_stampa/archivionotizie/comunicati/globalcompact-for-migration.html](https://www.esteri.it/mae/it/sala_stampa/archivionotizie/comunicati/globalcompact-for-migration.html).

15) See Alessandra Camilli, Francesca Spinelli, “Che cos’è il Global compact e perché l’Italia vuole rimanerne fuori”, in *Internazionale*, 6 December 2018, <https://www.internazionale.it/bloc-notes/annalisa-camilli/2018/12/06/globalcompact-migrazione>.

16) [http://www.ansa.it/sito/notizie/topnews/2018/11/28/contento-global-compactattendo-parlamento\\_4dcd061b-e8c1-48ec-958d-b5aca60a1e14.html](http://www.ansa.it/sito/notizie/topnews/2018/11/28/contento-global-compactattendo-parlamento_4dcd061b-e8c1-48ec-958d-b5aca60a1e14.html). However, as pointed out, a prior pronouncement by Parliament does not appear to be necessary to adopt a document which, like the GCM, is not an international treaty (see Andrea Spagnolo, “Di intese segrete e alibi parlamentari: tra la decisione del TAR sull’Accordo col Niger e il Global Compact sulle migrazioni”, in *SIDIBlog*, 5 December 2018, <http://www.sidiblog.org/2018/12/05/di-intese-segrete-e-alibi-parlamentari-tra-ladecisione-del-tar-sullaccordo-col-niger-e-il-global-compact-sulle-migrazioni>).

17) Camera dei Deputati, mozione 1/00113, <https://aic.camera.it/aic/scheda.html?numero=1-00113&ramo=C&leg=18>. See on this point Fulvio Cortese, “The Global Compact and national legislation: quid iuris?”, in *Questions of International Law*, 30 April 2019, p. 27, <http://www.qilqdi.org/the-global-compact-and-national-legislation-quid-iuris/>.

18) Para. 7 GCM. On the non binding force of the Compact see Anne Peters, “The Global Compact for Migration: to sign or not to sign?”, in *European Journal of International Law: Talk!*, 21 November 2018, <https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/>; Alessandro Bufalini, “The Global Compact for Safe, Orderly and Regular Migration: What is its contribution to International Migration Law?”, in *Questions of International Law*, 30 April 2019, pp. 5 ff., <http://www.qil-qdi.org/the-global-compact-for-safe-orderly-and-regular-migration-what-is-its-contribution-to-international-migration-law/>.

19) Para. 7 GCM. On the question of whether the GCM has “governance potential – a capacity which may move it beyond the mere ‘international cooperation framework’”, see Marion Panizzon, Daniela Vitiello, “Governance and the UN Global Compact on Migration: Just another Soft Law Cooperation Framework or a New Legal Regime governing International Migration?”, in *European Journal of International Law: Talk!*, 4 March 2019, [www.ejiltalk.org/governance-and-the-un-global-compact-on-migration-just-another-soft-law-cooperation-framework-or-a-new-legal-regime-governing-international-migration/](http://www.ejiltalk.org/governance-and-the-un-global-compact-on-migration-just-another-soft-law-cooperation-framework-or-a-new-legal-regime-governing-international-migration/) more-16947.

20) Para. 4 GCM.

21) <https://www.un.org/sg/en/content/sg/press-encounter/2018-12-10/secretary-generals-joint-press-encounter-marrakech-srsg-louise-arbour>.

22) Vincent Chetail, *International Migration Law*, Oxford, 2019, p. 333.

23) For a detailed analysis of the objectives see “The UN’s Global Compact for Safe, Orderly and Regular Migration: Analysis of the Final Draft and Monitoring Implementation”, in Elspeth Guild, Tugba Basaran (eds.), *Refugee Law Initiative Blog*, <https://rli.blogs.sas.ac.uk/themed-content/global-compact-for-migration/>.

manner. 12. Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral. 13. Use migration detention only as a measure of last resort and work towards alternatives. 14. Enhance consular protection, assistance and cooperation throughout the migration cycle. 15. Provide access to basic services for migrants. 16. Empower migrants and societies to realize full inclusion and social cohesion. 17. Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration. 18. Invest in skills development and facilitate mutual recognition of skills, qualifications and competences. 19. Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries. 20. Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants. 21. Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration. 22. Establish mechanisms for the portability of social security entitlements and earned benefits. 23. Strengthen international cooperation and global partnerships for safe, orderly and regular migration.

As mentioned before, when the USA declared that they would no longer participate in the negotiation, the European Union, which had been invited to take part on the basis of its observer status at the General Assembly of the United Nations, actually acquired a leading role and exercised influence, both in form and substance, in the drafting of the final document<sup>24</sup>).

Indeed, the form of the *Global Compact on Migration* shows marked similarities with the documents adopted by the European Union in order to implement the European Agenda on Migration<sup>25</sup>). Although the term Global Compact is not entirely new within the United Nations<sup>26</sup>), its use in relation to the final product of an intergovernmental negotiation process is quite innovative<sup>27</sup>). The most significant precedents are to be found rather in the European regional framework: one example is the Italian proposal of Migration Compact, of 15 April 2016<sup>28</sup>), another the *Communication of the Commission establishing a new Partnership Framework with third countries* of 7 June 2016 – COM (2016) 385 final<sup>29</sup>). In particular, the partnership established by the Commission's 2016 Communication calls for the use of compacts and follows the trend of adopting tools softer than treaties, in order to obtain effective and rapid results<sup>30</sup>).

As for substance, the European Union has aimed to emphasize the distinction between regular and irregular migrants, and in general shown itself much more interested in border control and in affirming the obligations of readmission of States of origin than in recognizing migrants' rights<sup>31</sup>).

In the end the position of EU Member States was split: although the majority voted in favour, three States (the Czech Republic, Hungary, Poland) voted against, one (Slovakia) did not vote, five (Austria, Bulgaria, Italy, Latvia, Romania) abstained<sup>32</sup>).

### 3. Global Compact on Migration and human rights

The *Global Compact on Migration* places great emphasis on human rights. First of all, the statement "Refugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times", already contained in the New York Declaration<sup>33</sup>), is reiterated at para. 4 of the Global Compact, further strengthened by the call for an "overarching obligation to respect, protect and fulfill the human rights of migrants, regardless of their migration status" (at para. 11); furthermore, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Cov-

enant on Economic, Social and Cultural Rights and "the other core international human rights treaties"<sup>34</sup>) are expressly referred to (at para. 2) and human rights are among the "guid-

24) On the role of the European Union see Elspeth Guild, Katharine T. Weatherhead, "Tensions as the EU Negotiates the Global Compact for Safe, Orderly and Regular Migration", in *EU Immigration and Asylum Law and Policy*, 6 July 2018, [eumigrationlawblog.eu/tensions-as-the-eu-negotiates-the-global-compact-for-safe-orderly-and-regular-migration/](http://eumigrationlawblog.eu/tensions-as-the-eu-negotiates-the-global-compact-for-safe-orderly-and-regular-migration/); Daniela Vitiello, "Il contributo dell'Unione europea alla governance internazionale", cit.; Giuseppe Cataldi, Adele Del Guercio, "I *Global Compact* su migranti e rifugiati. Il *Soft Law* delle Nazioni Unite tra spinte sovraniste e potenziali sviluppi", in *Diritto, Immigrazione e Cittadinanza*, No. 2/2019, pp. 204 ff., <https://www.dirittoimmigrazione cittadinanza.it/saggi/400-i-global-compact-sumigranti-e-rifugiati-il-soft-law-delle-nazioni-unite-tra-spinte-sovraniste-e-potenzialisviluppi>. On the position of Latin America States see Camila Barretto Maia, Diego Morales, Raisa Ortiz Cetra, "Global Compact for Migration: stop the hypocrisy and listen to the Global South", 27 February 2018, <https://www.opendemocracy.net/en/global-compact-for-migration-stop-hypocrisy-an/>.

25) See Daniela Vitiello, "Il contributo dell'Unione europea alla governance internazionale dei flussi di massa di rifugiati e migranti: spunti per una rilettura critica dei Global Compacts", in *Diritto, Immigrazione e Cittadinanza*, No. 3/2018, p. 121, <https://www.dirittoimmigrazione cittadinanza.it/saggi/304-saggio-vitiello/file>.

26) See, for example, the Secretary General's proposal at the Davos Forum in 1999: *Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos*, Press Release SG/SM/6881, 1999.

27) Daniela Vitiello, "Il contributo dell'Unione europea alla governance internazionale", cit., p. 21.

28) *Italian Non-Paper – Migration Compact. Contribution to an EU Strategy for External Action on Migration*, [http://www.governo.it/sites/governo.it/files/immigrazione\\_0.pdf](http://www.governo.it/sites/governo.it/files/immigrazione_0.pdf).

29) This approach is however problematic because by resorting to arrangements which do not fall within the scope of Article 218 of the Treaty on the Functioning of the European Union, Member States and EU institutions circumvent political and judicial mechanisms of control (those of the European Parliament and the Court of Justice, respectively): on this point see Anna Liguori, *Migration Law and the Externalization of Border Controls. European State Responsibility*, London and New York, 2019, p. 66, and literature quoted therein.

30) In the same direction see *EU Input to the UN Secretary-General's Report on the Global Compact for Safe, Orderly and Regular Migration, Making Migration Work for All*, UN Doc. A/72/643.12.12.2017, p. 1; see also *EU Priorities at the United Nations and the 73rd United Nations General Assembly (September 2018 – September 2019)*, Doc. 10056/18, 25.6.2018, p. 3.

31) On the different position of Latin America States see Camila Barretto Maia, Diego Morales, Raisa Ortiz Cetra, "Global Compact for Migration: stop the hypocrisy and listen to the Global South", cit.

32) On EU Member States positions vis-à-vis GCM see Sergio Carrera/Karel Lannoo/Marco Stefan/Lina Vosyliūtė, "Some EU governments leaving the UN Global Compact on Migration: A contradiction in terms?", in *CEPS Policy Insights*, No. 2018/15, November 2018, [www.ceps.eu/system/files/PI2018\\_15\\_SCKLMSVL\\_UN%20Global%20Compact\\_0.pdf](http://www.ceps.eu/system/files/PI2018_15_SCKLMSVL_UN%20Global%20Compact_0.pdf); Mauro Gatti, "EU States' Exit from the Global Compact on Migration: A Breach of Loyalty", in *EU Immigration and Asylum Law and Policy*, 14 December 2018, <http://eumigrationlawblog.eu/eu-states-exit-from-the-global-compact-on-migration-abreach-of-loyalty/>; Evelien Wauters, Jan Wouters, *The UN Global Compact for Safe, Orderly and Regular Migration: Some Reflections*, Leuven Centre for Global Governance Studies, Working Paper No. 210 – February 2019, [https://ghum.kuleuven.be/ggs/publications/working\\_papers/2018/wp210-wouterswauters.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/2018/wp210-wouterswauters.pdf).

33) At para. 6.

34) The footnote indicates: International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, International Convention for the Protection of All Persons from Enforced Disappearance, and Convention on the Rights of Persons with Disabilities.

ing principles” on which the *Global Compact on Migration* is based. Finally, para. 41 reiterates: “the Global Compact is to be implemented in a manner that is consistent with our rights and obligations under international law” (and therefore also in conformity with international human rights law).

Numerous references<sup>35</sup>), both to human rights in general and to specific rights<sup>36</sup>), are also contained in many points of the pact. Here it seems appropriate to focus on two objectives in particular: objective No. 8 and objective No. 13.

Objective 8<sup>37</sup>), entitled “Save lives and establish coordinated international efforts on missing migrants”, says:

24. We commit to cooperate internationally to save lives and prevent migrant deaths and injuries through individual or joint search and rescue operations, standardized collection and exchange of relevant information, assuming collective responsibility to preserve the lives of all migrants, in accordance with international law. We further commit to identify those who have died or gone missing, and to facilitate communication with affected families.

It seems particularly significant that an explicit objective has been dedicated to this topic, in the light of the practices of recent months of some European states, with the culpable silence, if not the explicit support, of the European Union itself. An example is the evolution, or rather involution, of Italian practice, which has gone from the laudable *Mare Nostrum*<sup>38</sup>) operation to alignment with the much more restricted operation *Triton* within the European Union. Furthermore, in February 2017, Italy concluded a Memorandum with Libya<sup>39</sup>), which was made delegated to intercepting migrants at sea and pulling them back, despite the risk of torture and all sorts of abuses in Libyan detention centers – already known before the stipulation of the aforementioned agreement<sup>40</sup>) – and despite the fact that Libyan Coast Guard rescue procedures are often in open violation of the obligation to rescue and of the right to life<sup>41</sup>). At the same time, hostility has been growing towards NGOs (crucial protagonists of thousands of rescue operations at sea), from the adoption of a questionable code of conduct<sup>42</sup>), and certain controversial legal actions<sup>43</sup>), up to the closure of ports<sup>44</sup>) and the latest changes to the so called *security decree bis*, openly aimed at hindering NGO rescue operations<sup>45</sup>).

In light of this, the measures indicated in the Migration Compact seem particularly important; in order to achieve its goal of saving lives at sea, the Compact identifies, among necessary actions: developing procedures and agreements “with the primary objective of protecting migrants’ right to life, that uphold the prohibition of collective expulsion, guarantee due process and individual assessments” and also ensuring that assistance to migrants for exclusively humanitarian reasons is not considered illegal.

35) See Elspeth Guild, “The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?”, in *International Journal of Refugee Law*, Vol. 30, pp. 661ff., <https://academic.oup.com/ijrl/article/30/4/661/5281365>, che ne individua 45.

36) For instance the rights of the child: see objectives Nos. 8, 11 and 21.

37) On this objective see Syd Bolton, Catriona Jarvis, “GCM Commentary: Objective 8: Save lives and establish coordinated international efforts on missing migrants”, in *Refugee Law Initiative Blog*, 18 October 2018, <https://rli.blogs.sas.ac.uk/2018/10/18/gcm-commentary-objective-8/>. For an analysis of this objective in the light of the current migration crisis see Bernard Ryan’s talk “The Migration Crisis and International Law”, at the Conference held in Leicester on 22 March 2019 “Migrants’ Rights at a Crossroads. Seizing the Moment(um) of

the UN Global Compact on Migration and the SDGs 2030 to forge a new path for the protection of migrants’ rights” (video available at: [https://www.youtube.com/watch?v=HqY-iYMjrJg&list=PL-kiElc\\_8yhTcvUm1251aQ1heHh1KwOd&index=21&t=0s](https://www.youtube.com/watch?v=HqY-iYMjrJg&list=PL-kiElc_8yhTcvUm1251aQ1heHh1KwOd&index=21&t=0s)).

38) Tullio Scovazzi, “Some Cases in the Italian Practice relating to Illegal Migration at Sea”, in *International Law and the Protection of Humanity* (Pia Acconci et alia eds), Leiden, 2017, pp. 196ff.

39) The Italy-Libya MoU is not an isolated case, but a small piece of a larger scenario. Indeed, over the past decades, the European Union has been implementing various strategies of externalized border controls: see Anna Liguori, *Migration Law and the Externalization of Border Controls*, cit.

40) See United Nations Security Council, *Report of the Secretary-General on the United Nations Support Mission in Libya*, 1 December 2016, Doc. S/2016/1011, <http://undocs.org/S/2016/1011>; the report of the UNSMIL and the Office of the United Nations High Commissioner for Human Rights (OHCHR), released on 13 December 2016, [http://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised\\_en.pdf](http://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf); *European Border Assistance Mission (EUBAM) Libya Initial Mapping Report*, January 2017, <http://www.statewatch.org/news/2017/jun/eu-eeas-strategic-review-libya-9202-17/>; *Human Rights Watch World Report 2017*, January 2017, <https://www.hrw.org/world-report/2017/country-chapters/libya>.

41) See for instance the fatal accident of 6 November 2018 (a video is available at: <https://sea-watch.org/en/clarification-on-theincident-of-november-6th>). On 8 May 2018 a claim was brought before the European Court of Human Rights (ECtHR) by 17 survivors against Italy “over its coordination of Libyan Coast Guard pull-backs resulting in migrant deaths and abuse”: <http://www.glanlaw.org/single-post/2018/05/08/Legal-action-against-Italy-over-its-coordination-of-Libyan-Coast-Guard-pull-backs-resulting-in-migrant-deaths-and-abuse>; on this case see Moritz Baumgärtel, “High Risk, High Reward: Taking the Question of Italy’s Involvement in Libyan ‘Pullback’ Policies to the European Court of Human Rights”, in *European Journal of International Law: Talk!*, 14 May 2018, <https://www.ejiltalk.org/high-risk-high-reward-taking-the-question-of-italys-involvement-in-libyan-pullback-policies-to-the-european-court-of-human-rights/>.

42) See Martina Ramacciotti, “Sulla utilità di un codice di condotta per le organizzazioni non governative impegnate in attività di search and rescue (SAR)”, in *Rivista di diritto internazionale*, Vol. 101, 2018, pp. 213ff.; Federico Ferri, “Il Codice di condotta per le ONG e i diritti dei migranti: fra diritto internazionale e politiche europee”, in *Diritti umani e diritto internazionale*, 2018, pp. 189ff.

43) The Open Arms case was emblematic: on this point see Francesca De Vittor, “Soccorso in mare e favoreggiamento dell’immigrazione irregolare: sequestro e dissequestro della nave Open Arms”, in *Diritti umani e diritto internazionale*, 2018, pp. 443ff.

44) See Giuseppe Cataldi, “Migranti nel Mediterraneo e tutela dei diritti. Alcuni casi recenti della prassi italiana”, in *Quaderni di economia sociale*, No. 2/2018, pp. 33ff., [https://www.sr-m.it/wp-content/uploads/woocommerce/uploads/2018/11/QES\\_2\\_18.pdf](https://www.sr-m.it/wp-content/uploads/woocommerce/uploads/2018/11/QES_2_18.pdf). The Italian policy of closing ports and criminalizing NGOs has been criticized by the United Nations and the Council of Europe: see Francesca Cancellaro, “L’Italia è sotto osservazione dell’ONU con riferimento alla criminalizzazione del soccorso in mare, alla politica dei porti chiusi ed al decreto immigrazione e sicurezza”, 12 marzo 2019, in *Diritto penale contemporaneo*, 2018, [https://www.penalecontemporaneo.it/d/6525-l-italia-e-sotto-osservazione-dell-onu-con-riferimento-alla-criminalizzazione-del-soccorso-in-mare\\_ftn1](https://www.penalecontemporaneo.it/d/6525-l-italia-e-sotto-osservazione-dell-onu-con-riferimento-alla-criminalizzazione-del-soccorso-in-mare_ftn1); Stefano Zirulia, “Soccorsi in mare e porti sicuri: pubblicate le raccomandazioni del Commissario per i diritti umani del Consiglio d’Europa”, 20 giugno 2019, *ivi*, <https://www.penalecontemporaneo.it/d/6525-l-italia-e-sotto-osservazione-dell-onu-con-riferimento-alla-criminalizzazione-del-soccorso-in-mare>.

45) Decree of 14 June 2019, No. 53 (G.U. No. 138 of 14 June 2019). See Irini Papanicolopulu, “Tutela della sicurezza o violazione del diritto del mare?”, in *SIDBlog*, 26 June 2019, <http://www.sidblog.org/2019/06/26/tutela-della-sicurezza-o-violazione-del-diritto-del-mare/>, and the hearings before the Chamber of the Deputies of the Italian Parliament of Giuseppe Cataldi, Francesca De Vittor e Cesare Pitea, available at: [https://www.camera.it/leg18/1132?shadov\\_primapagina=9263&fbclid=IwAR0bwpMzC\\_ntbezKfZlnwqi\\_vDVxJ6b-4fME8XTcGh6WpM3K73wS1k5-tf0w](https://www.camera.it/leg18/1132?shadov_primapagina=9263&fbclid=IwAR0bwpMzC_ntbezKfZlnwqi_vDVxJ6b-4fME8XTcGh6WpM3K73wS1k5-tf0w). On the first application of this decree see Lorenzo Gradoni, Luca Pasquet, “Lisistrata a Lampedusa: una riflessione sul caso Sea Watch 3”, in *SIDBlog*, 6 July 2019, <http://www.sidblog.org/2019/07/06/lisistrata-a-lampedusa-una-riflessione-sul-caso-sea-watch-3/>.

Certainly, an explicit reference to the prohibition of *refoulement*<sup>46)</sup> – like that of the previous draft<sup>47)</sup> – would have been appreciated (in the final text a reference to this principle has been maintained only within objective No. 21, which deals with returns). As pointed out<sup>48)</sup>, the elimination in the final text of article 8 seems to have been due to the position of certain States: indeed, the position of the Chinese representation is emblematic – according to them “since migrants and refugees fall under different legal categories, the *non-refoulement* principle should not be applied to migration issues”<sup>49)</sup>. However, the *refoulement* prohibition, which was introduced by Art. 33 of the Geneva Convention on the status of refugees<sup>50)</sup>, was subsequently not only explicitly envisaged in human rights treaties, such as the United Nations Convention on the Prohibition of Torture, in Art. 3<sup>51)</sup>, but also inferred from the prohibition of torture both by the European Court of Human Rights and by the Human Rights Committee<sup>52)</sup>; moreover, according to prevailing doctrine this principle has acquired the status of customary law<sup>53)</sup>.

It is worth noting also lett. b) of Objective 8, which says: “Review the impacts of migration-related policies and laws to ensure that these do not raise or create the risk of migrants going missing, including by identifying dangerous transit routes used by migrants ...” A human-rights oriented interpretation of this paragraph could only lead to the recognition of the illegitimacy not only of criminalizing NGOs, but also of the most recent practices of externalization<sup>54)</sup>, the so-called “pullbacks”, provided for by the aforementioned Italy-Libya agreement of 2 February 2017. In this regard the words of Nils Melzer, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, in his report of 26 February 2018<sup>55)</sup>, are enlightening: “... while both retaining States and supportive destination States often portray ‘pullbacks’ as humanitarian operations aiming to ‘rescue’ migrants in distress from overcrowded and unseaworthy vessels at sea, or to prevent them from embarking on such ‘unsafe journeys’, or to ‘defeat the business model of smugglers and traffickers’, the well-documented reality is that intercepted migrants are generally returned to their port of departure, where they are routinely detained or further deported to unsafe third States and, in both cases, exposed to a substantial risk of torture and ill-treatment, or even death, without access to an assessment of their protection needs or any other legal remedy”<sup>56)</sup>.

Objective No. 13 (“Use of immigration detention only as a measure of last resort and work towards alternatives”) concerns one of the most prejudicial practices, namely detention, and reads verbatim:

29. 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. We further commit to prioritize non-custodial alternatives to detention that are in line with international law, and to take a human rights-based approach to any detention of migrants, using detention as a measure of last resort only.

This clear statement is followed by a detailed list of actions, all to be pursued in line with the principles of due process and human rights. Overall, objective No. 13 “is quite a strong and positive statement of standards that should apply to immigration detention”<sup>57)</sup>. Furthermore, if we compare the rule provided in the Zero Draft and that contained in the final text, there are some improvements<sup>58)</sup>. Among these noteworthy

revisions are point a), which requires independent monitoring of immigration detention; d), which establishes the right to a regular review of detention orders; f), providing for the right of all migrants to be informed about the reasons for their detention, in a language they understand.

Sadly, however, one amendment concerning the detention of minors has moved in the opposite direction: while the Zero Draft included<sup>59)</sup>, among its recommended actions: “Uphold the protection and the rights of the child at all times, with respect to their migration status, *by ending*”<sup>60)</sup> the practice of child detention in the context of international migration, and providing alternatives to detention ...”, the final text opts for

46) See Andrea Spagnolo, “We are tidying up”, cit.; Alessandro Bufalini, “The Global Compact for Safe, Orderly and Regular Migration”, cit.

47) Second Draft of the Global Compact for Safe, Orderly and Regular Migration (28 May 2018), [https://refugeesmigrants.un.org/sites/default/files/180528\\_draft\\_rev\\_2\\_final.pdf](https://refugeesmigrants.un.org/sites/default/files/180528_draft_rev_2_final.pdf).

48) Alessandro Bufalini, “The Global Compact for Safe, Orderly and Regular Migration”, cit., p. 17.

49) <https://www.un.org/en/conf/migration/assets/pdf/GCM-Statements/china.pdf>.

50) “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

51) The Charter of Fundamental Rights of the European Union also contains an explicit prohibition of *refoulement* at Article 19.

52) On the principle of *non-refoulement* in human rights treaties see Adele Del Guercio, *La protezione dei richiedenti asilo nel diritto internazionale ed europeo*, Napoli, 2016, and literature quoted therein.

53) See *ex multis* Guy S. Goodwin-Gill, Jane McAdam, *Refugee in International Law*, 3rd Ed., Oxford, 2007, pp. 353 ff.; Elihu Lauterpacht, Daniel Bethlehem, “The Scope and Content of the Principle of Non-refoulement: Opinion”, in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Erika Feller, Volker Turk, and Frances Nicholson eds.), Cambridge, 2003, pp. 89 ff.

54) With regard to externalization and GCM see also Marion Panizon, Daniela Vitiello, “Governance and the UN *Global Compact on Migration*: Just another Soft Law Cooperation Framework or a New Legal Regime governing International Migration?”, in *European Journal of International Law: Talk!*, 4 March 2019, [www.ejiltalk.org/governance-and-the-un-global-compact-on-migration-just-another-soft-law-cooperation-framework-or-a-new-legal-regime](http://www.ejiltalk.org/governance-and-the-un-global-compact-on-migration-just-another-soft-law-cooperation-framework-or-a-new-legal-regime). The authors highlight the risk that the GCM, in providing multiple interconnections between different actors, does not offer adequate guarantees against abuses: “If refashioned as a tool of conditionality by State practice, this “interconnectedness” may cast non-migration specific policies – such as trade, development aid, security policy – as kickbacks to reward countries of the Global South that are willing to sign up onto the externalization of migration policies by border shifting, pull-backs and other non-arrival cooperative strategies”. For the authors the risk is therefore that these interconnections may become “a catalyst for externalization”.

55) See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment of 26 February 2018, Doc. A/HRC/37/50.

56) See also Anna Liguori, *Migration Law and the Externalization of Border Controls*, cit., pp. 3 ff.

57) See Justine N. Stefanelli, “GCM Commentary: Objective 13: Use immigration detention only as a measure of last resort and work towards alternatives”, in *Refugee Law Initiative Blog*, 27 September 2018, <https://rli.blogs.sas.ac.uk/2018/09/27/gcm-commentary-objective-13/>.

58) Ibidem.

59) Para. 27 lett. g) of Zero Draft.

60) Italics added.

a much softer “*working to end*”<sup>61</sup>) the practice of child detention in the context of international migration”<sup>62</sup>). Although the existence of a customary rule prohibiting detention of minors cannot be stated at the present time, the Global Compact could have been an important opportunity to favor the progressive development of international law in such a delicate matter<sup>63</sup>).

#### 4. Concluding remarks

Overall, the Migration Compact is essentially limited to recognising existing rights and the opposition it has met is justified more by reasons of political propaganda than purely legal ones. Indeed, a comparison between the final document and the initial draft shows that, with some exceptions, some important points have been either eliminated (e.g. the prohibition of the detention of minors and the reference to regularization procedures) or cut back (e.g. family reunification), while other rights, absent in the initial draft, continue to be ignored in the final draft too, including the right to leave any country, which is certainly particularly at risk due to the current practices of externalization<sup>64</sup>). In addition, as pointed out, in some cases respect for human rights is subject to the States’ political will and conditions of vulnerability are tolerated<sup>65</sup>). A blatant example is the situation of people who have no legal status but cannot be expelled. Certainly, the importance attached to the distinction between regular and irregular migrants provided for in the GCM confirms the limbo reserved for all those who live in a grey area between these two categories and – if we focus on European law in particular – are not adequately protected either under the EU Return Directive<sup>66</sup>) or under the European Convention on Human Rights<sup>67</sup>).

However, despite these problems, in my opinion the importance of the *Global Compact on Migration* is indisputable.

First of all, it is significant that States explicitly declare in this document: “we aim to *facilitate*”<sup>68</sup>) safe, orderly and regular migration”<sup>69</sup>). And this is not an isolated statement: the verb “to facilitate”, or words deriving from the verb, appear all of 62 times in the text of the Migration Compact. Thus, as pointed out<sup>70</sup>), States recognize “that facilitating mobility over time will be the best way to govern it: to take maximum advantage of its economic, social, and cultural benefits, while also meeting its challenges”.

Finally, it seems to me to be extremely important to highlight once again the words of para. 4 of the Migration Compact, namely “Refugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times”, since this pays the best tribute to the Universal Declaration of Human Rights, and is particularly valuable in the delicate historical moment we are experiencing. Indeed the rights of migrants and refugees are being trampled on more than ever in every part of the globe (on the one hand, Trump’s migration policy, the so-called Australian Pacific Solution, the Rohingya crisis in Asia spring to mind; on the other, with specific reference to Europe, the measures adopted by Orbán in Hungary, the Italian

policy of closed ports, as well as the evolution of externalization). In such a context, this straightforward commitment in favour of human rights “could not be taken for granted”, as rightly pointed out<sup>71</sup>).

However, the real success of this compact will depend on the concrete will of the States to move from words to action: indeed, in the words of the pact, “the Global Compact for Safe, Orderly and Regular Migration is a milestone, but not the end to our efforts”<sup>72</sup>).

61) Italics added.

62) Para. 29 lett. h) of final text.

63) Indeed, soft law can contribute to the development of hard law: see on this point *ex multis* Christine Chinkin, “Normative Development in the International Legal System”, in Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, Oxford, 2003, p. 31; Mary Ellen O’Connell, “The Role of Soft Law in a Global Order”, *ivi*, pp. 100ff. With specific regard to the Global Compact for Migration see Anne Peters, “The Global Compact for Migration: to sign or not to sign?”, *cit.*; Alessandro Bufalini, “The Global Compact for Safe, Orderly and Regular Migration”, *cit.*, in particular pp. 18ff.

64) See Nora Markard, “The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries”, in *European Journal of Migration and Law*, 2016, pp. 591ff.; Violeta Moreno-Lax, *Accessing Asylum Europe*, *cit.*, pp. 341ff.; Elspeth Guild, Vladislava Stoyanova, “The Human Right to Leave Any Country: A Right to Be Delivered”, in *European Yearbook on Human Rights*, 2018, pp. 373ff.

65) 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)”, in *International Migration*, 2019.

66) Indeed, as pointed out (see Elspeth Guild, Katharine T. Weatherhead, “Tensions”, *cit.*), “Article 9 of the Directive might indeed require for a postponement of removal of migrants with irregular status, when for the listed reasons they cannot be removed from a Member State, but it does not provide them with a regular status in the (potentially indefinite) meantime”.

67) The case *Ahmed v. Austria* (judgment of the European Court of Human Rights of 17 December 199) is emblematic: although the applicant was successful before the European Court of Human Rights (the Court found that the applicant’s deportation to Somalia would breach Article 3 of the ECHR), he was left without *status* in Austria and committed suicide 15 months after the ECHR decision.

68) Italics added.

69) Para. 11 GCM.

70) François Crépeau, “Towards a Mobile and Diverse World: ‘Facilitating Mobility’ as a Central Objective of the Global Compact on Migration”, in *International Journal of Refugee Law*, Vol. 30, 2018, p. 651, <https://academic.oup.com/ijrl/article/30/4/650/5250652>.

71) Jane McAdam, “The Global Compacts on Refugees and Migration: A New Era for International Protection?”, in *International Journal of Refugee Law*, Vol. 30, 2018, <https://academic.oup.com/ijrl/article/30/4/571/5435574>, p. 571.

72) GCM, para. 14.