The Global Compact for Safe, Orderly and Regular Migration (GCM) and its implications for constitutional law

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Abstract: The article discusses the nature, in legal terms, of the Global Compact for Safe, Orderly and Regular Migration, and of its implementing instruments. The negotiating process that led to the genesis of the Global Compact is critically analysed to enquire its non-binding nature (but contributing significantly to the development of customary international law because as authoritative expressions of an opinio iuris ac necessitates), its political nature, and its possible use for interpretative purposes both on an international and national level.

Keywords: Global migration compact, structure of the sources of law, migration, national sovereignty

1. The migration emergency as an international law issue. Overview.

The numbers of refugees and migrants in the world warrant attention. The 2019 estimates tell us that they have reached as total of 272 million.[2] At the end of 2019 there were nearly 80 million refugees: the highest number ever recorded.[3] If we shift our focus from the global situation to Europe, we see that, according to the statistics, the European Union (EU) received over one million two hundred thousand asylum applications in 2016—an increase of over 50% compared to 2014.[4] The total number of applications for international protection fell to 549,000

[1] This study is the product of authors' common research, nonetheless, G. Cerrina Feroni is mainly responsible for sections 2,3 and 4, A. Cardone for sections 5, 6 and 7. For sections 1 and 8, the authors claim joint responsibility.

[2] United Nations Department for Economic and Social Affairs Statistical Division (UN SD), *International migrant stock 2019*, available at: www.un.org/en/development/desa/population/migration/data/estimates2/estimates19.asp.

[3] UNHCR, *Global trends, forced displacement in 2019*, available at www.unhcr.org/5ee200e37/. More specifically, a total of 79.5 million of refugees. The report clarified that the figure included "26.0 million refugees: 20.4 million under UNHCR's mandate and 5.6 million Palestine refugees registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). The global figure also included 45.7 million internally displaced persons (source: IDMC), 4.2 million individuals whose asylum applications had not yet been adjudicated by the end of the reporting period, and 3.6 million Venezuelans displaced abroad" (p. 8).

[4] See the data provided by Eurostat, *Asylum quarterly report*, available at ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report.

in 2018, only to rise again in 2019 (612,700).[5] These unprecedented numbers have triggered a lively public debate, with calls for the elaboration and implementation of new policies and new legislative interventions in order to manage what has been defined as "the refugee crisis",[6] or, interchangeably—albeit disputably—"the migrant crisis".

Within this context, the calls for solutions, interventions and programmes have transcended national boundaries and have also been directed at the European Union and the United Nations, in line with a trend of progressive "extra-territorialization".[7]

The high-level summit on migrants and refugees, convened by the UN General Assembly in September 2016,[8] represents an attempt to respond to these demands[9] by addressing the issue of managing mass movements[10] of migrants and refugees. The objective, in other words, was to overcome the fragmentary character and localised application of national migration policies, whose ineffectiveness and insufficiency emerged more and more clearly.[11] The framework

[5] *Ibidem.*

[6] The expression recurs very frequently in documents from various sources (NGO position papers, scientific articles and even national newspapers). In this regard, see for example the following UNHCR news release, *2015: the Year of Europe's Refugee Crisis*, 27 January 2016, available at www.unhcr.org/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html. On the use of this expression by the media, see M. Georgiou and R. Zaborowski, *Media coverage of the "refugee crisis": a cross-European perspective*, Council of Europe report DG1(2017)03, 2017, rm.coe.int/1680706b00. There has obviously been no lack of criticism against the aforementioned expression, as some have stressed that the "crisis" is not a refugee issue, but rather a crisis of Europe and its policies.

[7] For an analysis of migration governance according to a multi-level approach, see M. Panizzon and M. van Riemsdijk, *Introduction to special issue: migration governance in an era of large movements: a multi-level approach*, in 45 *Journal of Ethnic and Migration Studies* 8, 1 – 17 (2018).

[8] United Nations General Assembly Decision no. 70/539 to convene a *High-level plenary meeting on addressing large movements of refugees and migrants* is available at www.un.org/ga/search/view_doc.asp?symbol=A/70/L.34.

[9] A visible trace of this aim can be found in par. 2 of the New York Declaration. Moreover, some point out that the New York Declaration can also be seen as a response to the dysfunctions of the Dublin Regulation, as well as the resistance shown by many to the adoption and implementation of the EU Council decision on relocation. See in this regard M. Panizzon and D. Vitiello, *Governance and the UN Global Compact on Migration: Just another Soft Law Cooperation Framework or a new legal regime governing international migration?*, in *EJIL:Talk! Blog of the European Journal of International Law*, 4 March 2019, available at 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/, 3.

[10] The term "large movements" appears in the New York Declaration, but is not precisely defined. Indeed, it should be noted that the term *large movements* evokes a wide range of considerations and in any case it does not regard regular migratory flows from one country to another, but may rather regard mixed migratory flows that include both migrants and refugees, "who move for different reasons but who may use similar routes" (par. 6).

[11] The ineffectiveness of national migration policies and the need for interstate cooperation is frequently underscored and clearly attested in all the documents referenced in this essay. In particular, see the preparatory report: UN General Assembly, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants. Report of the Secretary-General*, UN Doc. A/70/59, 70th Sess., 21 April 2016, par. 14; UN General Assembly, *New York Declaration for Refugees*

into which this response fits was identified in the 2030 Agenda for Sustainable Development (hereinafter also 2030 Agenda), adopted on 25 September 2015. Under the heading of Goal 10, "reduce inequality", it clearly outlines the following objective: "[f]acilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies" (paragraph 10.7).[12] In line with this objective, the plenary meeting of September 2015 focused precisely on global movements of vast proportions, "that are not regular, safe or orderly, and for whom shared responsibility has been lacking" (as is stated in the summit preparatory document submitted by the Secretary General on 21 April 2016[13]). The intergovernmental summit called by the United Nations closed with the General Assembly resolution of 19 September 2016,[14] unanimously approved and better known as the New York Declaration.

2. The New York Declaration of 19 September 2016 and the genesis of the Global Compact for Safe, Orderly and Regular Migration.

Before going on to illustrate the negotiating process that led to the genesis of the two Global Compacts, of which the New York Declaration represents the initial stage, it is worth briefly considering the contents of the latter. This analysis will provide insight into how and in what terms the challenge of managing the phenomenon of mass migration was placed on the international agenda. To begin with, from the very first lines the "migration issue" is framed within the context of international law, international human rights law, international humanitarian law and international refugee law, to which explicit reference is made on more than one occasion.

In the introductory part, after acknowledging the positive role of migrants in terms of growth and sustainable development (echoing the contents of the 2030 Agenda), the document affirms the obligation to respect the human rights and fundamental freedoms of migrants and refugees, irrespective of their status; emphasis is laid on international cooperation and the need to address the causes of mass migration; manifestations of racism, discrimination and xenophobia are

and Migrants, UN Doc. A/RES/71/1, 19.9.2016, par. 7 and again the *Global Compact for Safe, Orderly and Regular Migration, Final Draft, 11 July 2018*, par. 11.

[12] United Nations General Assembly, Resolution adopted on 25 September 2015, Transforming our World: The 2030 Agenda for Sustainable Development, available at www.unfpa.org/sites/default/files/resource-pdf/Resolution_A_RES_70_1_EN.pdf.

[13] See the preparatory report: UN General Assembly, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants. Report of the Secretary-General*, UN Doc. A/70/59, 70th Sess., 21 April 2016, 4, available at www.un.org/en/ga/search/view_doc.asp?symbol=A/70/59&=E%20.

[14] UN General Assembly, *New York Declaration for Refugees and Migrants*, UN Doc. A/RES/71/1, 19.9.2016, available at www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf.

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strongly condemned.[15] The first part is followed by a section dedicated to "commitments": in particular commitments regarding migrants and refugees, considered together (section II) and separately (sections III and IV). As specifically regards the commitments applying to migrants, the declaration recognises that "everyone has the right to leave any country, including his or her own, and to return to his or her country".[16] However, what at first glance might seem an affirmation of a "human right to migration" is in reality qualified immediately afterwards, when it is recalled "at the same time that each State has a sovereign right to determine whom to admit to its territory, subject to that State's international obligations".[17]

The Declaration takes into consideration the condition of migrants in a situation of vulnerability (especially separated or unaccompanied minors who do not meet the requirements for obtaining international protection), as well as those who are not entitled to international protection, but are also unable return home due to the existing conditions in their country of origin. In the case of the former, it is proposed to adopt non-binding guiding principles and guidelines, on a voluntary basis; as for the latter, the choice of some States to provide forms of temporary protection receives express approval.[18]

In regard to the strengthening of international cooperation, emphasis is again placed on the centrality of repatriation, an objective to be pursued while assuring respect for the principle of non-refoulement and human rights. In this regard, the document underscores the need to abide by and implement existing readmission agreements.[19]

As seen, the text of the Declaration includes a number of references that seem almost to imply a willingness to construct a framework of common rules and a unified architecture governing the status to be attributed to migrants. However, in general, the approach adopted in the New York Declaration, in terms of both structure and contents, tends rather to reproduce the paradigms that traditionally govern international migration policies, including the rigid dichotomy between "refugees" and "migrants".[20] Furthermore, and consistently with what was just observed, though there is frequent reference to human rights and the fundamental freedoms of refugees

[15] Ibidem, paragraphs 1 – 20. Again in reference to the framework of international law, in paragraph 48 States are urged to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, as well as the relevant International Labour Organization conventions.
[16] *Ibidem*, par. 42.
[17] *Ibidem*, par. 42.
[18] *Ibidem*, par. 52 and 53.
[19] *Ibidem*, par. 58.
[20] D. Vitiello, *Il contributo dell'Unione Europea alla governance internazionale dei flussi di massa di rifugati e migranti: spunti per una rilettura critica dei global compacts*, in *Diritto Immigrazione Cittadinanza*, 3, 2018, 3 – 5. However, others have highlighted the revolutionary approach underlying the Global Compact, defined as a veritable *turning point*. See C. Carletti and M. Borraccetti, *Il Global Compact sulla migrazione tra scenari internazionali e realtà europea*, in *Freedom, Security & Justice: European Legal Studies*, 2, 2018. However, a more doubtful view is expressed by M. Buccarella, *Il Global Compact for Migration: una svolta per il futuro della migrazione internazionale?*, in *DPCE Online*, 4, 2019.

and migrants, no precise catalogue clarifying what these rights and freedoms are or who is entitled to them is to be found anywhere in the Declaration.[21]

In this context, other principles specifically regarding economic migration deserve particular attention. They are based on the premise, already alluded to in the Preamble,[22] that economic migrants have the right to leave their country and be received by another and that, like refugees, they are entitled to human rights and fundamental freedoms.

It is worth noting that the affirmation of the rights of migrants is accompanied by a proclamation of States' commitment to creating conditions that enable individuals to live in peace and prosperity in their countries of origin. Consequently—it is affirmed—"[m]igration should be a choice, not a necessity".[23] In particular, based on the consideration that the lack of educational opportunities is often a push factor for migration, especially among young people, States commit to strengthening education and educational institutions in countries of origin and to enhancing employment opportunities in countries of origin.[24] The call upon States that had not already done so to consider ratifying or acceding to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and other conventions of the International Labour Organization is therefore consistent with the qualification of migration as a choice.[25]

This part of the New York Declaration thus fits into the framework of international initiatives aimed at protecting workers' rights, as do two other commitments undertaken by States:[26] that of evaluating the possibility of "facilitating opportunities for safe, orderly and regular migration, including, as appropriate, employment creation, labour mobility at all skills levels, circular migration, family reunification and education-related opportunities" and of paying attention to "the application of minimum labour standards for migrant workers regardless of their status, as well to recruitment and other migration-related costs, remittance flows, transfers of skills and knowledge and the creation of employment opportunities for young people".

Another interesting aspect is that economic migration is not considered exclusively as a problem, but also an opportunity for developed countries, by virtue of the fact that migrants can make positive and profound contributions to economic and social development in the host societies and to global wealth creation, just as they can help to respond to demographic trends, labour shortages and other challenges in the host societies and add new skills and dynamism to the latter's economies.[27]

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[21] For a critical view, see A. Spagnolo, *'We are tidying up': the Global Compact on Migration and Its Interaction with International Human Rights Law*, in *EJIL:Talk! Blog of the European Journal of International Law*, 1 March 2019, available at www.ejiltalk.org/we-are-tidying-up-the-global-compact-on-migration-and-its-interaction-with-international-human-rights-law/.
[22] Par. 5, but see also paragraphs 41 and 42.
[23] Par. 43.
[24] Par. 44.
[25] Par. 48.
[26] Par. 57.
[27] Par. 46.

With respect to sources, moreover, also for the purpose of reconstructing the binding effectiveness of the Global Compact, it is worth mentioning States' commitment to consider developing non-binding guiding principles and voluntary guidelines, consistent with international law, on the treatment of migrants in vulnerable situations, especially unaccompanied or separated minors who are not eligible for international protection as refugees and may need assistance.[28] This provision clarifies that the whole approach envisaged has been conceived from the very start with a view to achieving the stated purposes not only through binding rules, but also through soft law instruments.

The New York Declaration concludes, finally, with two annexes announcing the elaboration of a Global Compact on Refugees (Annex I) and a Global Compact for Safe, Orderly and Regular Migration (hereinafter also GCM)[29] (Annex II). The second annex outlines the "way forward" for the adoption of the GCM.

Summing up briefly, the picture that emerges from the New York Declaration is an approach to migration problems that goes well beyond issues tied to the management of national borders, which—not coincidently, as we have seen—are left within the exclusive jurisdiction of States, and is largely forward looking in character; in some passages relating to migration as a choice and its impacts on the host countries it even risks appearing unrealistic.

3. The negotiating process leading to adoption.

The working programme provided for negotiations to be led by two co-facilitators[30] (together with the Secretary-General's representative), as well as for the broad involvement of civil society, academia and government and non-governmental organizations.[31] A foremost role was played throughout the negotiation process by the International Organization for Migration (IOM), which underwent an institutional restructuring in order to strengthen its legal and working relationship with the United Nations.[32] The goals are also clearly established in Annex II: the contents of the Global Compact—"a range of principles, commitments and

[28] Par. 52.
[29] In this regard, some critics have observed that the wording contained in the New York Declaration was changed from that of the preparatory report: in the former document, in fact, there is no longer any reference to 'responsible' migration. E. Guild, *The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?*, in 30 *International Journal of Refugee Law* 4, 661 (2018).
[30] Juan José Gómez Camacho, Permanent Representative of Mexico, and Jürg Lauber, Permanent Representative of Switzerland.
[31] In this regard, see the Global Coalition on Migration, whose web page may be found at the following address: gcmigration.org/2017/04/what-is-the-global-compact-on-migration/ .
[32] New York Declaration, par. 50 and Annex II par. 12. On the role of the IOM, see generally C. Carletti and M. Borraccetti, *Il Global Compact sulla migrazione tra scenari internazionali e realtà europea*, cit., 23 ff.; E. Guild and S. Grant, *What role for the EU in the UN negotiations on a Global Compact on Migration?*, *CEPS Research Report No 2017/05*, 7 ff. (2017) available at www.ceps.eu/publications/what-role-eu-un-negotiations-global-compact-migration and C. Thouez, *Strengthening Migration Governance: The UN as 'Wing-man'*, in 45 *Journal of Ethnic and Migration Studies* 8, 1242 (2019).

understandings among Member States regarding international migration in all its dimensions"—will in fact serve to enhance global governance and coordination on international migration.[33]

The negotiation process was divided into three phases: a first consultation phase (April - November 2017); a second stocktaking phase (November 2017 – January 2018) and a third phase of intergovernmental negotiations (February – July 2018). In the latter phase, the initial draft of the GCM (presented on 5 February 2018)[34] underwent numerous revisions until a final version[35] was agreed on. The final draft was presented at the intergovernmental conference held in Marrakech on 10-11 December 2018.

4. Structure, objectives and actions of the GCM.

The final text of the GCM presents itself as a "non-legally binding, cooperative framework",[36] aimed at increasing international cooperation among all relevant stakeholders on migration issues. It is organized as follows: a first part, or preamble, dedicated to principles, a second part, which illustrates commitments and objectives, and, finally, a last part dedicated to implementation and review of the GCM. No fewer than 23 objectives are identified by the GCM; each one is associated with a commitment and concrete actions that States should undertake in order to attain the objectives presented and thereby realise the ultimate goal of safe, orderly and regular migration. It is not possible here to analyse all of the objectives in detail. We will focus on individual objectives or groups of objectives that are similar in purpose or contents. Objective 1 highlights the need to strengthen the systems used to collect and analyse data on migrations, which should serve as a basis for building evidence-based policies (*regulation by information*). Objectives 6 to 10 all refer to the need to eliminate the vulnerabilities that particularly afflict migrants (hence, respectively, 6) labour exploitation; 7) situations of particular need, as in the case of children; 8) the risk of death; 9) smuggling of migrants and 10) human trafficking. Objective 2 consists in combating "the adverse drivers and structural factors that compel people to leave their country of origin". At the same time, a strengthening of international cooperation will be pursued (objective 23). Objective 5 focuses on enhancing the "availability and flexibility of pathways for regular migration", whereas objective 13 establishes that, in the context of international migration, detention should be considered as a measure of last resort. Objective 11 relates to the commitment to "manage borders in an integrated, secure and coordinated manner", whilst objective

[33] Annex II, par. 2.
[34] *Global Compact for Safe, Orderly and Regular Migration, Zero Draft*, 5 February 2018, available at refugeesmigrants.un.org/sites/default/files/180205_gcm_zero_draft_final.pdf. For a first analysis of the 'Zero Draft' see E. Guild and T. Basaran, *First Perspectives on the Zero Draft (5 February 2018) for the UN Global Compact on Safe, Orderly and Regular Migration, Queen Mary School of Law Legal Studies Research Paper No. 272/2018*, 14 February 2018, available at ssrn.com/abstract=3123876
[35] *Global Compact for Safe, Orderly and Regular Migration, Final Draft*, 11 July 2018, available at: refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf
[36] GCM, par. 7.

21 calls for a dual commitment: to cooperate in "facilitating safe and dignified return and readmission" and the "sustainable reintegration" of returning migrants into their countries of origin.[37] Objectives 15 to 18 are instead aimed at improving the condition of migrants once they have settled in the receiving countries by ensuring that they have access to basic services (15), social cohesion (16), the elimination of discrimination (17) and recognition of skills (18). The objectives also include improving systems for the transfer of remittances and portability of social security entitlements (objectives 20 and 22).

5. The implementing mechanisms of the GCM.

Instruments for implementing the GCM are likewise considered. Worthy of mention are: 1) The International Migration Review Forum as a "global platform for Member States to discuss and share progress on the implementation of all aspects of the Global Compact [...] with the participation of all relevant stakeholders". The Forum will be held every 4 years, beginning in 2022, to discuss the implementation of the Global Compact at the local, national, regional and global levels, as well as to allow for interaction with "other relevant stakeholders" with a view to identifying opportunities for further cooperation (paragraphs 48 and 49 of the GCM). The International Migration Review Forum will rely on the Global Forum on Migration and Development, whose task will be "to provide a space for annual informal exchange on the implementation of the Global Compact, and report the findings, best practices and innovative approaches", whilst Member States are encouraged to develop "as soon as practicable, ambitious national responses for the implementation of the Global Compact, and to conduct regular and inclusive reviews of progress at the national level, such as through the voluntary elaboration and use of a national implementation plan". 2) The whole-of-society approach, whereby the Global Compact will promote "broad multi-stakeholder partnerships to address migration in all its dimensions by including migrants [...] local communities, civil society, academia, the private sector, parliamentarians, trade unions, National Human Rights Institutions, the media and other relevant stakeholders in migration governance", as well as "faith-based organizations" (paragraphs 15 and 44 of the GCM). Other actors that may be called on to support efforts of Member States on a continual basis and to help strengthen the capacities of the United Nations in implementing the Global Compact include "philanthropic foundations" (paragraph 43), which (together with other stakeholders), will thus be allowed to provide a financial contribution by initiating a start-up fund, also in the immediate future.

[37] As observed by K. Newland, *The Global Compact for Safe, Orderly and Regular Migration: an unlikely achievement*, in 30 *International Journal of refugee law* 4, 657 (2018). In particular, objective 21 represents an important example of compromise, which is a feature of the GCM as a whole. The first part responds to the demands of the EU, whereas the second part reflects the demands of the countries of origin.

6. The constitutional impact: can the New York Declaration express principles apt to give rise to rules of international customary law in the community of States?

The analysis of the complex set of circumstances leading to the approval of the GCM raises various questions of constitutional law, whose concrete resolution will largely determine the evolution of the legislative framework in which migration policies will be developed in the coming years, not only in our own country, but also in the European Union as a whole, since the latter must necessarily be considered the territorial context of reference.

A first significant problem emerges if we consider that, as it was attempted to show in the preceding pages, the GCM, despite its provisional nature, is the point of arrival—given the complex system of governance as envisaged thereunder—of a process rooted in the UN General Assembly resolution of 25 September, setting forth the 2030 Agenda for Sustainable Development, as well as the resolution of 19 September 2016, containing the New York Declaration for Refugees and Migrants. This fact should lead us to wonder whether such instruments, in addition to conditioning the subsequent process of formation of the GCM, are to be considered expressions of autonomous constraints on States. It appears above all to be of fundamental importance to understand whether the mandatory scope of those instruments extends to the recognition of subjective legal rights of individuals, and, accordingly, to the attribution of obligations to States vis-à-vis such individuals.

The problem seems to arise essentially for the principles contained in the main body of the New York Declaration, rather than in relation to Annex II of the Declaration, which sets out "steps towards the adoption of a global compact for safe, orderly and regular migration in 2018", or the 2030 Agenda. On the one hand, the provisions contained in the first of the two documents, as we have seen, have a mainly procedural character and are all aimed at governing the formation and implementation of the agreement; on the other hand, the provisions of the Agenda consist essentially in international obligations States have assumed in the context of the United Nations, albeit with a fundamental contribution of the EU to the negotiations, and which should guide their future policies.

Confirmation of this may be found in the Italian legal system if we analyse the first implementing instruments. In particular, the National Sustainable Development Strategy (*Strategia nazionale per lo sviluppo sostenibile-SNSvS*) was approved by the inter-ministerial committee for economic planning on 22 December 2017. The document set out guidelines for economic, social and environmental policies aimed at achieving the objectives of sustainable development by 2030. These were broken down into five areas: the *People* area, where the aim is to combat poverty and social exclusion and promote health and wellbeing so as to assure conditions conducive to the development of human capital; the *Planet* area, focused on sustainable management of natural resources, as well as measures to combat biodiversity loss and protect environmental and cultural heritage; the *Prosperity* area, relating to the promotion of sustainable production and consumption models that can guarantee

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quality employment and training; the *Peace* area, aimed at promoting a non-violent and inclusive society, free of discrimination; and the *Partnership* area, for the definition of integrated interventions in the other four areas. With the aim of achieving the necessary coordination of actions, a directive of the President of the Council of Ministers of 16 March 2018, containing, precisely, Guidelines for the Implementation of the United Nations 2030 Agenda and the National Sustainable Development Strategy (*Indirizzi per l'attuazione dell'Agenda 2030 delle Nazioni Unite e della Strategia nazionale per lo sviluppo sostenibile*) established, at the Presidency of the Council of Ministers, a national Commission for Sustainable Development, chaired by the Prime Minister and made up of the Cabinet, the President of the Conference of Regions, the President of the Union of Italian Provinces and the President of the National Association of Italian Municipalities. The Commission discusses and approves an annual report on the implementation of the National Sustainable Development Strategy, also with a view to assuring timely updates. For the purpose of conducting its activity, the Commission avails itself of the support of the competent administrative authorities. The document further identifies a system of sustainability drivers defined as "crosscutting areas of action" and "fundamental levers" for launching, guiding, managing and monitoring the integration of sustainability in national policies, plans and projects.

The subject is addressed differently, however, in the case of the New York Declaration, whose provisions, as previously noted, contain a series of rules that regard not only relations between States, but also the internal relations of State communities and thus—potentially—the relations between States and their citizens, as has already occurred numerous times in the practice of the United Nations (one need only consider the Universal Declaration of Human Rights or the resolutions on genocide and the elimination of racial discrimination).

As is commonly acknowledged, the declarations of principle adopted in a UN framework cannot be considered sources of general international law, as the powers of the UN General Assembly are limited essentially to recommendations of a non-binding nature. However, it is equally acknowledged that the declarations contribute significantly to the development of customary international law because, being authoritative expressions of an *opinio iuris ac necessitatis*, if combined with constant, uniform behaviours of States, they give rise to customary rules of general international law. Some declarations, moreover, have the force of veritable international agreements, when they not only set out principles, but also expressly equate the inobservance thereof with a violation of the Charter, thereby binding the States that have approved them. They may thus be considered as agreements in a simplified form.

From a constitutional law perspective, this is a question of considerable importance because if the provisions of the Declaration express principles apt to give rise to rules of customary law within the community of States, we must consider the automatic adaptation clause of Article 10, paragraph I of the Italian Constitution to be applicable in relation to such rules. Accordingly, the latter would have prevalence

not only over any incompatible legislative acts, but also over the provisions of the Constitution itself.

Regarding this point it should be observed that the Declaration affirms respect for international law and international human rights law as regards the treatment of migrants and refugees, regardless of their legal status, as well as international humanitarian law and international refugee law, where applicable.[38] Consequently, according to the Declaration, the distinction made between migrants and refugees does not prevent either of the two categories from enjoying universal human rights and fundamental freedoms.[39] It contains express reference to the international obligations undertaken by States, giving a series of specific examples, such as situations of armed conflict which trigger refugee flows, human trafficking, situations of vulnerability, assistance to migrant communities abroad, border control, protection of refugees and so on but does not clarify whether the reference to such obligations is to be understood as based on customary international law or treaty law.

In this regard, it may be noted that the Declaration does not provide any definition or list of the human rights to which migrants and refugees are entitled. Therefore, as legal scholars have pointed out, this category of rights remains a subject of controversy in general international law[40] and thus does not seem to provide any real basis for customary law.

It is worth highlighting, moreover, that the treatment reserved for such individuals is described through a broad, heterogeneous series of rights, which range from the satisfaction of basic needs tied to an individual's life and safety, to civil and political rights, which, given the vagueness of their definition and the necessary legislative intervention of States, do not seem sufficient to serve as a foundation for clearly defined behaviours such as to generate rules of customary international law.

To this we may add that the Declaration insists a great deal on States' right to control and manage their own borders, as the implementation of border control procedures constitutes an element of national security.[41] On the one hand, in the part relating to both migrants and refugees, the Declaration affirms that their right to move must be accompanied by full respect for international rules regarding the protection of individuals and refugees (including, therefore, the principle of non-refoulement); on the other hand, it underscores the right of States to adopt measures to repress illegal border crossings.[42] Similarly, in the part relating to the commitments vis-à-vis migrants, the Declaration reaffirms the right, again deriving from an international obligation, of every individual to leave any country, including

[38] Par. 5.
[39] Par. 6.
[40] On this topic see, among others, B. Nascimbene, *L'individuo e la tutela internazionale dei diritti umani*, in S.M. Carbone, R. Luzzatto and A. Santa Maria (cur.), *Istituzioni di diritto internazionale*, Turin, 2011, 438 ff.; F. Sudre, *Droit européen et international des droits de l'homme*, Paris, 2012, 214-215; M. Scheinin, *Core Rights and Obligations*, in D. Shelton (ed), *The Oxford Handbook of International Human Rights Law*, Oxford, 2013, 528; G. Citroni and T. Scovazzi, *La tutela internazionale dei diritti umani*, Milan, 2013, 60-61; C. Zanghì, *La protezione internazionale dei diritti dell'uomo*, Turin, 2013, 35.
[41] Par. 24.
[42] Par. 24.

his or her own, and to return to that country, while at the same time highlighting the sovereign right of every State to have the final word when it comes to allowing access to its territory.[43]

7. What obligations are legally binding on Italy following the signing of GCM?

A second question, which is central to the perspective adopted here, regards the mandatory force of the GCM. In particular, it is important to clarify whether it should be considered as giving rise to legal obligations that are directly binding on the Italian State, or whether it should instead be regarded as an instrument of international soft law. In this case as well, it is a question of particular relevance from the standpoint of internal constitutional law because, should the GCM be qualifiable as a full-fledged international treaty, its provisions could be used as a parameter of reference in assessments of constitutionality. This ultimately means that it would act as a binding constraint on the Italian legislator in any future interventions in this area.

In this regard it may be pointed out that an analysis of the preparatory work leading to the agreement suggests that the GCM should be considered an instrument that, in itself, does not directly produce any legal effects. Indeed, this was the view expressed by various representatives of the States participating in the Conference of Marrakesh, who highlighted that the purpose underlying the agreement was to rationalize ("tidy up") the international framework on migration, without implying the assumption of any new obligations and reaffirming the full sovereignty of States in this area.[44] Above all, on the basis of this argument, it was concluded that the GCM was not intended to bring about an innovation in the current legal framework governing migratory flows. It was indeed stressed that the wording in numerous passages clearly showed that States had no intention of binding themselves legally from an international law perspective, but rather wished to share common policy guidelines for the management of the migration phenomenon.[45]

To this we may add that the provisions of the GCM, as seen, are not formulated in such a manner as to be interpreted as a sufficiently clear, unambiguous and detailed basis for expressing binding legal obligations. Moreover, the fact that the GCM was adopted at the end of an intergovernmental conference does not mean that it can be qualified as an international treaty, since the practice of international law in this area, above all as regards the instruments developed in the framework of the UN, shows that such a procedural route may be taken both in international agreements and in non-binding declarations.

On the other hand, it should be taken duly into account that soft law instruments, both in international law and in internal constitutional law, may generate legal effects on a number of levels which do not imply direct applicability to

[43] Par. 42.
[44] A. Spagnolo, *We are tidying up": The Global Compact on Migration and its Interaction with International Human Rights Law*, cit.
[45] A. Peters, *The Global Compact for Migration: to sign or not to sign?*, in *EJIL:Talk! Blog of the European Journal of International Law*, 21 November 2018, available at www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/.

concrete cases and/or the immediate production of legal obligations. From this point of view, it seems possible to affirm that the provisions of the GCM may produce legal effects on three distinct levels.

A first level is represented by the political nature of the agreement. Indeed, this aspect ensures that, in order to honour the political commitment undertaken in an international forum—and in a UN context to boot—States will have to adopt internal measures that will certainly have legal effect. Therefore, it can reasonably be affirmed that a first legal dimension of the GCM is the indirect one deriving from future migration policies that States will put in place to implement the agreement.

A second legal dimension of GCM may derive from its possible use for interpretative purposes. This could take place both on an international and national level. In the former case, the GCM could be taken into consideration as an interpretative tool in relation to international conventions expressly mentioned among the objectives of the agreement itself—for example, the United Nations Convention on Transnational Organized Crime (cited in objective 10). In the latter case, on the other hand, it cannot be ruled out a priori that the GCM might be used by national courts for the purpose of interpreting international obligations undertaken by the Italian State in other contexts or, as has already been seen in case law relating to other formally non-binding international instruments, as a hermeneutical means for deriving wholly new rights, as occurred, for example, after the Nice Conference and before the Lisbon Treaty with some innovative rulings of the ordinary courts regarding the applicability of the EU Charter of Fundamental Rights.

Finally, a further normative dimension of the agreement could arise from the administrative practice of the national agencies responsible for managing migrant flows. In this realm, indeed, there is a great deal of margin in determining whether policies are oriented in one direction rather than another, and as such forms of administrative discretion have a direct impact on subjective legal positions—we need only consider, for example, the organization of reception centres or the management of push-backs at sea—administrative choices based on the objectives of the GCM could end up producing innovative downstream effects within the national legal system.

8. Some open issues.

It may be useful to touch upon several issues that might arise in relation to the implementation of the GCM and for which no clear solution seems to be provided in the instruments briefly reconstructed thus far.

A first issue regards the regime and the consequences of the margins of discretion of the State with respect to the obligations undertaken. In particular, we might ask whether the internal provisions adopted by the Italian State to implement the GCM, or its inaction as the case may be, can be considered subject to scrutiny by the international governance bodies mentioned earlier. In the author's view, this is a central issue. In fact, the concrete possibility of achieving the political objectives set

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in New York Declaration will mostly depend on the implementation of the GCM. However, as migration policy is very sensitive to changes in the parliamentary majority, a control of international governance bodies over the implementation and non-implementation choices of States appears to be fundamental, albeit not unproblematic in relation to the exclusive jurisdiction maintained by States in managing their borders.

A second issue could regard the lack, in the implementing mechanisms provided for, of any difference, in terms of legitimation and scope of implementation, between representative democratic (State) institutions and private stakeholders with a whole variety of interests, promoted by financial backers that are also private. Here a problem arises regarding the compatibility of such a choice with the principle of popular sovereignty enshrined in Article 1 of the Republican Constitution. One possible solution for mitigating this lack of differentiation might be to regulate by law the forms of intervention and implementation adopted by private stakeholders, which would thus find an additional source of legitimacy with respect to that deriving from the agreement.

A third issue remains in the background. It poses more radical problems we can only touch upon briefly here. It is worth asking ourselves, in fact, whether the set of rights attributed by the New York Declaration and the GCM to economic migrants is compatible with the constitutional protection of the rights of Italian citizens. This issue arises essentially in relation to social rights, at least those that the Constitutional Court, through its decisions, has not extended to foreign nationals, whereas it does not seem to pose any particular problems in relation to migrants' rights to liberty, which can be protected without impacting the level of protection of the corresponding rights of citizens. For example, could a budget law set up a special fund for supporting the social rights of migrants which are protected under the GCM?

As noted, this is not the right place for answering such difficult questions, but it is the authors' opinion that we should start asking them, if only to increase awareness that, despite the scant attention dedicated to the GCM by legal scholars, it could soon burst into the life of national constitutional orders.

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