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Impacts of the Adoption of the Global Compact for Safe, Orderly and Regular Migration for Austria

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1. Introduction on the General Legal Background of the Global Compact on Migration

The Global Compat for Safe, Orderly and Regular Migration (hereinafter: Global Compact on Migration) is often called "UN Global Compact on Migration", which, strictly speaking, it is not. It is true that the Global Compact on Migration roots on the New York Declaration, a resolution adopted by the United Nations General Assembly in 2016 (UNGA) (in particular, on para 63),[1] but it has not been elaborated by the United Nations (UN) themselves, but by the International Organisation for Migration (IOM). The IOM has a strange history and one (hidden) objective of the Global Compact on Migration seems to be to let the IOM, without formal amendment of its constitutional fundaments and without cooperation agreement with the UN Economic and Social Council, appear as UN Specialized Agency. The IOM does not have such a close relationship with the UN as has the UNHCR or a Specialized Agency (eg International Labour Organization (ILO), World Food and Agriculture Organisation (FAO)). The IOM is a so-called "Related Organisation", and since 2016, has a relationship with the UN comparable to that of the International Atomic Energy Agency (IAEA). The agreement currently in place between the IOM and the United Nations is attached as annex to the Resolution of the UN GA of 25 July 2016[2].

The IOM's history by doctrine has been correctly described as "chaotic".[3] Its origins date back to 1951, when the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME), was born in order to help European governments to manage the chaos and displacement of Western Europe following the Second World War and to identify resettlement countries, where nearly a million migrants, uprooted by the war, could be transported to with its help as a logistics agency during the 1950s. In 1952, the PICMME was renamed to the Intergovernmental Committee for European Migration (ICEM). For a long period of time, it was seen as "travel agency for migrants", in particular in the context of the cold war crisis of Hungary 1956 and Czechoslovakia 1968. It changed its transatlantic orientation for migration from Europe to predominantly the United States of America (US), to a non-European crisis management at the occasion of Chile 1973 and the Vietnamese boat people in 1975. In 1980, its name was replaced by the Intergovernmental Committee for Migration (ICM) and only in 1989, it became a permanent organization under its today's name International Organization for Migration (IOM). In 2007, Jürgen Bast, having observed IOM's changed role as a migration agency in the context of Kuwait 1990, Kosovo and Timor 1999, and the Asian tsunami and Pakistan earthquake of 2004/2005 and having witnessed a massive increase in membership[4], nevertheless stated that irrespective of IOM's

[1] New York Declaration for Refugees and Migrants on 19 September 2016, Resolution A/RES/71/1 of 3 October 2016.

[2] A/RES/70/296.

[3] See Antoine Pécoud, What do we know about the International Organisation for Migration? Journal of Ethnic and Migration Studies vol 44/10, 1621 – 1638 (1622).

[4] In 1998 only 68 member states to 172 member states as of June 2018. See http://www.iom.int/members-and-observers (retrieved 15 October 2018) and Megan Bradley, The International Organization for Migration

increasing significance for political advice a relevant role of the IOM for international law, for example, by laying down recognized standards, does not exist.[5]

On the other hand, the IOM, following to its own presentation on its website maintains

"*from its roots as an operational logistics agency," to have "broadened its scope to become the leading international agency working with governments and civil society to advance the understanding of migration issues, encourage social and economic development through migration, and uphold the human dignity and well-being of migrants*."[6]

The Global Pact on Migration, thus, obviously shall fill the gap as becoming the global standard of philosophy and politics of the IOM currently running an operating budget of an estimated $1.4 billion and some 9,000 staff working in over 150 countries worldwide. The Compact fits into the 11 strategic focus points presented by the IOM on its website, in particular, numbers 1 – 3 and 7.[7]

The UN GA resolution of 25 July 2016 explicitly has not integrated the IOM into the UN, but has placed it on the UN's side. This fact continues to raise the question of explanation of the philosophy and motives behind. As a result, the Constitution of the IOM appears to be on the same level and not subordinate to the UN Charter.[8] This is a fact which weakens the UN Charter's value and understanding by many

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(IOM): Gaining Power in the Forced Migration Regime. In: Refuge. Canada's Journal on Refugees Vol 33 N° 1 (2017), pp 97 – 106 (97).

[5] Jürgen Bast, Internationalisierung und De-Internationalisierung der Migrationsverwaltung (Internationalisation and de-internationalisation of the administration of migration). In: Christoph Möllers, Andreas Vosskuhle, Christian Walter (edts), Internationales Verwaltungsrecht (International Administrative Law). Tübingen 2007, pp 279 – 312 (286).

[6] https://www.iom.int/mission (retrieved 15 October 2018).

[7] These numbers read as follows: " *1. To provide secure, reliable, flexible and cost-effective services for persons who require international migration assistance.*
2. To enhance the humane and orderly management of migration and the effective respect for the human rights of migrants in accordance with international law.
3.To offer expert advice, research, technical cooperation and operational assistance to States, intergovernmental and non-governmental organizations and other stakeholders, in order to build national capacities and facilitate international, regional and bilateral cooperation on migration matters.
…
7 .To promote, facilitate and support regional and global debate and dialogue on migration, including through the International Dialogue on Migration, so as to advance understanding of the opportunities and challenges it presents, the identification and development of effective policies for addressing those challenges and to identify comprehensive approaches and measures for advancing international cooperation.
…".

[8] Article 2 para 1 of the Agreement concerning the Relationship between the UN and the IOM attached to UNGA Resolution A/RES/70/296 reads as follows. "*The United Nations recognizes the International Organization for Migration as an organization with a global leading role in the field of migration. The United Nations recognizes that the Member States of the International Organization for Migration regard it, as per the International Organization for Migration Council Resolution, No. 1309, as the global lead agency on migration. The foregoing shall be without prejudice to the mandates and activities of the United Nations, its Officers, Funds and Programmes in the field of migration.*" Specific reference can also be made to Article 3 para 5 as a model for the whole set-up of the agreement. This provision reads as follows: "*The United Nations and the International Organization for Migration, within their respective competencies and in accordance with the provisions of their constituent instruments, shall cooperate by providing each other, upon request, with such information and assistance as either organization may require in the exercise of its responsibilities.*"

international lawyers as universal constitution. Migration and migration law are subject to a separate – and only related to the UN – world order.

By setting-up such world-order, it becomes also clear, that migration shall be considered to be a matter of international concern, beyond the sovereignty of states. Thus, the statement of the Global Compact on Migration at the end of para 7, "*that no State can address migration alone, and upholds the sovereignty of States and their obligations under international law*" as well as the commitment of the Global Pact on Migration to the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction (para 15) and to respect national sovereignty with regard to the implementation of border management policies (para 27) are de-facto overruled by the existence and adoption of the Global Compact itself. By accepting the Global Compact a state accepts that migration is a matter of international concern, and, thus, not anymore a matter of national sovereignty. The Global Compact, therefore, simply by its adopted existence demonstrates that migration is a matter run by the IOM and not by its member states. The Global Compact creates an international migration policy on the universal level which can well differ from a national migration policy and limit the latter, once both policies enter into conflict with each other.

The mandate given by para 63 of the New York Declaration reads as follows: "*We commit to launching, in 2016, a process of intergovernmental negotiations leading to the adoption of a Global Compact for safe, orderly and regular migration at an intergovernmental conference to be held in 2018. We invite the President of the General Assembly to make arrangements for the determination of the modalities, timeline and other practicalities relating to the negotiation process. Further details regarding the process are set out in annex II to the present declaration*." Para 12 of Annex II to the New York Declaration gets straight, that the UN Secretary General shall support the negotiations. The UN Secretariat and the IOM shall jointly service the negotiations, "*the former providing capacity and support and the latter extending the technical and policy expertise required*". The IOM, thus, has been the mastermind of the enterprise, the UN provided only technical service.

2. The Legal Nature of the Global Compact on Migration

Para 7 of the Global Compact on Migration expressly states that the Global Compact is not legally binding, calls itself a "*cooperative framework*" and does not speak of "legal", but just of "*obligations*" ensuing from the New York Declaration for the member states and confesses to "*foster international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone*", and that the Global Compact upholds the sovereignty of States and their obligations under international law. The document as such, thus, is a clearly political document, it lays down political and not legal obligations for the states ready to sign it.

However, the contents of the Global Compact on Migration massively transgresses the so-called international migration law as currently in legal effect. From a strict point

of view, differently from what the IOM promotes, a public international law term “migrant“ in correlation to the term “refugee in the understanding of the Geneva Convention on Refugees“ does not exist. There is no international treaty for migrants comparable to the Geneva Convention on Refugees. From the perspective of public international law, migrants are human beings like all others with the right to respect their human rights according to the general human rights treaties, in the universal context in particular, the 1966 International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as well as all other universal international human rights treaties, many of them enumerated in the Preamble of the Global Compact on Migration. As far as migrants fall in the territorial or personal scope of regional human rights treaties (eg the European or American Conventions on Human Rights, the African Charter on Human and People’s Rights, the Arab Charter of Human Rights, etc), they are entitled to the rights emanating from these international legal instruments. Special rights, as the Geneva Convention on Refugees grants to recognised refugees, do not exist for migrants, with the exception of migrant workers and for those states only that have ratified the respective treaties.

In this context particular attention must be paid to para 4 of the Global Compact on Migration, which subliminally places refugees and migrants on one and the same level, thereby, nevertheless, but discreetly admitting in a second sentence that there are – decisive – differences according to international law. This para reads as follows: “*4. 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 as defined by international refugee law. This Global Compact refers to migrants and presents a cooperative framework addressing migration in all its dimensions.*“

It would have been correct if this provision had disclosed that the Global Compact on Migration creates this framework and that this framework is a “political” and not a “legal” one, but the Global Compact calls also the framework for migrants a legal one by assembling migrants and refugees under the same term. Whereas the Global Compact on Refugees widely, but not fully, is based on current international law, the Global Compact on Migration is the (political), but not (legal) framework for migrants. The fact that this framework is called “legal” raises particular attention to the question whether and how such political framework can change its nature to a legal framework. This can happen progressively – beyond the current state of law – by deducting international customary law or general principles of law from the Global Compact on Migration.

3. The Current State of the International Law on Migration

3.1. On the Level of the International Labour Organization

International law as currently in force with regard to migration essentially is law of the International Labour Organization (ILO) referring, however, to one specific group of migrants, the migrant workers. Cécile Vittin-Balima lists quite a big amount of ILO Conventions, Recommendations and Standards that apply to migrant workers.[9] A few of them specifically and exclusively address migrant workers. The most important conventions of this type are the Migration for Employment Convention (Revised), which dates from 1949,[10] and the Migrant Workers (Supplementary Provisions) Convention from 1975.[11] The vast majority of ILO Conventions and Recommendations refer to workers in general and, thus, include migrant workers, but are not specific for them. The most important conventions of this type for migrant workers are the Protection of Workers' Claims (Employer's Insolvency) Convention from 1992,[12] the Forced Labour Convention from 1930[13] and the Abolition of Forced Labour Convention from 1957.[14]

The Migration for Employment Convention (Revised) obliges its member states to make available on request to the ILO and other member states certain information on national laws relating to emigration and immigration, on employment of migrants and on respective international treaties (article 1), to provide a free migration employment service (article 2), to fight misleading propaganda relating to emigration and immigration (article 3), to facilitate the departure, journey and reception of migrants for employment (article 4), to maintain appropriate medical service for migrants for employment and their families (article 5), to equal treatment of lawfully staying immigrants with their own nationals (article 6), to certain restrictions as to returning such persons (article 7) and some other obligations. Article 11 of the Convention defines as "*migrant for employment*" "*a person who migrates from one country to another with a view to being employed otherwise than on his own account and*

[9] Migrant Workers: The ILO standards, p 6. Available at: http://library.fes.de/pdf-files/gurn/00067.pdf (retrieved 18 October 2018).
[10] C097. Text available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C097 (retrieved 15 October 2018).
[11] C143. Text available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288 (retrieved 15 October 2018).
[12] C173. Text available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312318:NO (retrieved 15 October 2018).
[13] C029. Text available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312174:NO (retrieved 15 October 2018).
[14] C105. Text available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312250:NO (retrieved 15 October 2018).

includes any person regularly admitted as a migrant for employment." Austria is not a member of this Convention, whereas Belgium, Italy, France (with certain exceptions) and Germany are. In total the Convention irrespective of its considerable age has only been ratified so far by 49 states.

Even worse is the situation with regard to the Migrant Workers (Supplementary Provisions) Convention, which counts only for 23 ratifications. Austria is not a member, but for example Italy, Norway, Sweden and Portugal are members. The Convention addresses migration in abusive conditions and equality of opportunity and treatment. Article 1 obliges the members to respect "*the basic human rights for all migrant workers*". The wording is very important. The convention does not speak of "the basic human rights of all migrant workers", but "for all migrant workers", which means that there are not meant specific human rights inherent to migrant workers, but the general human rights (inherent to all human beings) are inherent also to migrant workers and should be respected for them by the member states to the convention. Apart from that the Convention focusses on illegal migration for employment and imposes respective obligations on its members, for example, "*systematically seek to determine whether there are illegally employed migrant workers on its territory and whether there depart from, pass through or arrive in its territory any movements of migrants for employment in which the migrants are subjected during their journey, on arrival or during their period of residence and employment to conditions contravening relevant international multilateral or bilateral instruments or agreements, or national laws or regulations.*"

The same goes with regard to the ILO Convention No. 173, which, however, is of much younger date and has entered into force only in 1995. There are in total 29 members, Austria is a member since 1996 as is Bulgaria, Finland, Portugal, Latvia, Lithuania, Slovakia, Slovenia, Spain from EU members and Switzerland among others. This Protection of Workers' Claims Convention is not a specific migrant worker convention, but since the obigations a state member to this Convention undertakes refer to all employees and to all branches of economy (article 4), it covers also migrant workers. It addresses the case of insolvency of an employer and provides its members with two options, either to protect workers' claims by a privilege or by a guarantee institution. Austria like approximately half of the other member states has opted for a guarantee institution.

The Forced Labour Convention is also no specific migrant worker convention, but applies to them, because it addresses forced labour as such and obliges its member states to undertake to suppress the use of forced or compulsory labour in all its forms within the shortest possible period (article 1). It is one of two of the five ILO Conventions relevant for migration law and analysed here to more details which are practically universally binding counting 178 member states. Austria is a member since 1960.

The Abolition of Forced Labour Convention binds its members "*to suppress and not to make use of any form of forced or compulsory labour (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (b) as a method of mobilising and using labour for purposes of economic*

development; (c) as a means of labour discipline; (d) as a punishment for having participated in strikes; and (e) as a means of racial, social, national or religious discrimination." (article 1). In the same manner as the Forced Labour Convention its personal scope extends to migrant workers, even if the convention itself is not a specific migrant worker convention. Like the Forced Labour Convention it is nearly universally binding and embraces 175 member states, amongst them Austria, which has ratified the convention in 1958.

Apart from the ILO Conventions there exist a number of ILO Recommendations, most of them of a general nature applying to workers in general, including, but not specific for, migrant workers. The most important examples for ILO Recommendations, specifically addressing or primarily relevant for migrant workers is on the one hand the Migrant Workers Recommendation which was adopted by the General Conference of the ILO in 1975.[15] The Recommendation advises its member states to provide migrant workers and members of their families lawfully within the territory of a member with "*effective equality of opportunity and treatment with nationals of the member concerned*" in respect of certain services and in certain areas specified in para 2. The other most important relevant ILO Recommendation with regard to migrant workers is the Discrimination (Employment and Occupation) Recommendation from 1958.[16] Chapter I of this Recommendation defines discrimination as *"(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.*" From this definition follows the Recommendation's primary relevance for migrant workers. According to Chapter II of this Recommendation each (ILO) member "*should formulate a national policy for the prevention of discrimination in employment and occupation. This policy should be applied by means of legislative measures, collective agreements between representative employers' and workers' organisations or in any other manner consistent with national conditions and practice…* ".

According to article 19 para 5 b) of the ILO Constitution[17] an ILO member is obliged to undertake "*that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months from the closing of the session of the Conference, bring the Convention before the authority or authorities within whose competence the*

[15] R151. Text available at: MLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312489:NO (retrieved 15 October 2018).
[16] R111. Text available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R111 (retrieved 18 October 2018).
[17] Text available at: http://ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A19 (retrieved 18 October 2018).

matter lies, for the enactment of legislation or other action." As can be seen from the poor state of ratifications of key migrant workers conventions, mentioned above, most ILO members are more than reluctant with ratification and implementation on national ground based on a formal international treaty obligation. They prefer to act voluntarily based on their national sovereignty and national policies.

As for ILO Recommendations article 19 para 6 of the ILO Constitution sets up the obligation that

"(a) the Recommendation will be communicated to all Members for their consideration with a view to effect being given to it by national legislation or otherwise;

(b) each of the Members undertakes that it will, within a period of one year at most from the closing of the session of the Conference or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months after the closing of the Conference, bring the Recommendation before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action;

(c) the Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Recommendation before the said competent authority or authorities with particulars of the authority or authorities regarded as competent, and of the action taken by them;

(d) apart from bringing the Recommendation before the said competent authority or authorities, no further obligation shall rest upon the Members, except that they shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them."

Also the dealing with the Recommendations most relevant for migrant workers on the national level in many cases does not lead to more than fulfilling the minimum obligation of communication to its authorities without, however, any further legislation on the national ground. ILO's efforts as to international migration law have not turned out to be a success story.

3.2. On the Level of the United Nations

Apart from ILO on the universal level the most relevant convention for migrant workers has been adopted by the UNGA on 19 December 1990. It is called the International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families.[18] So far, this Convention was only ratified by 53 states which number needs to be compared to 193 members of the UN, which could have become members world-wide. The list of member states of the Convention shows as

[18] 2220 UNTS 3. Available at: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx (retrieved 18 October 2018).

members exclusively countries of origin of migrant workers (from the wider area of the Council of Europe: Albania, Azerbaidshan, Bosnia and Herzegovina as well as Turkey). The Federal Republic of Germany expressly justified its denial of ratification of the Convention by stating that the term "migrant worker" in the Convention has been used too generally and imprecisely. The term includes also persons, who illegally stay in a country and pursue there an illegal occupation.[19] Indeed article 2 para 1 of the UN Convention defines a "migrant worker" as "*a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.*" The term "Members of the family" according to article 4 "*refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.*" The UN Convention lays also the ground for the usage of the terminology "*regular*" and "*irregular*" migration later specific for the Global Compact on Migration. According to article 5 of the UN Convention, migrant workers and members of their families "*are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party*". If these conditions are not fulfilled they are considered as "*non-documented*" or "*in an irregular situation*".

The Federal Republic of Germany has also made reference to another argument very valid under international law: Migrant workers are entitled to the fundamental human rights according to the universal human rights instruments, simply just for the reason that they are human beings. There is no need and legitimacy to create or declare them entitled to human rights just for them. The whole Part III of the UN Convention, however, deals with "*Human Rights of All Migrant Workers and Members of their Families*" and entitles all of them, either regular or irregular, to even more fundamental rights and freedoms than enshrined in the European Convention of Human Rights. This goes for example as to the freedom to leave any state, including their state of origin and to enter and remain in their state of origin at any time (article 8), the national standard rights of articles 25, 27 and 30, the right to receive urgent medical care (article 28) and others. But also rights enshrined in general in the European Convention on Human Rights or in the general customary law standard for aliens become special when specifically assigned to migrant workers and their families and because of being construed as human rights.

It is obvious, that the development of the international migration law has come to a standstill on ILO level since the mid 1970ies, and on the UN level since the above Convention of 1990. All efforts to draft international treaties or move forward through ILO General Conference Recommendations, even if all of them are restricted to migrant workers, fail representative acceptance. Only a minority of states showed ready to accept formal international obligations.

[19] See: https://www.wanderarbeiterkonvention.de/die-deutsche-verweigerung-der-ratifizierung/ (retrieved 15 October 2018).

Against this background, the Global Compact on Migration without doubt tries to achieve three major goals:

- To bridge the gap between states of origin and transit of migration and states of destination of migration clearly visible as to the acceptance of universal instruments being in place for migrant workers;
- To extend the scope of migration from labor migration to general migration; and
- To extinguish the border between legal and illegal migration by avoiding this terminology, replacing it by “regular” and “irregular” migration” and by diluting the difference between legal and illegal migration by indifferently referring just to “migration” throughout the text of the Global Compact.

These basic characteristics of the Global Compact on Migration raise particular attention to the question, whether and how the Global Compact or elements of it could change its nature and become a legally binding instrument.

4. The Potential of the Global Compact on Migration or Its Elements to Become Legally Bindung under International Law

Better than any general theoretical discussion of the process of how an international political document or parts of it can develop into norms binding under international law appears to be a reference to a book of the author Anuscheh Farahat bearing the title “Progressive Inklusion. Zugehörigkeit und Teilhabe im Migrationsrecht” (Progressive Inclusion. Migrant citizenship and transnational migration in Germany), which appeared in 2014 in the prominent series of the Max Planck Institute for Comparative Public and International Law, one of the leading, if not, the leading international law institution(s) in Germany.[20]

The author, senior research affiliate at the Max Planck Institute in Heidelberg, perfectly demonstrates the technics applied in theory and practice of international law in order to deduct international legal norms from international political documents. The author explores two principles, which she considers governing migrant citizenship in Germany: the principle of progressive inclusion and the principle of static attribution. Referring to the English summary of her book,[21] she understands under “*principle of progressive inclusion*” that “*migrants are to be included in the host society by approximating their rights progressively to the rights of the citizens of that country”*. The “*principle of static attribution*”, on the other hand, is to be understood “*that citizenship remains the essential prerequisite for full participation in social, economic and political life.*”

[20] Beitršge zum ausländischen öffentlichen Recht und Völkerrecht 246. Available as print edition in Springer edition or as e-book. See: https://link.springer.com/content/pdf/10.1007%2F978-3-642-41785-6.pdf (retrieved 15 October 2018).

[21] (fn 20), pp 391 – 393.

The most interesting part of the monograph in the present context is chapter 5, where the author argues "*that both principles are also principles of law and can be understood as general principles of law in the sense of Article 38 of the ICJ Statute. Elements of both principles are reflected in numerous international treaties, general comments, ILO Conventions, in the jurisprudence of the European Court of Human Rights (ECHR) and in the EU Charter of Fundamental Rights.*"[22]

The author comes to the general conclusion that "*both principles, in their legal dimension, imply minimum requirements in relation to the legal situation of both transnational and settled migrants*." She sees shortcomings in the German law as currently in force "*with respect to the so-called 'option model' in German nationality law, the lack of diplomatic and consular protection for resident migrants, the political participation of migrants and the protection against expulsion of second-generation migrants*." and proposes "*a model for enhancing the effectiveness of the principle of progressive inclusion in migration law*. *This model includes a minimum set of rights for all migrants, an entitlement to equal rights based on duration of residence or social ties, the acceptance of multiple citizenship, a permanent residence status with privileged rights, and a fast track to citizenship.*"[23]

Mrs Farahat correctly describes the current state of the international migration law, which partly consists of regional legal instruments not binding on universal level, partly of universal international treaties just binding for some states. According to the author, and she is certainly right, such provisions in treaties formally not binding for a particular state, but also elements of political documents, not legally binding at all, can nevertheless become binding with regard to a particular state by entering the respective national legal order indirectly through reception by national courts or through international jurisprudence using such provisions as arguments when interpreting other norms. She offers examples from the practice, where the European Court of Human Rights (ECtHR), inter alia in the Maslov case vs. Austria,[24] used legally not binding documents of the Council of Europe.[25] Indirectly these political documents, thus, became binding for Austria through jurisprudence.

The author further correctly points out that, sometimes, not ratified norms become part of non-binding declarations and recommendations of international organisations and are later considered in the process of legislation or interpretation of norms. The general contents of these norms can be ordered as principles and can help "*to legally reflect, to which extent norms have arguably been recognized, even not having been formally ratified by states or having formal obligatory effects.*" The author calls this process "*reconstruction of law by principles*", but it would sometimes be more correct to call it "construction of law by principles". Anyhow, this is exactly the way how non-legally binding political documents or elements deducted from them become part of law.

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[22] Fn 20, p 392.
[23] Fn 20, pp 392 f.
[24] 1638/03. Decision of the Grand Chamber of 26 June 2008. Available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-87156"]} (retrieved 18 October 2018).
[25] Fn 20, p 136.

If one just focusses on the transfer of the terminology “regular” and “irregular” migration from the International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families into the Global Compact on Migration it can be easily shown how the process described by Mrs Farahat already successfully started as to the Global Compact. The Convention binds just a minority of states. Irrespective of this fact, the terminology used by the Convention became the terminology of the Global Compact. Even more, what Germany critisized with regard to the Convention and what Germany, therefore, led to non-ratification of the Convention became the basic concept of the Global Compact on Migration: migration covering both, regular and irregular migration. At the same time “labor migration” changed to “migration” and the rights of “migrant workers and their families” became the “rights of migrants”.

In chapter 5 of her treatise, Mrs Farahat correctly explains the change of nature of principles to become principles of law. Mrs Farahat starts from the assumption that the principles of progressive inclusion and static attribution are principles of international law which emanate from various international legal norms, court interpretation of these norms and – which is the most important element of her argumentation in the present context – from “*decisions of treaty bodies*”.[26] What must be kept in mind is that the UNGA is a treaty body and the adoption of a resolution on the Global Compact on Migration is a decision of a treaty body.

The author correctly argues that the existence of an individual norm stating the principle is not necessary for evidence of that principle of law. “*Principles of law often can be developed only by reconstruction from various materials, such as norms, respective jurisprudence and decisions of international treaty bodies, which formally are not legally binding for the states (e.g. resolutions and recommendations).*”[27] If these various instruments reflect corresponding aims of ruling, which can be attributed to an overlapping idea, one can speak of a principle of law.

Mrs Farahat continues her line of argumentation – fully correct according to the international legal doctrine – that there are two possibilities how such principles of law can be subsumed to the traditional sources of international law enumerated in article 38 para 1 Statute of the International Court of Justice (ICJ Statute). This provision is considered the universally binding norm enumerating the main sources where international law is emanating from.[28] One source – excluded in the case of the Global Compact on Migration – is international treaties. The Global Compact on Migration as a political document certainly is no international treaty and without being formally adopted or without any of its provisions formally included in an international treaty never will become an international treaty or international treaty norm.

But it is correctly not an international treaty, Mrs Farahat is referring to. It is either international customary law without state practice or general principles of law (articles 38 para 1 lit b and c).

[26] Fn 20, p *265.*

[27] Fn 20, p 266*.*

[28] *Fo*r many others e. V. D. Degan, Sources of International Law. The Hague, Boston, London 1997, pp 4 f.

4.1. The Global Compact on Migration or Elements of It Becoming Part of International Customary Law

Mr. Farahat at the end subsumes the principles dealt with by her as general principles of law, but does so, after having analysed opinions of prominent international lawyers that would argue more in the direction of subsuming such principles under the source of international customary law. She mentions Cheng, Henkin, Kirgis, Tasioulas and Roberts.[29] Usually international customary law requires general practice and legal opinion. Niels Peterson summarizes the position of these authors by them holding that international customary law based on mostly logical reasoning can come into being, even if there is no general practice at all.[30] Ben Chen referred, for example, to the UNGA resolutions on outer space and saw in the adoption of these resolutions the legal opinion. State practice was expressed by adoption of the resolution and has no more relevance than inducing legal opinion. Guzman and other representatives of the rationale choice theory of international law do not ask for state practice, but for the subjective attitude of the international community towards international norms. Another group of authors represented by Sohn do not abandon the element of state practice in all cases, but consider that in case of adoption of a resolution by the UNGA no further state practice is needed for the existence of international customary law.[31]

In this context an important opinion, not mentioned by Mrs Farahat and Mr Petersen has been raised by the Swiss international lawyer Mark Villiger. He does not abandon the element of state practice as necessary element besides legal opinion for the existence of international customary law and also does not assign a legally binding force to resolutions of the UNGA as such. With regard to UNGA resolutions with a progressive contents – as this certainly will be the UNGA resolution adopting the Global Compact on Migration – Mark Villiger holds that "*the statements in the preparatory and plenary phases, the absence of "reservations" by States, and the voting records (namely unanimous patterns) may constitute first instances of State practice, which contribute towards a new customary rule by stating its substance and effects, and by revealing the opinion juris of member States.*" Mark Villiger is not inventing such position, he can refer to two judgments of the ICJ, the Western Sahara Advisory Opinion and the Barcelona Traction case.[32]

As can be seen there are quite different and important opinions in the theory on international law which for different reasons hold that UNGA resolutions can replace state practice and, thus, create international customary law. The most convincing view is held by Mark Villiger whose arguments find support in the jurisprudence of the leading international court. Mark Villiger's arguments let it appear necessary for any

[29] See Fn 20, p 269 fn 14.

[30] Niels Peterson, Demokratie als teleologisches Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht (The Legitimacy of Governments under International Law). Berlin, Heidelberg, New York 2009, pp 64 f. Available as e-book at: https://link.springer.com/content/pdf/10.1007%2F978-3-540-92174-5.pdf (retrieved 15 October 2018).

[31] See Petersen (fn 30), p 65 with further references.

[32] Mark Villiger, Customary International Law and Treaties. The Hague, London, Boston 1997^2, p 126 and fn 24 with further references.

state that wants to avoid that the Global Compact on Migration once adopted by the UNGA through a resolution becomes international customary law to consider its voting behavior (either vote against or abstain) and explicitly declare reservations. In the case of the Global Compact on Migration which first shall be adopted by an Intergovernmental Conference in Marrakesh also the behavior of the states in this preparatory phase for the later UNGA resolution will be of legal relevance. Non-participation at the conference or participation with voting against or abstaining together with declaration of a "reservation" will be necessary.

Even if one state alone or a small group of states will not be able to hinder the adoption of the Global Compact on Migration and its evolving change into international customary law, at least such state or group of states will be able to be considered as persistent objectors. This institute of international law results from a judgment of the ICJ of 18 December 1951, the so-called Fisheries Case between the United Kingdom and Norway.[33] Norway could not hinder the eventual development of the international customary law of the sea as to the maximum of ten sea miles for the length of the closing line of an indentation entitling a state to claim a bay or fjord or sund as internal waters. Since Norway, however, has always opposed any attempt to apply this rule to the Norwegian coast, the ICJ found that the rule was inapplicable against Norway.[34] Thus, in order at least to aquire the position of a persistent objector, non participation at the Conference of Marrakesh and a vote against or at least abstention at the voting on the Global Compact at the UNGA together with a clear voting declaration expressing the will of the state that no legal obligation shall ever be deducted from this resolution and, in case, such legal obligation will develop, nevertheless,.never to be bound by such obligation referring to its express, continued and consistent opposition, is highly advisable.

4.2. The Global Compact on Migration as Potential Source of General Principles of Law

Such state behavior is even more advisable, considering the more convincing second argument of how the Global Compact on Migration or parts of it can aquire the quality of international law. This can happen and is even very likely to happen based on the source of General Principles of Law.

It is no less important figure in the theory and practice of international law, than Bruno Simma, former member to the International Law Commission and Judge at the ICJ, who paved the way for this line of arguments. In 1988, in an article together with the prominent Australian international lawyer Philip Alston, Bruno Simma described a process of how human rights obligations can appear independently of specific treaties based on the "'Authoritative Interpretation' Approach".[35] The authors – and

[33] ICJ Reports 1951, p 116

[34] ICJ Reports 1951, p 131.

[35] Bruno Simma, Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles. In: Australian Yearbook of International Law 82 (1988-89), pp 82 – 108 (100). Content downloaded fromHeinOnline (retrieved 18 October 2018).

many others, including the author of this study himself, but also international and national practice followed them over the years since then – start from an understanding, that the Universal Declaration of Human Rights and the body of soft law built upon it are to be dealt with as "*authoritative interpretation of the obligation contained in Articles 55 and 56 of the U.N. Charter."* According to these articles in the UN Charter all UN members are obliged to "*take joint or separate action in cooperation with the Organization*" in order to achieve "*universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion*".[36] Simma/Alston and, one can well state today, the majority of international lawyers, do not connect this reasoning to international customary law, but to general principles of law. This allows – for legitimate reasons – to assume binding law, even if this law is widely violated in practice, which is a reality for many human rights all over the world.[37] The "authoritative interpretation approach" has been joined by understanding general principles of law as a "*modern method of articulating and accepting*" this source of law.[38] Personally, the author of this study prefers the first approach, but for both approaches a necessary requirement is "general acceptance and recognition".[39] This general acceptance and recognition is seen by Simma/Alston in the resolutions and even public debates of the UNGA, at the time also of the Human Rights Commission and its Sub-Commission, and reports of Special rapporteurs and their acceptance by the bodies mentioned.[40]

In the context of the Global Compact on Migration it is sufficient to refer to the adoption of the Global Compact on Migration through UNGA resolution and its preparatory handling on the UNGA and Marrakesh Conference level. There is no matter of doubt that General Principles of Law can be deducted based on the above reasoning from this Global Compact once adopted.

What Simma and Alston did not discuss, but what would be logical as a consequence of this approach is to accept that the rule of persistent objector is applicable also for such general principle of law, because it is element of "general acceptance and recognition". Thus, if a state wants to object to the deduction of such general principle of law deducted from the Global Compact on Migration it is well advised to explicitly declare so when abstaining or voting against. Voting in favour would be an inconsistent behavior in any case. However, one must state the same as for international customary law above: One state or a small group of states alone might not be enough to effectively hinder the deduction of such general principle of law. What one needed to assign to them, however, is their legitimate right not to be bound by a general principle of law deducted against their express will, non-acceptance and further consistent behavior giving evidence for their continued obstruction. Thus, if Austria wants to avoid the deduction of such general principle at all or, if at least, it

[36] The authors themselves refer to practice of the Inter-American Court of Human Rights, (fn 34), p 101.

[37] Fn 34, pp 102 – 106 referring inter alia to a report of the American Branch of the International Law Association and to the ICJ judgements in the Nicaragua, Corfu Channel, Tehran Hostages cases and other practice (examples of Germany) and support in theory. They also – with good reasons – see a compliance of the result with the opinion held by the famous Austrian international lawyer Alfred Verdross (pp 104 f).

[38] Fn 34, p 105.

[39] This follows from the underlying "consensualist conception of international law" also shared by the author of the present study. See Simma/Alston (Fn 34, pp 104 f).

[40] Fn 34, p 98.

wants not to become bound by a genereal principle deducted against its explicit will, a voting declaration together with abstaining or voting against is highly advisable.

Mrs Farahat critizises the understanding of general principles of law in the (broad) manner developed by Simma/Alston, because general principles of law can then be also the source for individual prescriptions and prohibitions. Her main argument is that this would open the door for entry or implementation of political and hegemonial interests through dogmatic reasoning.[41] She, thus, proposes to restrict general principles of law to principles of law and not also to a source of indivual rights and obligations.[42] Her argument, however, is a predominantly political one. From legal point of view and also considering the arguments of the authors she is referring to, based on a consensualist understanding of international law the position of Simma and Alston seems to be stronger and more convincing. Like the sources of international treaties and international customary law also the source of general principles of law is open for any contents which becomes binding because it emanates from one of these three sources.

But even if one followed Mrs Farahat, the answer to the question raised for this study will be the same: the Global Compact on Migration or elements therefrom can become legally binding through general principles of law being deducted from this Compact. As for the treatise of Mrs Farahat, the Global Compact can and will support her assumption that progressive inclusion and static attribution general principles of law.

5. Progressive Elements of the Global Compact on Migration beyond Current International Law

When at the end of this study analyzing the contents of the Global Compact on Migration with the aim of defining what goes beyond existing international law and, thus, is to be considered “progressive soft law” which eventually will acquire the nature of binding international law through upcoming international customary law and/or deduction of general principles of law, no universal answer can be given. The content of the international migration law in place today, depends for each state from the universal conventions it has ratified and, thus, accepted as binding for itself. Austria has been rather hesitant in joining the respective international treaties. In particular, it is not a member of the International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families dating from 1990.

For all states, whether they are members of this Cnvention or not, to shift from “migrant worker” to “migrant” in correlation to the category “refugee” is to be called progressive as is not to differentiate between “legal migrant” and “illegal migrant”. For those states that are not members of the above UN Convention also the replacement of the terminology “illegal” and “legal” by “irregular” and “regular” goes beyond the current state of law and does not correspond to the terminology used by most states

[41] Fn 20, p 272.

[42] Fn 20, pp 273 – 275.

on the national legal ground. As far as individual entitlements and even more such of human rights nature are linked to migrants as such the Global Compact goes beyond the current state of law binding for such state.

Wherever the Global Compact on Migration shifts matters so far falling under the sovereignty of states to matters of international concern it transgresses the current state of law. Wherever the Global Compact provides entitlements to the IOM, currently not covered by its Constitution and By-Laws, or to non-governmental organizations it goes beyond the existing state of law. There is also no basis in the current international law founding the concept of multiculturalism.[43]

Based on the current state of international law problems for an acceptance of the Global Compact result, in particular, from:

a. the creation of the category of "migrant" in correlation to the category "refugee";
b. the dilution of the border between legal (regular) and illegal (irregular) migration; and
c. Informal expansion of the international protection of human rights through "soft law" by linking general human rights obligations up with the category "migrant".

Further progressive elements refer to:

d. Further development of international migration law through "soft law";
e. approximation of the IOM to the UN through "soft law";
f. strengthening of the role of the IOM through "soft law; and"
g. creation of new possibilities for action of non-governmental organisations and other fora through "soft-law".

Each of the characteristics above under lit a – c and d) of the Global Compact on Migration shall be documented by a few examples from across the whole of the Compact. The characteristics of lit d – f have already been analysed in the previous chapters.

5.1. The Creation of the Category of "Migrant" in Correlation to the Category "Refugee"

Para 4 (part of Preamble) of the Global Compact on Migration provides that "*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 as*

[43] See eg as expressed in para 32 h "*Support multicultural activities through sports, music, arts, culinary festivals, volunteering and other social events that will facilitate mutual understanding and appreciation of migrant cultures and those of destination communities.*"

defined by international refugee law. This Global Compact refers to migrants and presents a cooperative framework addressing migration in all its dimensions."

This provision lays down the basic concept of the Global Compact on Migration. The term "migrant" is put in correlation to the term "refugee". For a refugee "international refugee law" and considering the New York Declaration the "Global Compact on Refugees" applies. On "migrants" the "legal" and "cooperative" framework of the Global Compact on Migration applies. It has been shown above that his qualification of the Global Compact on Migration as "legal" contradicts para 7 (also part of the Preamble), which states that "*This Global Compact presents a non-legally binding, cooperative framework…*". Both provisions read together say the Global Compact is a "legal", but "non-legally binding" framework. The progressive aim to place the term "migrant" in correlation to "refugee" made the drafters commit an error, but emphasizes the relevance of this correlation.

The term "migrant" is explicitly addressed by the Protocol of 15 November 2000 against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention against Transnational Organized Crime,[44] which entered into force on 25 January 2004 and binds 147 states, including Austria.[45] The Protocol uses the term "migrant" not in the above broad understanding, but as element of "smuggling". Article 3 lit c) defines "*smuggling of migrants*" as "*the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident*". The term "migrant", thus, indirectly defined by this Protocol requires the element of "illegal entry" and, therefore, relates only to "illegal migrant".

Such use of term is clearly not the intention of the Global Compact on Migration, because it wants to address "*migration in all its dimensions*" and does so by creating the global and at the same time diluted term "migrant", including "legal" and "illegal" migrant. This confusion was created earlier, partly by the New York Declaration, partly in the preparatory phase of negotiations on officials' level and has a certain legal potential already there. This goes, in particular, for paras 5 and 6 of the New York Declaration, which isolated "refugees and migrants" as holders of human rights and by not mentioning all other people at the same time laid the ground for a specific understanding of these two categories as separate subjects of human rights law. In addition, it is the New York Declaration that called also the framework for migrants "a legal framework" (para 6).[46]

But, when it now comes to the adoption of this particular framework for "migrants", the fact that this framework has been described a "legal" one already on UNGA's level, when issuing the mandate, increases the necessity to oppose in order to avoid legal consequences, in the present context the "creation of the legal category of migrant, including legal and illegal migrant."

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[44] Text available at: https://www.unodc.org/documents/southeastasiaandpacific/2011/04/som-indonesia/convention_smug_eng.pdf (retrieved 18 October 2018).

[45] Since 30 November 2007.

[46] "*Though their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms….*".

5.2. The Dilution of the Border between Legal (Regular) and Illegal (Irregular) Migration

Using the colours of traffic lights, an analysis of the whole text of the Global Compact on Migration would lead to only few parts of its text that could be adopted without reservation and, thus, shown in green colour. Most of the text becomes red or orange, just because of the fact that it has not been clearly linked to "legal" ("regular") migration only. Put into the context of just "migration" and considering that this is meant to include both kinds of migration, a text otherwise eventually acceptable as such either raises issues ("orange") or is clearly contradictory to national laws and migration policies, not only of Austria or the EU member states, but even beyond and needed to be shown in red colour. This shall be demonstrated at some examples which are representative for many more throughout the text.

The first two sentences of the initial para 8 of the Chapter "*Our Vision and Guiding Principles*" right after the Preamble reads as follows: "*This Global Compact expresses our collective commitment to improving cooperation on international migration. Migration has been part of the human experience throughout history, and we recognize that it is a source of prosperity, innovation and sustainable development in our globalized world, and that these positive impacts can be optimized by improving migration governance.*" Considering that "migration" does not mean "refugees", the sentences would be correct, if clearly linked to "legal" ("regular") migration. If states can select the persons migrating to them, receiving the entrance permits and permits for a legal stay by these states, as did many states on earth for decades or even centuries, multiple examples of prosperity, innovation and sustainable development can be found. But where are the examples for prosperity, innovation and sustainable development caused by illegal ("irregular") migration, to be underlined, apart from refugee movements? At the occasion of Austria the movements from Hungary 1956, Czechoslovakia 1968, Poland 1982, Bosnia-Herzegowina 1993, and Kosovo 1999 to Austria, none of these events can be adduced as example for "illegal" ("irregular") migration. These cases have been broadly dealt with on the ground of refugee law. The IOM owes the creation of its earliest predecessor to the effort of the US and other over-sea states to have up-rooted people from Europe after the Second World War "legally" migrated to these states. Thus, as far as Europe's people who emigrated to the US contributed to the prosperity of the US and other states it was a contribution of "legal" ("regular") migration.

The next two sentences added to this para do not help to make it correct: "*The majority of migrants around the world today travel, live and work in a safe, orderly and regular manner. Nonetheless, migration undeniably affects our countries, communities, migrants and their families in very different and sometimes unpredictable ways.*" The fist sentence needed statistical evidence, whether it is true at all, because it would mean that the majority of migrants are "legal" ("regular")

migrants. Only the last sentence as such fits to “legal” (“regular”) as well as to “Illegal” (“Irregular”) migration.

The dilution of “illegal” (“irregular”) and “legal (“regular”) migration in the Global Compact on Migration becomes crucial when the Global Compact lays down obligations, for example, in the same chapter by the last sentence of para 10. This sentence reads as follows: “*We also must provide all our citizens with access to objective, evidence-based, clear information about the benefits and challenges of migration, with a view to dispelling misleading narratives that generate negative perceptions of migrants.*”

If this sentence referred to “legal” (“regular”) migration and given there is respective evidence a state might well agree to subject to such commitment. But where is the evidence for the benefits of “illegal” (“irregular”) migration”? How can a state subject to such unspecified and contradictory in se obligation?

The obligation ensuing from para 13 of the Global Compact on Migration, “*We must empower migrants to become full members of our societies, highlight their positive contributions, and promote inclusion and social cohesion.*”, signed by representatives of Austria as to migrants of any kind, including “illegal” (“Irregular”) migrants, as it is to be understood, “would simply mean that the respresentatives move beyond Austrian legal acts to be applied by them.

Since each of these commitments can turn into a general principle of law, it is no excuse to consider them as empty words, pointing at the fact that there is also the cross-cutting and interdependent principle of “national sovereignty” enshrined in para 15 of the Global Compact on Migration, where one element states: “*Within their sovereign jurisdiction, States may distinguish between regular and irregular migration status, including as they determine their legislative and policy measures for the implementation of the Global Compact, taking into account different national realities, policies, priorities and requirements for entry, residence and work, in accordance with international law.*” The obligation of para 13 read together with the principle of para 15 sets a clear limit for the sovereign jurisdiction: The permit, which is not a consequence of their statehood, but which is assigned to states by the Global Compact as a residual competence within the otherwise matter of international concern, allows them to distinguish between regular and irregular migration. However, both of them must become full members of the respective societies.

The dilution between “illegal” (“irregular”) and “legal” (“regular”) migration must be seen as so essential that it compromises all of the 23 objectives enumerated in para 16 of the Global Compact on Migration. There could not be found any of these objectives, described in the subsequent paras until and including para 39, where, because of the dilution of the terms, there are not at least a few sentences to be shown by orange color. This goes also for the objective 9 “*Strengthen the transnational response to smuggling migrants*”, where the commitment e) “*Design, review or amend relevant policies ..*” could only be implemented if “*the correct definitions*” were set by the Global Compact, but they are not.

As a consequence of the dilution described above substantial issues arise as to many commitments and statements of the Global Compact on Migration, in particular,

but not limited to family reunification, change of status from irregular to regular migrant, access to legal assistance, availability of a basic supply and of school ressources, access to the health care system and to higher education, inclusion into the labour market, recognition of informally acquired skills, relief as to business establishment, transfer of financial contributions to families in the countries of origin.[47]

5.3. The Informal Expansion of the International Protection of Human Rights through "soft law" by Linking General Human Rights Obligations up with the Category "Migrant"

It has been mentioned above, that the New York Declaration by separating refugees and migrants from other bearers of human rights creates the appearance if refugees and migrants are bearing own human rights which are different from those of other people. The Global Compact on Migration in para 4 follows this concept when stating: "*Refugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times.*" The sentence would be correct from point of view of international human rights law if the sentence had been formulated as follows: "*Refugees and migrants are entitled to the same universal human rights and fundamental freedoms" "as all other people". (which) "These rights" "must be respected, protected and fulfilled at all times.*"

This conceptual inconsistency is continued in the last sentence of para 11, which reads as follows: "*We acknowledge our shared responsibilities to one another as Member States of the United Nations to address each other's needs and concerns over migration, and an overarching obligation to respect, protect and fulfil the human rights of all migrants, regardless of their migration status, while promoting the security and prosperity of all our communities*".

When it comes to the cross-cutting and interdependent principle of "human rights", laid down in para 15, the Global Compact on Migration states as follows:

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

[47] Objective 16 ("*Empower migrants and societies to realize full inclusion and social cohesion*") as a whole, most parts of objectives 17 ("*Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration*") and 19 ("*Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries*") and many parts of objectives 18 ("*Invest in skills development and facilitate mutual recognition of skills, qualifications and competences*") and 20 ("*Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants*") seem not tob e acceptable from the perspective of a country of destination of migration for the reason of lack of differentiation between illegal (irregular) and legal (regular) migration.

Even at this essential place for the whole document, the Global Compact on Migration does not repair the conceptual deficiency and spreads principles inherent to the International Covenant on Economic, Social and Cultural Rights ("*non-regression and non-discrimination*") to general human rights law, regardless, whether the human rights are civil or political rights or whether they are general human or specific citizens' rights. Since all this is done in a context specific to migrants, this leads to a positive discrimination of migrants compared to other people and to an informal increase of the protection of human rights for migrants. This result is reinforced by linking the commitment to elimination of all forms of discrimination, including racism, xenophobia and intolerance specifically to "*against migrants and their families.*" Migrants and their families, "illegal" ("irregular") and "legal" ("regular") thus, become subjects of a particular prohibition of discrimination, a fact which gives them prominence in comparison to all other people.

This has a direct consequence, for example, when reading this provision together with para 20 lit f) in the framework of the objective 4 ("*Ensure that all migrants have proof of their legal identity and adequate documentation*"). The respective obligation reads "*Review and revise requirements to prove nationality at service delivery centres to ensure that migrants without proof of nationality or legal identity are not precluded from accessing basic services nor denied their human rights*". Not only can the provision be understood that access to basic services must be given "illegal" ("irregular") and "legal" ("regular") migrants on a non-discrimanatory basis between them, but also with regard to citizens of the respective state.

Reference in this context must also be made to para 23 (objective 7 "*Address and reduce vulnerabilities in migration*"). It may well be that the authors of the Global Compact on Migration simply did not think of what results they created, but if migrants have the above specific human rights, the obligation "*We commit to respond to the needs of migrants who face situations of vulnerability, which may arise from the circumstances in which they travel or the conditions they face in countries of origin, transit and destination, by assisting them and protecting their human rights, in accordance with our obligations under international law.*" leads to more protection of human rights of migrants than of other people. Today it is a legally non-binding commitment and tomorrow it may be a general principle of law.

The same goes for para 31 in the framework of objective 15 ("*Provide access to basic services for migrants*"). In the context of the above the commitment "*We commit to ensure that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services.*" must appear unacceptable for any state, even if the next following sentence "*We further commit to strengthen migrant inclusive service delivery systems, notwithstanding that nationals and regular migrants may be entitled to more comprehensive service provision, while ensuring that any differential treatment must be based on law, proportionate, pursue a legitimate aim, in accordance with international human rights law.*" might mitigate to a certain extent the commitment emanating from the first sentence. Once more, the failure must be seen in assigning "*all migrants, regardless of their migration status*" "*their human rights*".

For the same reason and for the reason that the commitment could be read to provide a further specific human right for irregular (iilegal) migrants the further commitment in the framework of the same objective "*Ensure that cooperation between service providers and immigration authorities does not exacerbate vulnerabilities of irregular migrants by compromising their safe access to basic services or unlawfully infringing upon the human rights to privacy, liberty and security of person at places of basic service delivery*".[48] hardly can be accepted by any state envisaging that without its contribution the commitment could become binding international law.

A further example of hardly bearable consequences resulting from para 15 read together with the respective commitments offers para 37 lit f) within the framework of objective 21 ("*Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration*"), which reads as follows: "*Establish or strengthen national monitoring mechanisms on return, in partnership with relevant stakeholders, that provide independent recommendations on ways and means to strengthen accountability, in order to guarantee the safety, dignity, and human rights of all returning migrants*." Para 15 and the above analysis must be read into "*human rights of all returning migrants*", even if this might not have been the purpose of the provision.

5.4. The Creation of New Possibilities for Action of Non-governmental Organisations and Other Fora through "soft-law"

The Global Compact on Migration in quite a number of provisions[49] assigns a particular role to the non-governmental sector and civil society. Without evaluating this as positive or negative, it is a progressive element of the Global Compact. The key provision can be found in para 44, which reads as follows:

"*We will implement the Global Compact in cooperation and partnership with migrants, civil society, migrant and diaspora organizations, faith-based organizations, local authorities and communities, the private sector, trade unions, parliamentarians, National Human Rights Institutions, the International Red Cross and Red Crescent Movement, academia, the media and other relevant stakeholders.*"

At first glance, the provision appears to be a jump in progress towards democracy on the universal level. When considering the provision to more details, it appears more a fig-leaf than apt to function in practice. Without clear rules for the selection of the representatives, procedures for their participation and rules on their particular rights, above all vis-à-vis states, the provision offers an entry-door for unspecific lobbyism, pick and choose on all sides and for systematic manipulation.

[48] Para 31 lit b).

[49] See, in particular, paras 15, 18 lit c), 27 lit c, 28 lit c, 31 lit d, and 33 lit d.

5.5. Measures for Leading the Global Compact on Migration back to the Ground of Current International Law

The scenarios of the Marrakesh Intergovernmental Conference and of the UNGA do not envisage an option of fundamental re-negotiation of the Global Compact on Migration. Thus, the following recommendations are simply given without further motivation.

It would be highly advisable to renegotiate the Global Compact based on the following principles:

a) Recalling the mandate and formal framework of the New York Declaration 2016, but adjusted to the current state of international law;
b) Eventual transformation of the IOM into a Specialized Agency within the UN family on a regular path and through respective amendment of its constitutional fundaments
c) Replacement of the category "migrant" by a clear distinction of illegal and legal migration as well as hiving off illegal migration
d) Combining the Clobal Compact on Migration with the general system of protection of human rights
e) Elimination from the Global Compact on Migration of the ideological concept of multiculturalism which has failed in practice
f) Underlining of the character of soft-law of the progressive elements remaining and well-received after all and safeguarding their nature as political commitments

6. Concluding Recommendation

On 31 October 2018, the Austrian Government based on the proposal of the Minister for Europe, Integration and Foreign Affairs decided

"*not to adopt the Global Compact for Safe, Orderly and Regular Migration and to express this opinion by not sending an official representative to the Intergovernmental Conference for the Adoption of the UN Global Compact on Migration, by declaring in writing not to accede to the UN Global Compact on Migration and by abstaining at the voting on this Global Compact at the General Assembly of the United Nations as well as by making a respective explanation of its vote at this occasion.*"[50]

This position of Austria is to be assessed as logical, understandable, consistent and diplomatically well-advised. Austria expresses its opinion that the result of two years

[50] The text of the proposal (GZ. BMEIA-AT.4.15.10/0154-IV.5c/2018), is available at: https://www.bundeskanzleramt.gv.at/documents/131008/1068065/33_11_mrv_Votumserklaerung.pdf/2998648a-b042-4863-b0ee-7a473ff28977 (retrieved on 5 November 2018).

of negotiations on the level of officials under the lead of the two facilitator states Switzerland and Mexico provides a compromise in the universal field of tension between the states of origin and the states of potential destination of migration, where the pendulum swung in favor of the states of origin and to the disadvantage of the potential states of destination, even more than this had happened already at the occasion of the adoption of the International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families. For exactly the same reason Austria was not able to ratify this Convention.

Austria was also right in assuming that the result of the negotiations on the officials' level ended so far away from the interests of the Austrian people that, even considering the principal possibility of submitting at the Intergovernmental Conference proposals for substantial amendments of the Global Compact on Migration, there was not even the tinest chance to amend the negotiational result to such extent that it could be brought to compliance with the Austrian migration policy.

Austria's decision not to participate at the Conference in Marrakesh signals to the other members of the international community a fundamental dissatisfaction of Austria, but this is done diplomatically elegantly. Austria does not formally vote against the Global Compact on Migration what, however, Austria would have been required to do in case of participation at the Conference. It, thus, does not put any of the states' nose out of joint, that will be voting in favor of the Global Compact. Since the Conference of Marrakesh is no conference on the adoption of an international treaty, the non-participation of Austria has no legal impact as to the adoption of the Global Compact on Migration. If there will be a majority at the Conference in Marrakesh voting in favor of the Global Compact on Migration, the Compact will be adopted as a political document.

However, considering an eventual later interpretation of the Global Compact on Migration as reflection of international customary law or as source of general principles of law, the Austrian non-participation has a signaling effect. Whoever in future in the international legal doctrine and in the international and national jurisprudence will undertake to draw arguments from thw Global Compact for the existence of international customary law or general principles of law, first will have to examine how many states were present in Marrakesh at the occasion of the adoption of the Global Compact and how many states present at the Conference have voted in favor or against the adoption of the Global Compact or chose abstention.

Assuming that the Global Compact on Migration will be adopted by acclamation, the non-praticipation of Austria acquires additional relevance. Austria shows not even ready to contribute to a procedure of acclamation or consensus, where the President of the Conference states the consensus without formal voting procedure and option for voting declaration. Austria avoids all these inponderabilities, reduces the quorum and, thus, the universal expressiveness of the Global Compact on Migration.

Since the Global Compact on Migration in addition to the Intergovernmental Conference of Marrakesh will also become object of a resolution of the UNGA, it is also necessary and correct as expressed by the decision of the Austrian Government to determine Austria's position in the UNGA. At the UNGA Austria will abstain and

submit an explanation of its voting behavior. This behavior, too, is as necessary as diplomatically circumspectly. Austria does not vote against the resolution and the Global Compact on Migration, but only abstains. Assuming that the resolution will be adopted, Austria does not snub the majority of the international community with a vote against, but shows distance and dissatisfaction without obstructing the majority.

It must be considered, however, that simply abstention at the UNGA without voting declaration will not be sufficient. Abstaining alone can be interpreted in two directions:

- Austria is not interested in the resolution and does not assign special importance to it, or

- Austrai disagrees to the contents of the resolution, but does not vote against for reasons of diplomacy.

A declaration of explanation of vote, thus, appears necessary on the one hand in order to clarify that, considering the two options of interpretation above, Austria wanted to be understood having chosen the second option. On the other hand, the declaration of explanation of the vote must include a clear statement which is able to hinder the process of development of international customary law or the deduction of general principles of law based on the Global Compact on Migration. Since this process, as shown above, eventually cannot be prevented at all, it is advisable to adopt a declaration which should contain the following elements:

"Austria would like to declare explicitly, to consider the Global Compact on Migration not binding under international law. Austria's abstention and any measures that Austria might voluntarily undertake in future in line with the Global Compact, shall neither be considered for legal opinion, nor for state practice with respect to the emergence of international customary law, nor for deduction of a general principle of law. In case, that a respective norm will emerge or will be deducted, Austria claims, not to be bound by such norm under international law."

If international customary law will come into existence, Austria based on such declaration and consistent later behavior can avoid being bound by such norm, if it gives evidence to a behavior of a so-called persistent objector. At the same time; Austria can reduce the space for argumentation as to the deduction of general principles of law from the Global Compact on Migration.

As reasons for its non-acceptance of the Global Compact on Migration Austria could refer in its declaration of explanation of its vote, in particular, to:

- The Global Compact does not respect Austria's sovereignty
- Austria does not recognize the Global Compacts concept of a category of migrant under international law
- Austria in difference from the Global Compact does not recognize special human rights of migrants
- Austria does not accept the Global Compact's dilution of legal and illegal migration
- Austria does not recognize any rights and entitlements linked by the Global Compact to such diluted concept of migration beyond those rights and

entitlements already granted under Austrian law. This goes, in particular, but not limited as to:

- family reunification
- change of status from irregular to regular migrant
- access to legal assistance
- availability of a basic supply and of school ressources
- access to the health care system and to higher education
- inclusion into the labour market
- recognition of informally acquired skills
- relief as to business establishment
- transfer of financial contributions to families in the countries of origin, etc.

With kind regards

Michael Geistlinger