



Some EU governments leaving the UN Global Compact on Migration:

A contradiction in terms?

Sergio Carrera, Karel Lannoo, Marco Stefan and Lina Vosyliūtė

Summary

The United Nations (UN) Global Compact on Safe, Orderly and Regular Migration provides a non-legally binding political instrument for deepening and strengthening international cooperation and coordination on migration policies. A few EU member states and their interior ministries have recently announced decisions not to sign this document at the upcoming inter-governmental conference to be held on 10 and 11 December in Marrakech (Morocco).

This Policy Insight examines the scope and significance of the Global Compact for EU Member States. It argues that the Compact does not create new legally enforceable obligations or a 'human right for immigration'. By not adopting it, EU member states will actually have 'less national sovereignty' at a time when ensuring safer and regular immigration pathways to Europe is high on their agendas. They will also be neglecting the human rights of their own citizens when they travel, live or reside abroad.

Regardless of their position on Global Compact, all EU member states are already under a clear obligation to protect and uphold international and European Union law and human rights standards for all migrants and refugees. Human rights are a condition for legitimate sovereignty. Effective migration management can and should go hand-to-hand with rule of law and human rights. The adoption of the Global Compact on Migration, along with the accompanying Global Compact on Refugees, would serve European governments well in their interest to implement fairer and greater solidarity-based sharing of responsibilities on migration and asylum policies.

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978-94-6138-708-0

Available for free downloading from the CEPS website (www.ceps.eu)

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CEPS Policy Insights No. 2018-15/November 2018

1. Introduction

2018 is expected to witness the finalisation of the inter-governmental processes of negotiation on the United Nations (UN) Global Compacts on Migration and Refugees. The Global Compacts process was officially launched by the [UN New York Declaration for Refugees and Migrants](#) by the UN General Assembly in 2016, where all heads of state and government committed to join forces and coordinate their actions in dealing with the global phenomenon of large movements of refugees and migrants in full compliance with international law and human rights.

The key idea behind the Compacts is at first sight simple: the challenges emerging from cross-border mobility are better addressed by the international community as a whole, through more global governance and enhanced international coordination. The drafting and consultations over the last 18 months have taken place on two parallel tracks: one dealing with ‘migration’, under the [Global Compact on Safe, Orderly and Regular Migration](#), co-facilitated by Switzerland and Mexico; and another covering asylum, under the [Global Compact on Refugees](#), coordinated by the UN High Commissioner for Refugees.

The Global Compact on Migration, due to be adopted at the intergovernmental conference in Marrakech on 10 and 11 December 2018, has proved to be most controversial of the two. In December 2017, the Trump administration announced the [withdrawal of the US](#) alleging that it would undermine “the [sovereign right](#) of the United States to enforce our immigration laws and secure our borders”. This was followed by similar declarations by [Australian](#) Home Affairs Minister Dutton, who reportedly referred in justification to “the national interest” and sovereignty in a country where detention of asylum seekers, including minors and families, is a widespread policy.

Similar hesitations have more recently emerged from some EU member states. The first to express disagreement was the [Hungarian government](#) of Viktor Orbán, which exited the Compact in October 2018 stating that the document is at odds with Hungary’s security interests and “in conflict with common sense and also with the intent to restore European security”. The [Austrian government of Sebastian Kurz](#), currently holding the rotating EU Presidency, declared in October 2018 that it would not sign the Compact because “migration is not and should not become a human right”, and “we decide who comes into Austria and no one else”.

This came alongside similar announcements by governments in Poland, Bulgaria and the Czech Republic with references to “[national interests](#)”, “[sovereign principles](#)” and the principle of

separating [legal and illegal immigration](#). The list is [growing](#), with the Slovak parliament deciding to reject the Compact, which has led to the [resignation](#) of the country's Foreign Minister.

The Global Compact on Migration is subject to heated internal political debates in other EU member states such as [Germany](#), Estonia, Croatia, [the Netherlands](#), Slovenia or [Belgium](#). Last in the line of potentially defecting member states is [Italy](#). Interior Minister Matteo Salvini just announced that the country will not take part in the Marrakech conference and only sign the document if its Parliament votes in favour of the text.

The reactions by EU member state governments and their ministries of interior has been regretted by [the European Commission](#), which declared that “those countries that decided they are leaving the UN migration compact, had they read it, they would not have done it”. The [UN Special Representative for International Migration Louise Arbour](#) has stated that this “reflects very poorly on those who participated in negotiations...it's very disappointing to see that kind of reversal so shortly after a text was agreed upon.”

To date, the political spin-offs of the 2015 European Humanitarian Refugee Crisis are still felt in the EU, [despite actual numbers falling down to the “pre-crisis” levels](#). There is a lot confusion and disinformation about migration often driven by nationalistic anti-immigration agendas in the run up to European Parliament elections in 2019. In such context, it is important to shed some light on what the UN Global Compact on Migration could actually mean for EU member states, and why the broadest common Union position supporting their signature and adoption, in combination with the Global Compact on Refugees, would be most desirable outcome for everyone.

2. Is the Global Compact legally binding?

One of the most common arguments used by the above-mentioned member state governments and interior ministries is that the Global Compact on Migration will mean ‘less sovereignty’ in domestic immigration management policies. This argument is flawed for several reasons.

First, the Global Compact expressly specifies that it is *not* a legally binding instrument. It does not qualify as an international agreement, nor does it add any new legal obligations to any State party. As opposed to purely informal international relations instruments, the qualification of a document as an ‘international treaty’ depends on the verification of the parties’ intention to conclude an agreement which is legally binding. Such intention can be inferred on the basis of a series of factors.

Rather than the formal designation, it is the specific wording (the actual terms used to formulate the content) of the text which determines its legal nature. To constitute a legally binding treaty, reference must be made in the document to the [parties’ intention](#) to undertake specific agreements. The obligatory character of an *agreement* (i.e. its capacity to become a source of rights and corresponding obligations under international and/or domestic law) also depends on whether its provisions are [sufficiently precise](#) as to constrain the signatory parties.

The latter represents an essential precondition for an international agreement to be [judicially enforced](#).

In the case of the Global Compacts, however, there is no element that reflects the parties' will to assume new legal obligations. International agreements usually contain terms such as "shall" or "agree", which are designed to stress the parties' obligation to implement, at least partially, their content. On the contrary, the language used in the UN Migration Compact leaves wide margins of discretion as to the type of actions foreseen.

The document calls for more *policy coordination* based on a number of political declarations, incentives and follow-up measures. Nevertheless, it is difficult to claim that any legal effect could derive from the Compact's broad reference to a "collective commitment to improving cooperation on international migration". The text appears to simply "recognize" or "acknowledge" the existence of a continuous need for international efforts. It does not prescribe, but only invokes the undertaking of further actions.

The choice of the Compact's non-legally binding nature is not unintentional. This option allows for a wide degree of flexibility in the implementation phase, while at the same time providing financial support and the possibility for monitoring progress through periodic reviews. At the same time, there are no sanctions associated to cases of non-compliance. This has been confirmed by the [External Action Service \(EEAS\)](#), which stated at the European parliament debate on the Global Compact on Migration of 13 November 2018 that:

the Compact is not legally binding. It will not create any legal obligations for States. It is a menu of policy actions and best practices, from which States may draw to implement their national migration policies.

As a non-legally binding initiative, the Compact does not require lengthy ratification processes either. Italian Interior Minister Salvini's idea to submit the UN Global Compact on Migration to a vote in the Italian Parliament is therefore an unnecessary and futile step, as it would only create additional procedural hurdles likely to undermine the work conducted by Italian diplomats participating in the multilateral negotiations of the text.

Second, national sovereignty is very much present in many of the passages of the Global Compact on Migration and constitutes one of its guiding principles. This is illustrated in a few specific references such as:

The Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law.

The Compact's message is not that governments should not control migration in line with domestic priorities and policies, but rather that they would gain by doing so in a way which ensures "safe, orderly and regular" pathways of immigration.

Participation in the Global Compact on Migration would not translate into any new legal obligations or rights. It would instead represent a much needed confirmation of already

existing national commitments to the delivery of widely (if not universally) agreed international standards that are legally binding for all EU member states. The Compact simply reasserts the need for improving cooperation under existing international instruments.

3. Unsafe, irregular and unregulated migration as a product of restrictive policies

The Global Compact on Migration aims at reducing the incidence and negative impacts of irregular migration through more international cooperation on regular migration. While there is not a 100% direct correlation between establishing more regular pathways for immigration and effectively overcoming irregular immigration in destination countries, [the lack of regular channels](#) often constitutes a key factor in people falling into irregularity or attempting irregular and dangerous paths of entry and residence. The European Commission stated in the 2015 [European Agenda on Migration](#) that:

A clear and well implemented framework for legal pathways to entrance in the EU (both through an efficient asylum and visa system) will reduce push factors towards irregular stay and entry, contributing to enhance security of European borders as well as safety of migratory flows.

This has been confirmed by the [European Parliament Resolution](#) on the Global Compacts of April 2018, which stated that “opening more legal pathways for migration, including on the basis of realistic analyses of labour market needs, would discourage irregular migration and lead to fewer deaths, less abuse of irregular migrants by smugglers and less exploitation of irregular migrants by unscrupulous employers”. With this Resolution, the European Parliament highlighted the need for addressing unacknowledged labour market gaps at both the EU and national level in sectors of low and medium skills, such as for example [migrant domestic work](#).

Since 2014, [the European Parliament](#) has been calling for a ‘holistic’ approach to the crisis in the Mediterranean and considered “that further avenues of legal migration should be explored”. For example, its [Report on Blue Card recast](#), revealed that in 2014, Sub-Saharan Africans only amounted to 2.1 % of the total beneficiaries of the Blue Card Scheme. The same Report emphasised that:

The lack of diversity among the EU Blue Card holders may reflect national policies and practices which can perpetuate forms of direct, indirect or institutional discrimination towards new candidates.

Restrictive immigration policies have often resulted in “races to the bottom”, with irregular migrants being employed in sectors such as agriculture or construction without any legal protection. The [exploitation of irregular migrant labour](#) renders legal employment unattractive (because economically disadvantageous) and makes it impossible to ensure proper enforcement of decent international labour standards. In [Spain](#), for example, the reduction of quotas for immigrant domestic workers has only led to an increase in the informal economy

and domestic foreign workers falling into irregularity. By contrast, labour market gaps were not filled by Spanish nationals despite high levels of youth unemployment.

Societal changes, such as ageing and increased gender equality, call for the development of evidence-based employment policies. For many households, for instance, it is a rational choice that children, elders and dependents with disabilities are looked after by migrant domestic workers. These needs are to a large extent neglected in policy making. Similar examples can be found in other sectors such as agriculture, transport and construction.

[A recent overview by the EU Fundamental Rights Agency shows that](#) migrant workers have the highest price to pay as they are more vulnerable to exploitation while living and working irregularly, while national politicians take a ‘tokenist’ approach towards what kind of persons are (not) needed or welcomed in the EU. As [previous research](#) has shown, qualified third country nationals are already incentivised to head towards non-EU countries, at least partly because it is much easier and faster to obtain employment-related visas or residence permits.

In addition, [Europol’s academic advisory group](#) has confirmed that migrant smuggling and trafficking are complex phenomena created by socio-economic and geopolitical phenomena. These include conflicts or wars in countries of origin, but also other factors (such as environmental degradation and national disasters) that force people to leave. The insistence on the need to ensure the “downward trend” in immigration has resulted in more restrictive policies which, while directed at combatting irregular migration, also deny asylum seekers the possibility of seeking protection and a right to asylum in Europe. Individuals who would qualify as refugees, or as beneficiaries of other forms of international protection, are often wrongly reframed and treated as irregular immigrants.

As highlighted by the Global Compact on Refugees, complementary pathways for admission of those with international protection need to be created instead. For instance, in addition to resettlement, the Compact on Refugees explicitly calls for the introduction of:

humanitarian visas, humanitarian corridors and other humanitarian admission programmes; educational opportunities for refugees (including women and girls) through grant of scholarships and student visas, including through partnerships between governments and academic institutions; and labour mobility opportunities for refugees, including through the identification of refugees with skills that are needed in third countries.

Criminal justice or border controls alone cannot provide an adequate policy response to the specific needs of different categories of people on the move. [Evidence](#) also shows that restrictive immigration management policies are making the daily work of national border and coast-guard officials less effective, as people are smuggled into the EU, bypassing regular border controls. Progressive disengagement from search and rescue at sea is also problematic. Coast guards have confirmed that when provided with a clear mandate for rescuing people at sea they, civil society and agents deployed in EU maritime operations could register all rescued persons so governments would know who arrived when. However, recently all Search and Rescue (SAR) activities and missions in the Mediterranean have been wrongly framed as a ‘pull

factor' and discontinued. [Research has illustrated](#) that this is allowing the smuggling business to shift from a community of amateur operators to deeper networks involving higher profile criminal groups.

By not signing the Global Compact on Migration, EU countries are in reality calling or allowing for more irregular immigration. They will therefore end up having 'less control or sovereignty' domestically over cross-border mobility. Moreover, by refusing to participate in the UN Migration Compact, EU member states contradict EU commitments in the area of legal migration. As recently as June 2018, the [European Council](#) reconfirmed that the

precondition for a functioning EU migration policy is a comprehensive approach, where actions both on the internal and external sides go hand in hand to ensure an effective control of the EU's external borders, a firm return policy and a well-managed legal migration and asylum policy.

This language echoes that of the UN Compact. This document is in fact only instrumental to a more coherent EU legal immigration policy. It would allow the EU to pursue its objective of reinforcing cooperation with third countries, in particular by facilitating the creation of [safe and controlled pathways](#).

4. A human right to immigration?

Does the Global Compact on Migration materially deviate from values and norms already binding on EU member states, and if not, what does its rejection by some of them mean in terms of their constitutional and EU commitments to those principles? In fact, the references that the Global Compact on Migration makes to international obligations and human rights constitute simply a reminder of already existing international, EU and domestic obligations.

A majority of the EU countries concerned are already bound by many of the core UN human rights instruments and International Labour Organisation (ILO) labour standards that apply to immigrants irrespective of their status. An exception is the 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPRMW), which continues to be one of [the lowest ratified](#) UN human rights tools, with no single EU country among its signatories.

The argument according to which the Global Compact on Migration would create a 'human right to immigration' is equally misguided. Nothing in the Compact says or proclaims such a 'human right' to exist. Nor does the Compact make the instruments such as the above-mentioned ICPRMW binding for signatories. As opposed to people seeking international protection, who fall within the particular scope of the accompanying [Global Compact on Refugees](#), there is no obligation for countries under international human rights law to allow entry and residence of non-nationals.

Regardless of their position and signature on UN Global Compact on Migration, all EU member states are already under an unequivocal obligation to protect and upheld the [human rights standards of all migrants and refugees](#), irrespective of their status. It is not a 'policy choice' for

any EU government to adopt and implement domestic migration policies that directly or indirectly lead to human rights violations of foreigners and citizens. International human rights standards apply to *everyone* as human beings and for the sake of their human dignity.

This was underlined in a Joint Communication issued by UN Special Procedures (five UN Special Rapporteurs and two Working Groups) to the Presidents of the European Commission, the European Parliament and the European Council on 18 September 2018. The Joint Communication raised serious concerns about recent policy initiatives in the EU calling for regional disembarkation platforms, controlled centres and the further reinforcement of [the European Border and Coast Guard \(Frontex\)](#) (with a new standing force of 10,000 operational staff) ahead of the Austrian presidency meeting in Salzburg on 19 and 20 September 2018. It concluded:

We are concerned that these measures are being proposed as a means to leverage political gain in response to the worrying rise of anti-immigration and xenophobic hate speeches and stances, as reflected by increased acts and discourses of violence and racism against migrants in various EU member States.

5. Human rights of citizens

It is moreover of utmost importance to underline that human rights and other ‘international commitments’ are not only relevant for ‘immigrants’ and refugees. They are also of central importance for citizens too. The moment in time when any sovereign government starts [backsliding in rule of law](#) and human rights protections for non-nationals, a similar backsliding for human rights can be expected to follow in relation to citizens.

Contrary to what some national governments and interior ministries are stating, the UN Global Compact on Migration is also of key relevance for nationals. Not signing it would mean less human rights protections for them too. By saying ‘no’ to the Global Compact on Migration, national governments would in reality be denying protection to their own nationals when they travel, live and work outside the EU.

From a pure ‘state’ perspective, the general principle is rather simple: your ‘nationals’ are my ‘immigrants’. It is not often recalled that citizens of signatory countries are in fact ‘migrants’ in any other countries. As recent European contemporary history has sadly demonstrated, those same nationals may even become [‘the refugees of the future’](#) should their democratically elected governments undermine basic rule of law guarantees and engage in human rights violations.

6. Human rights as a condition for legitimate sovereignty

International cooperation on migration is often wrongly framed as a ‘dichotomy’ or ‘trade-off’ between national sovereignty and rights. This was recently emphasised by [UN Secretary General](#) Antonio Guterres on the occasion of the 70th Anniversary of the Universal Declaration of Human Rights, when he stated that: “There is still resistance to supporting human rights,

often linked to a false dichotomy between those rights and national sovereignty. But human rights and sovereignty must go hand in hand. Human rights strengthen States and societies and reinforce sovereignty.” Indeed, human rights have been considered as the pre-condition for [deliberative politics](#) and for [legitimation](#) of rule of law-based power.

Effective migration management can and should go hand-in-hand with rule of law and human rights protection. For sovereignty to be legitimate, it must be in compliance with national and EU constitutional principles, not only securing healthy democratic principles, but also robust checks and balances over the elected government and effective safeguards for the civil liberties and rights of citizens and residents. This lies at the foundation of domestic constitutional systems and constitutes a key pre-condition for Union membership and trust-based European cooperation.

A related concern expressed about the Global Compact on Migration is that it presents migration as ‘something positive’. It is not surprising that some of the governments and interior ministries having expressed their intention *not* to sign the Global Compact have based their electoral agenda on anti-immigration rhetoric. Importantly, the Global Compact calls for a commitment by its signatories “to eliminate all forms of discrimination, including racism, xenophobia and intolerance against migrants and their families”, as well as policies based on facts and evidence that acknowledge and promote the positive effects of immigration.

One would expect that all EU government officials and ministers would comply with these commitments irrespective of signing the Global Compact or not. It seems that we cannot easily take that for granted. For example, the Council of Europe Venice Commission and the OSCE ODIHR underlined in their recent [2018 Opinion on Hungary](#) that the Hungarian government policy has “contributed to a hostile public perception towards all immigrants/foreigners”. This has been also brought to light for instance by a report issued by the [UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance](#) on April 2018. The Report refers to how the rise of

populist nationalism and right-wing extremism has delivered a devastating blow to racial equality, especially in the global North. Non-citizens, including refugees and stateless persons, have been the most vulnerable as a result of the ethno-nationalism that has accompanied this rise... Racist and xenophobic speech and violence against racial and other minorities, and against refugees and migrants in particular, escalated.

The restrictive immigration and border management policies adopted and implemented by the EU member state governments now opposing the Compact have in fact led to well-documented fundamental rights violations and generated significant rule of law as well as wider societal challenges. The Council of Europe’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has documented [ill-treatment](#) inflicted upon third-country nationals by Hungarian authorities during ‘push backs’ towards Serbia.

In Italy, the government's decision to deny the entry of [NGO rescue vessels](#) in order to stop and potentially deter arrivals through the Central Mediterranean route only resulted in an increase in fatalities among those attempting the sea crossing. Meanwhile, anti-immigration sentiments have become more widespread in the country, with [cases of crime and racism](#) against not just migrants but also persons of [African descent](#) and [Jews](#), [Muslims](#) and [Roma](#) becoming ever more common. As for Austria, the UN High Commissioner for Human Rights has recently noted how the priority put on the [swift return of migrants](#) arriving from other EU countries has been pursued at the cost of key international human rights obligations.

Conclusions

All EU member states *must* stick to their international commitments to respect human rights while managing migration. The signature of the Global Compacts does not change that well-established obligation. Their adoption could however actually help these same EU member states to move beyond the current *impasse* in negotiations of measures aimed at making the Union crisis-proof when it comes to future humanitarian crises.

The Global Compact on migration, and its action points intended to establish regular channels for migration into Europe, could facilitate the development of policies that would no longer force people to choose irregular pathways. It is time for European governments and their interior ministries to *normalise* migration in their politics as a fundamental feature of today's world and move towards long-term planned migration policies instead of paranoid, ad hoc, crisis-led and populist responses.

The Global Compact on Migration is a welcome step in that direction. Its signature and adoption, along with the Global Compact on Refugees, would serve European governments well in their interest to find fairer, more legitimate and greater solidarity-based sharing of responsibilities on migration and asylum policies.

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