Rule of Law and Human Mobility in the Age of the Global Compacts

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This is a reprint of articles from the Special Issue published online in the open access journal *Laws* (ISSN 2075-471X) (available at: https://www.mdpi.com/journal/laws/special_issues/global_immigration).

For citation purposes, cite each article independently as indicated on the article page online and as indicated below:

LastName, A.A.; LastName, B.B.; LastName, C.C. Article Title. *Journal Name* **Year**, *Volume Number*, Page Range.

ISBN 978-3-0365-7206-2 (Hbk)
ISBN 978-3-0365-7207-9 (PDF)

Cover image courtesy of Paul Klee

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Preface to "Rule of Law and Human Mobility in the Age of the Global Compacts"

The pros outweigh the cons that glow
from Beckett's bleak reductio -
and who would trade self-knowledge for
a prelapsarian metaphor,
love-play of the ironic conscience
for a prescriptive innocence?

Beyond Howth Head, by Derek Mahon 1970

Almost five years after the two Global Compacts on migration and refugees were adopted, legal scholars are still pondering their effects for migrants, refugees, the sending, transit, and receiving countries, and, above all, their implications for international law. Starting out with the elephant in the room means to circle around this 'unidentifiable' international cooperation framework and to assess its law-like quality. This is especially true for the Global Compact for Safe, Orderly and Regular Migration (GCM), for which many open questions remain: What kind of (legal) sources, what normative values, which aspirations were embedded in its 23 objectives, as well as its guiding principles and common understandings cementing its pieces together? What functions should practitioners and academics ascribe to the Compacts' soft legal quality: can these be—using the conceptual frame developed by Peters (2011)—gap-filling as '*para*-law', soft norms as forerunner to hard law ('*pre*-law') or, finally, a consolidation of regional and bilateral best practices, which pre-empt the emergence of prescriptive rules or else expand and diversify the scope and content of general principles of law or customary norms ('law-*plus*')? This list goes on for both Global Compacts: according to which criteria were the composites assembled, and do they provide international migration and refugee law with a coherent and actionable global institutional architecture?

In this book, which reprints the Special Issue The Rule of Law and Human Mobility in the Age of the Global Compacts: Relativising the Risks and Gains of Soft Normativity?, nine contributions dive into the pandemonium of the Global Compacts buzzing in our analytical universe, and the verses of Derek Mahon come to our minds. 'Self-knowledge', for us legal scholars, reveals our own projections about our legal traditions interacting with different epistemic communities and their visions over the Global Compacts. As a result, their legal characteristics are filtered through the perception of an academic community that clusters around pre-fixed normative conceptions, methodologies, approaches, and legal theories. As in Mahon's metaphor, the 'prescriptive innocence' of this methodological approach trades ironic conscience for familiar epistemic keys to decrypt and describe complexity. By this turn, it renounces to unlock that bulk of rules with a different key, one which is similar to a pen drawing the ink from evolving patterns in public international law.

Likewise, the ambition and intention of this edited volume are to relinquish for a while our pre-determined self-knowledge as legal scholars and envisage new epistemic keys switching from innocent 'relative normativity' (Weil 1983) to interdisciplinary analytical platforms, which could feed substance into the goal of 'making migration work [better] for all' (UN Secretary General 2017).

In line with the vision of a 'comprehensive approach to the Global Compacts', which is guiding this Special Issue, we decided to arrange the articles in a deductive order, starting out with those

pieces of work discussing the Global Compacts on an international legal scale and from a global governance perspective, followed by those articles that analyze the impact of the Compacts on the external dimension of EU migration and asylum policies, with a third set of articles investigating specific issues of national migration law and policy for which the Compacts are setting standards for.

As co-editors of this Special Issue based in Bern, Rome, and Vienna, overcoming pandemic-induced physical distance through a shared vision and a steady common endeavor, we were not alone. Indeed, with the firm resolve to ascribe real meaning to the array of projects, practices, principles, and programs revolving around the Global Compacts, we reached out to authors from the United Kingdom, Bangladesh, the Netherlands, Italy, Switzerland, and Sweden, directly and through an open call for papers, to lend us their ear and offer their enriching insights.

The result is this edited volume that hosts a collection of articles embracing and proposing new epistemic legal keys and cross-comparative perspectives, ranging from those of the European Union, selected EU and UN Member States, the Global South, NGOs, and legal theory. Within this collection, finding its center of gravity in the Global Compact for Migration, multiple insights, loopholes, and long-held beliefs are identified and challenged, with a view to delivering a thought-through map and a guidepost toward new multilateral (legal) solutions. Common to all articles is the contribution to rooting the rule of law, human rights, and due process more firmly into the regimes governing cross-border movement of persons, such that a precondition is laid for the human rights of all the people on the move to be enjoyed and protected, also at borders, during dangerous journeys, in transit and once admitted to a foreign soil.

We, as editors, strongly believe that the approach adopted challenges conventional knowledge on the two Global Compacts and conveys thought-provoking key messages to policy makers, reflective practitioners, and academics alike on the potential of the Global Compacts for rethinking the law and policy underpinning international migration and refugee governance. We do hope this edited volume will be of inspiration for everyone interested in unpacking the Global Compacts and the plethora of salient public international law issues—and beyond—that they raise.

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Editorial

The Rule of Law and Human Mobility in the Age of Global Compacts: Relativizing the Risks and Gains of Soft Normativity?

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Citation: Panizzon, Marion, Daniela Vitiello, and Tamás Molnár. 2022. The Rule of Law and Human Mobility in the Age of Global Compacts: Relativizing the Risks and Gains of Soft Normativity? *Laws* 11: 89. https://doi.org/10.3390/laws11060089

Received: 8 December 2022
Accepted: 9 December 2022
Published: 15 December 2022

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1. Global Compacts: Between Legal Aspirations and Political Achievements

The 2016 New York Declaration,[1] for the first time in United Nations (UN) history, coalesced a diverging palette of regional and a few multilateral efforts before the UN General Assembly. The uniqueness of this global cooperation effort is still felt today, despite the fact that only 155 out of the voting 164 UN Member States endorsed the subsequent Global Compact for Safe, Orderly and Regular Migration (GCM).[2] However, from the legal perspective adopted in this *Special Issue*, the GCM's compilation of standards and practices stopped mid-way before settling on a source of law-like quality or on standard-setting for the national, regional, and multilateral norms as well as on practices that it had identified, collected, and arranged globally. Hence, the predominance of the "soft" and "opaque" in international migration law is nowhere as tangible than in case of the GCM (Chétail 2020, pp. 254, 265).

The GCM commits (at least) 155 UN Member States to align to its 23 objectives and 10 guiding principles, the majority of which focus on the proclaimed aspiration to turn dangerous migratory routes and unsafe journeys into regular pathways by "strengthening international cooperation" for effective migration management (objective 23 of the GCM). Though this call for cooperation does not challenge the traditional premise of the international ius migrandi, since the mainstay of migration trajectories remains governed by the sovereign right of states to decide over whom to admit, the GCM acts as a launchpad for states to experiment with creative solutions to other phases throughout the "migration cycle" (paragraph 16 of the GCM). Since many of these inroads to sovereignty start out, understandably, as experiments, their legal formats resemble nonbinding partnerships, common dialogues, joint guidelines, action plans, and pilot projects. Consequently, the diverse carve-outs that states hold each other actionable for remain "blurry" in comparison to the clear and precise language of binding obligations (Vitiello 2022 in this *Special Issue*). In addition, the GCM's boundaries towards the formal sources of law-making remain "fuzzy", which is one of the reason the GCM has been labelled a "concept without a settled meaning in international law".[3] In consequence, it makes sense for legal scholars to contextualize the law-making of the GCM within concepts such as soft law, governance, and

1 UN General Assembly, New York Declaration for Refugees and Migrants. Resolution adopted by the General Assembly on 19 September 2016, UNGA Res 71/1 (2016) UN Doc A/RES/71/1.

2 UN General Assembly, Global Compact for Safe, Orderly and Regular Migration. Resolution adopted by the General Assembly on 19 December 2018, UNGA Res 73/195 (2018) UN Doc A/RES/73/195.

3 Statement by the Representative of the Philippines, UN General Assembly, Plenary, 73rd session, 60th and 61st meetings, 19 December 2018, General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants, UN Meetings and Press Coverage. Available online: https://www.un.org/press/en/2018/ga12113.doc.htm (accessed on 9 December 2022).

treaty interpretation, which all are categories of legal inquiry uniting the authors of this *Special Issue*.

If this research has been premised on the paradigm of the "quasi-legal system" which is often associated with soft law as the GCM embodies, there is evidence that the GCM nonetheless encourages states to achieve a certain coherence towards other fields of law (Guild et al. 2019). In result, states tread a thin line between politically benefitting from joining this cooperation framework while, at the same time, being called upon to normatively affirm the actions, to which they committed to politically, through adopting implementing national legislation (Molnár 2021). At the same time, the voluntary nature of reporting before the GCM review bodies can entice states to "cherry-pick" over which action out of the 23 objectives they wish to report on and over which ones to abstain, as Farahat and Bast (2022) point out in a recent collection of articles on the GCM. Hence, in come the 10 guiding principles of the GCM, some of which promote coherence while others exacerbate the risk of fragmentation. In particular, the GCM's third guiding principle, national sovereignty, stands diametrically opposed to some of the others, including international cooperation and the whole-of-government/society approach, and thus undermines the vision of the "first intergovernmental agreement prepared under the auspices of the United Nations [. . .] to cover all dimensions of international migration in a holistic and comprehensive manner"—borrowing the words of the Office of the UN High Commissioner for Human Rights.[4]

Instead of remaining entrapped in the closed-circuit of "sovereignty" being pitted against "international cooperation", this *Special Issue* selects the rule of law and due process as two out of the 10 guiding principles. Our choice is justified by the fact that these figure as the only two principles, which the GCM drafters extracted from national legal systems (also being general principles of international law), and which carry a normative value that can be judicially reviewed. In this *Special Issue*, all eight contributions address these two general principles of law, either because they "consolidate practices", in view of creating an inventory, or because, more ambitiously, due process and rule of law are co-responsible for "expanding" national, local, bilateral, regional, and multilateral norms (Chétail 2020).

Already within the legal aspiration to "make migration work for all"[5] lies an assumption that global cooperation should not work in silos—as Aleinikoff has suggested (Aleinikoff 2007, p. 267). The guiding principles connect states to their obligations under international law, and thus contribute to achieve "comprehensive" commitments when states are called to implement the GCM in a manner that is "consistent with [their] rights and obligations under international law" and to attain "policy coherence".[6]

At the same time, as the 2015 Global Commission for International Migration (GCIM) Report (p. 7) flagged, the narrative of "comprehensiveness" risks producing outcomes which are worlds apart from being desirable for migrants and responsive to fulfilling their human rights.[7] Only if comprehensiveness means acknowledging the complexity of each migrant's situation can human rights be sufficiently guaranteed. Hence, extensive recourse to border procedures, including mass screening at the borders, often coupled with comprehensive data mining on migrant routes and destinations, occurring at the expense of due process rights and access to justice, are several such contentious modes. This explains why a more comprehensive and integrated approach to human mobility should be informed by due process and the rule of law, especially if one goal of global cooperation is to resonate with a human-rights-driven approach (see Section 1.1, below).

[4] Office of the UN High Commissioner for Human Rights, *Global Compact for Safe, Orderly and Regular Migration (GCM)*. Available online: https://www.ohchr.org/en/migration/global-compact-safe-orderly-and-regular-migration-gcm (accessed on 9 December 2022).

[5] Ibid.

[6] Ibid., para 41: "emphasize that the Global Compact is to be implemented in a manner that is consistent with our rights and obligations under international law".

[7] Global Commission on International Migration (GCIM), "Migration in an Inter- connected World: New Directions for Action", Report 2015. Available online: https://www.iom.int/global-commission-international-migration (accessed on 13 December 2022).

In addition, the GCM upholds a rigorous dichotomous approach to the migration–refugee nexus, as also confirmed by the parallel existence of the Global Compact on Refugees (GCR).[8] As a result, the legal aspiration of revitalizing global partnerships for the sustainable management of cross-border human mobility, a programmatic element in objective 23 of the GCM and already found in the 2016 New York Declaration,[9] falls short of enabling effective interconnections between the respective commitments, actions, and guiding principles of the two Global Compacts. The result is a "kaleidoscopic" melting pot of action plans, commitments, and objectives (Chétail 2020). Yet, some general principles are steeped so deeply in the narrative behind the Global Compacts that they are more likely to penetrate domestic implementation than others, despite the Compacts' unascertained acceptance by certain national policymakers. Such basic tenets are the rule of law, due process, and good governance, which assume a pivotal role among these principles because they stand out in their "legal-like" quality from the other eight principles (Cholewinski 2020, p. 311). In particular because of the GCM's soft law frame, this triad transmits a cornerstone of a (hard) legal agenda by encapsulating the noyeau dûr of the right to an effective remedy as a limitation against arbitrary and discriminatory action by public authorities. On the one hand, getting rid of them through this cherry-picking approach (Farahat and Bast 2022), which characterized the first International Migration Review Forum (IMRF)'s monitoring of states' practices, would mean renouncing to the very same legal-like aspirations leading to this first, comprehensive framework on international migration at the global level. On the other hand, the ten "guiding principles" could then stand as the bright-line rule to be complied with by all UN Member States, which guarantee against states watering down their human rights obligations when implementing the Global Compact on Migration. Among those, the duo of due process and the rule of law potentially could sharpen the contours of an otherwise invisible judiciary and of judicial review.[10] The close-to absent role of the judiciary, is just one of the hicks in the GCM's 360-degree vision of comprehensiveness. Another is the dual sides of the concept of "global": firstly "global" implies that "comprehensive" complies with a whole-of-society approach, in the sense of involving all stakeholders, especially in the Global North, for actions, policies, and commitments that may render human mobility safe, regular, orderly, and dignified (Gombeer et al. 2019; Baxi 2016). Secondly, "global" refers to UN-leadership in managing international migrations. Yet, both notions of "global" derive from an "institutions"-driven orientation, which covers up a severe lacunae within comprehensiveness, which is the absence of concretizing universally binding norms. Whereas the GCM is imagined and narrated as "comprehensive" (Pécoud 2021), the vague quality of formulation when it comes to its alignment to UN conventions and public international law, accounts for its close-to absent universality. In result, a relativist ontology whitewashes the GCM just as its "global" aspiration pays only a lip service to the complexity of levels and actors involved in contemporary migration governance, from the local to the multilateral levels.

In this *Special Issue*, international and EU legal scholars and practitioners have filtered out key doctrinal, judicial, institutional, and political challenges which shape the ongoing implementation phases of both Global Compacts, with a specific focus on the GCM. Whereas some articles focus on systemic flaws and potential opportunities cutting across both Global Compacts, other authors focus in on how to legally analyse and contextualize a specific GCM objective. A third set of articles have opted for a comparative legal analysis of the Global Compacts by identifying gaps and loopholes, or, inversely, scoping for benchmarks and minimum standards evolving. Cutting across all articles is

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[8] UN General Assembly, Global Compact on Refugees. Resolution adopted by the General Assembly on 17 December 2018, UNGA Res 73/151 (2018) UN Doc A/RES/73/151.

[9] UN General Assembly, 'In safety and dignity: addressing large movements of refugees and migrants,' UN Doc A/70/59, 21 April 2016.

[10] Committee on Migrant Workers Discusses Draft General Comment on the Convergence of the Convention and the Global Compact for Safe, Orderly and Regular Migration, 28 September 2022: https://www.ohchr.org/en/press-releases/2022/09/committee-migrant-workers-discusses-draft-general-comment-convergence (accessed on 9 December 2022).

a critical appraisal of the imprimatur provided by the global commitments to firming up innovative cooperation strategies and migration governance modes in national and regional legal frameworks, alongside a scholarly analysis of the interdependence and separation of migrant and refugee statuses, as affected and mediated by the triangular relationship between host, transit, and sending countries (see objective 2 of the GCM).

1.1. The Interplay between Human Rights Anchorage and Good Governance in the Global Compacts

A particular focus of scholars and practitioners alike has been the human rights anchorage in the Global Compacts (Gammeltoft-Hansen et al. 2017; Guild 2018; Hilpold 2020). Whereas the duty to respect, protect, and fulfil the human rights of all migrants figures as a guiding principle of the GCM, which self-proclaims being grounded in the 1948 Universal Declaration of Human Rights (as well as the nine core UN conventions of international human rights law (IHRL)[11], this human rights anchorage lies at the heart of the debate about the repercussions that soft law status has on individual migrants and their families. At a second glance, however, the alignment to human rights and international legal obligations (para. 42 of the GCM) fails to motivate a type of legislative activity that might serve to supersede the asymmetric relation between national sovereignty and human mobility across international borders.

At the same time, the principle of good governance—forming a stronghold of the GCR, defended in earlier drafts of the GCM—appears quite diluted in the GCM's final text (Pécoud 2021), where it figures as both a guiding principle, and under objectives 2 and 23 of the GCM, while failing to appear in the first IMRF Progress Declaration, adopted in May 2022.[12] Nonetheless, good governance commits states to respect a degree of procedural legitimacy over decisions to admit and orders to expel migrants and their families (Höflinger 2020; Cholewinski 2020). In this sense, the due process/rule of law guarantees of paragraph 13 of the GCM open the door for judicial review, which in turn associates the GCM with a legally much deeper alignment among the different levels of international migration law than what mere "policy coherence" under objective 23 of the GCM implies. Yet, if objective 23 aspires to an interpretation "consistent" with bilateral and multilateral treaties, the soft law quality of the Compact renders it uncertain whether a "convergence and complementarity" can also be requested from the GCM when read in relation to the nine core UN human rights conventions, the WTO/GATS agreements, the UN Framework Convention for Climate Chance, and the UN Convention to Combat Desertification can be reached, as Desmond (2022) developed for a *Special Issue* on the GCM. How arts. 31 and 32 of the Vienna Convention on the Law of Treaties, VCLT apply to a soft law framework is one issue is one question (Yildiz in this *Special Issue*), another relates to how the respective membership within a given convention and the GCM overlap or fail to match (art. 31:2(a) of the VCLT; see also Ammann 2019; Desmond 2020).

The GCR, in turn, raises further human rights issues, especially in light of the potential role of the surrogacy principle in expanding the definition of refugee (Burson and Cantor 2016) and the Compact's "States plus" approach to multilateralism (Triggs and Wall 2020), mounting expectations for a more equitable and predictable system of burden and responsibility sharing for the world's refugees in the aftermath of the 2019 Global Refugee Forum.

A starting point for concretizing the GCM's 23 objectives might be departing from the guiding principles, some of which embody general principles of law. For instance, both Global Compacts acknowledge and uphold the principle of non-discrimination and call for "child-, gender-, age-, linguistically, culturally, faith and health-responsive policies" (Guild et al. 2019).

[11] Office of the UN High Commissioner for Human Rights, The Core International Human Rights Instruments and their Monitoring Bodies. Available online: https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies (accessed on 9 December 2022.

[12] Progress Declaration of the International Migration Review Forum. Resolution adopted by the General Assembly on 7 June 2022, UNGA Res 76/266 (2022) UN Doc A/RES/76/266.

In addition, the GCM is construed on a strong stand-still premise, featuring the principle of non-retrogression as a benchmark for future developments.

Nonetheless, this terminology betrays the full endorsement of conservative solutions, and has rather exacerbated than mitigated existing antinomies and inconsistencies in the normative structure of the Global Compacts (see, e.g., Panizzon and Daniela 2019), implying that some people on the move are still "left behind", either because of their legal status or the route chosen (Pijnenburg and Rijken 2021). By the same token, neither the quest for safe, orderly, and regular migration via global partnerships (in objective 23 GCM), nor that for more equitable and predictable systems of refugee responsibility sharing (under the GCR), seem to affect the existing balance between human mobility and state sovereignty (Guild 2018).

In this sense, as Guild et al. (2019) critically observed, the GCM is propagating a para-human rights vernacular of "-sensitive, -responsive, -relevant policies"—labeled in paragraph 13 of the GCM as "principles"—that, for the most part, fall short in advancing respect, protection, and the fulfilment of human rights obligations. Overcoming these flaws would call for alternative and creative solutions, which might lie (inter alia) in reading the GCM and GCR "together" to improve international protection—as Garlick and Inder (2021) suggest.

1.2. A Constructive Role for a "Principled Approach"?

Already in 2015, the Global Commission for International Migration suggested that "principled" approaches to laws, norms, and human rights should be taken to ensure the efficiency and predictability of the law's application to migrants, in particular because migrants are exposed to norms and laws from such varied and different sources: regional, national, and bilateral (GCIM Report 2015, p. 53). From this perspective, the adoption of a principled approach in the GCM cannot be underestimated. Although the "guiding principles" enshrined in the GCM represent a platform of mutual soft law commitments, which cannot be equated to the "general principles of law",[13] in a field as divisive as international migration law (IML) the mere fact of listing them at the outset of a global cooperation framework seems to already be an important achievement. Indeed, these principles capture a legal essence and, thus, they may "constitute both the backbone of the body of law [concerned] and the potent cement that binds together the various and often disparate cogs and wheels of the normative framework" (Cassese 2005).

Furthermore, the GCM adopts "cross-cutting and interconnected" principles (para. 13 of the GCM), which pivot around two "axes": "the first matching national sovereignty and good global governance and the second running along the *continuum* between human-centricity and the rule of law" (Vitiello 2022, p. 19, in this *Special Issue*). These axes—the centrality of which has been acknowledged in the 2022 IMRF Progress Declaration—cut across the migration-specific topics under the heading "Objectives" (as listed in para. 16 of the GCM) and the restatement of well-established principles of international law (such as the best interests of the child and the principle of non-refoulement, which are key to the GCR as well). Yet, the potential implications which this "cross-cutting and interconnected" approach might have on judicial review at the implementation level remain unchartered.

One of the explanations is linked to the rawness of the relation established among the axes. The principles guiding the implementation of the 23 objectives and the actions subordinated to these are not "logically differentiated" (Elias and Lim 1997), in the sense that states failed to reach a political consensus on a relative ranking among these, for example, by attributing pre-eminence to the rule of law (Panizzon 2022). During the IMRF 2022, Ecuador—speaking on behalf of 28 "champion countries"[14]—responded to the

[13] See Art. 38(1)(c) of the Statute of the International Court of Justice.

[14] GCM Champion countries are: Azerbaijan, Bangladesh, Cambodia, Canada, Chad, Colombia, Costa Rica, Ecuador, Egypt, El Salvador, Ethiopia, Ghana, Guinea-Bissau, Honduras, Indonesia, Iraq, Kenya, Luxembourg, Malawi, Mali, Mexico, Morocco, Nepal, Niger, Nigeria, Philippines, Portugal, Senegal, and Thailand.

UN Secretary General's biennial report[15] by positioning the GCM in the line of UN-led international cooperation tools:

> "[w]hen migration is safe, orderly, and regular, it represents a sustainable development opportunity. We have the 'what' in the 2030 Agenda. We have the 'how' in the GCM. And we must make sure that the IMRF constitutes the 'where' for the benefit of migrants and their communities of origin, transit, and destination".[16]

This plea underscores the urgency to come up with stronger language with which to identify priorities and give meaning to migration-related goals within the remit of both indicator 10.7.2 of the UN 2030 Agenda for Sustainable Development[17] and the GCM's 23 objectives. Nevertheless, the close-to-absent numerical targets in the GCM deflate any appearance of precision from the GCM's plain meaning. Clarity of formulation is—unlike in the GCM—more present in the 2030 Agenda, and thus in SDG 10.7 on migration (Denaro and Giuffré 2022; Desmond 2020). In addition, the choice of formulation in "making migration work for all", a term chosen by the UN Secretary General during the drafting of the GCM,[18] is less advanced in terms of equity and justice than "to leave no one behind" of the Agenda 2030. For that reason, the champion countries for the IMRF 2022 were adamant to call for a tighter amalgam between the GCM and SDG 10.7, under the assumption that a closer convergence between the two UN-led cooperation frameworks could secure the "dignified" and "responsible" migration policies that were missing out from the GCM final text. The different ambiguities featured in the Global Compacts' principled, yet permeable, approach to migration and refugee issues is explored in this *Special Issue*, inter alia, by using the EU legal order as a comparator and a testbed for implementation.

1.3. Moving from Guiding Principles to Implementation: Anything but a "Soft Landing"?

Legal scholars have commonly attributed a "gap-filling" mission to the soft law embodied in the Global Compacts (Peters 2018; Allinson and Croce 2021; Petrig 2021). Their observations depart from the hypothesis that the soft law in the GCM deploys a legal effect which, while not identical to the bindings of hard law (Hilpold 2020), nonetheless offers a "prescriptiveness" that elevates soft law to a normative quality beyond producing factual or political effects (Peters 2011). This idea has been shared by international relations scholars, who link the gap-filling idea attributed to the soft law in the GCM with its ambition to incentivize non-state actors to contribute to law and policymaking—an effort which could not be achieved through recourse to formal lawmaking (Appleby 2020; Höflinger 2020; van Riemsdijk et al. 2020).

Indeed, non-legally binding instruments enable states to rapidly clarify their positions and expectations on heated topics while avoiding the time-consuming process of concluding a treaty and undergoing domestic ratification (Bufalini 2019), two aspects which may make a difference in those fields of international cooperation that are most affected by national sovereignty constraints. In addition, there is another structural feature of soft law which should be weighed against its possible disadvantages. Soft law may perform—in the "penumbra of law" (Peters 2011)—important social functions, including the "whole-of-government" approach, and thus pave the way for inclusive multistakeholder involvement during negotiations and in the monitoring as well as reviewing of national implementation projects. Yet, the "corrective" potential of soft law by gap-filling or re-interpretation through e.g., nonstate actors reaches a limit, once the principles of non-retrogression, due process and rule of law deploy their full meaning. Just as "open-ended" negotiating outcomes have

[15] UN, "Global Compact on Safe, Orderly and Regular Migration", Report by the UN-Secretary General, UN Doc. A/76/647, 21 December 2021, available online https://migrationnetwork.un.org/resources/secretary-general-report (accessed on 13 December 2022).

[16] Statement of the GCM Champion countries at the Briefing on the Report of the Secretary-General on the implementation of the GCM, 16 February 2022: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/ecuador_on_behalf_of_the_champion_countries.pdf (accessed on 9 December 2022).

[17] Transforming our world: the 2030 Agenda for Sustainable Development. Resolution adopted by the General Assembly on 25 September 2015, UNGA Res 70/1 (2015) UN Doc A/RES/70/1.

[18] UN, "Making Migration Work for All", Report of the Secretary-General, UN Doc. A/72/643, 12 December 2017, available online https://refugeesmigrants.un.org/SGReport (accessed on 13 December 2022).

added complexity, the "degrees of normativity" (Peters 2011) seems in full display in the GCM, rendering its endorsement and implementation challenging for those states, which see their democratic ratification process (Petrig 2021) challenged by soft law's relative normativity (Weil 1983).

Concomitantly, a format such as a spectrum of "nascent obligations" (Elias and Lim 1997, p. 7) lacks—by design—the hierarchical structure and procedural legitimacy associated with formal sources of international law. Within the GCM, this architectural void explains the lingering divide between the axis of "sovereignty" and "international cooperation", as well as "whole-of-society/governance". A solution might be to resort to the two good governance guideposts of the rule of law and due process informing the GCM, which are mirrored in the "axiology" sketched out, if vaguely, by these "guiding principles" Hilpold (2020). Yet, the guidance to be expected in the principles is only half-way developed: it is difficult to detect clear priorities attributed to social or normative values, apart from the inter-relations shaped around IML and IHRL or IML and international environmental law (Yildiz in this *Special Issue*). Yet, even these inter-relations are not unidirectional and fully articulated, which means that there are different kinds of normative inferences determined by one and the same objective.

These stances raise the issue of balancing the risks and gains of soft normativity as an elective means to reach the intended goal of "making migration work for all" (see, e.g., Gammeltoft-Hansen et al. 2017; Gavouneli 2019).[19] The prime element to assess is, therefore, the relation between the soft commitments in the Compacts and the corresponding hard law obligations under international law. In particular, for cooperation frameworks such as the Global Compacts, which ingest both customary human rights rules (see, e.g., the principle of non-refoulement and the prohibition of torture as well as other forms of ill-treatment) and conventional IHRL, while incorporating general principles of law (such as the rule of law), the soft/hard law synchronicity appears to be key to delivering global outcomes in terms of enhancing good governance. Unlike in the fields of corporate social responsibility (Choudhury 2018) or climate change and environmental law (Pickering et al. 2019; Eckersley 2004)—where it has been suggested that a non-dichotomous concept of soft law could produce effective governance of sustainable development—if human mobility has to be taken seriously, as in the GCM, then decoupling soft law from its specular hard legal obligations may entail a serious risk of retrogression (e.g., Baxi 2016).

Can we derive from these premises that states' executive powers obtain a carte blanche to opt out of a commitment or to choose at their own discretion which type of normative inference to implement (Allinson and Croce 2021)? Relatedly, what could be the implications for democratic oversight and the role of domestic constituencies (Petrig 2021)? Additionally, what types of consequences can be foreseen—if any—for the progressive development of IML in the sense of art. 1(1) of the Statute of the UN International Law Commission (ILC) (Chétail 2019)? How does "compacting"—defined as the exercise of mapping practices and programs, in order to level out the playing field for stakeholders' inclusion in decision-making processes (van Riemsdijk and Panizzon 2022)—impact protection standards? Is the informal element implied in the "compacting" exercise—i.e., the establishment of soft partnerships and arrangements at the global and regional levels—capable of "firming up" obligations at the implementing level (see mutatis mutandis, Merry 2015)? Or is their legal effect altogether a different, alternative one (Hilpold 2020)?

Additionally, further zooming in, what has been (and could be) the contribution of a key regional actor—the European Union—to a systemic and contextual interpretation of the Global Compacts, inspired by art. 31(1) of the 1969 Vienna Convention on the Law of Treaties read in conjunction with art. 1(1) of the ILC Statute (Molnár 2020)? Could it stretch

[19] This ambition is embedded, for instance, in the "soft landing" that the 'EU MATCH' programme intends to deliver to Senegalese and Nigerian talents recruited for internships in Europe and upon their returns. For further info, see https://eea.iom.int/sites/g/files/tmzbdl666/files/documents/MATCH%20report%20-Looking%20at%20Labour%20Mobility%20Initiatives%20from%20the%20Private%20Sector%20Perspectives%20.pdf (accessed on 9 December 2022).

the asymmetry between the two axes—of sovereignty and human centricity—around which soft commitments are built? Or could a formal incorporation of the Global Compacts within the EU legal order underscore the prominent role of fundamental rights and the rule of law characterizing the process of European integration?

2. A Special Issue of *Laws*, Offering Fresh Insights into the Classics

Against the above backdrop, this *Special Issue* for 'Laws' puts under scrutiny the relations arising in the forcefield of the two Global Compacts between the rule of law and the governance of human mobility. In a collection of eight articles, this relationship is investigated from the classical standpoint of identifying the legal effects which such international soft law instruments might produce, but adding a dynamic investigation to the classics by adopting a multilayered approach to soft normativity. The latter draws on the prescriptive quality of soft law as a catalyst for generating some autonomous legal effects that move beyond factual or political impacts to evaluate the governance quality of the GCM and GCR for human mobility and its relationship to the rule of law.

By focusing on the transformative power of the interaction itself, much more than on the hegemonic or hierarchical relations between the sources that interact, such a relational approach to regime interaction raises several questions.

First, which are the gaps that the GCM failed to close, and what rights were white-washed in the final text, or curtailed? Examples of "firewalling" access to essential services, a patchy access to justice in border procedures, and the questionable detention of vulnerable persons are just a few such erasures.

Second and inversely, what are the achievements of the GCM in terms of gap-filling, in the sense of raising awareness of the legal challenges facing migrants that, so far, no international cooperation framework had addressed and which guide, for example, the EU's external dimension of migration law?

Third, what is the role of due process and the rule of law in approximating the acquis of the GCM with the nine UN core human rights conventions while sketching an accessible and adequate judicial response for migrants?

Tackling these questions can contribute to a better understanding of how (national and regional) legal systems could "embed" the global soft law instruments normatively. In addition, it would advance knowledge on how the predominantly political nature of the commitments in the Global Compacts excludes or triggers legally binding effects out of the normative inferences that they produce.

The above questions have guided the authors of the pieces in this *Special Issue*, which are summarized hereunder. A first strand of articles employs the EU legal order as a "principled" comparator to test the "relative normativity" of the Compacts (Section 2.1), while a second line of investigation relates to EU migration, asylum, and border policies as a testbed for their implementation (Section 2.2). The cross-fertilization between regional (supranational) law and practice is then explored prospectively, considering the first IMRF, by a third tranche of contributions dealing with selected issues concerning the ownership and implementation of the Global Compacts (Section 2.3). Finally, the challenges, gaps, and inconsistencies in national migration and asylum laws, as well as how they can they be fixed, with reference to the Global Compacts is the thread accounting for the final contributions (Section 2.4).

2.1. The Guiding Principles of the Global Compacts: Proxies for Legal Obligations or Transformative Agendas?

Guiding principles serve to create a common narrative: the same holds true for those of the GCM. Guild et al. (2019) posit that the Global Compacts incorporate guiding principles (see the GCR) and crosscutting as well as interdependent legally binding obligations (see the GCM), at the forefront being the duty to respect, protect, and fulfil human rights. This article discusses how the GCM and GCR, despite being non-legally binding, can constitute an interpretative tool that prompts adherence to three legal principles: the rule of law and due process,

non-retrogression from IHRL, and the principle of non-discrimination (Molnár 2020). Whereas Guild et al. (2022 in this *Special Issue*) argue that the EU asylum acquis—as interpreted by the Court of Justice of the EU (CJEU)—cannot disregard the principle of non-retrogression as enshrined in the Global Compacts when interpreting the EU Charter of Fundamental Rights, they lend some support to the idea of the "relative normativity" (Weil 1983) of the Compacts. In their view, non-retrogression counterweighs the traditional concept of state sovereignty in the production of normative inferences out of "non-consensual legal phenomena"—as described in the seminal analysis by Elias and Lim (1997).

Set against the background of the CJEU jurisprudence emerging in response to the "rule of law crisis" in some EU Member States, the contribution by Favi (2022 in this *Special Issue*) investigates the CJEU's case law through the lens of the Global Compacts. Her analysis of the CJEU concludes that the rule of law can enhance the protection of third-country nationals, at least within the EU, and that by the judiciary's activity the EU's compliance with some of the commitments laid down in the Global Compacts has increased, regardless of the position taken by some individual, recalcitrant EU Member States with respect to these universal instruments. In particular, several hallmark CJEU judgments handed down in preliminary ruling procedures are compared to EU infringement procedure cases as to their relative efficacy, seen from the perspective of upholding the rule of law and access to justice in certain EU Member States infamous for their border injustice.

2.2. The Global Compacts and Their Impact on EU Asylum and Border Policies: Puzzling Realities

In this *Special Issue*, a specific focus is devoted to the EU, considering the prominent role played by its cooperative models and highly integrated legal architecture in shaping concepts and governance mechanisms envisaged by the Global Compacts.

Cornelisse and Reneman (2022 in this *Special Issue*) analyze the (potential) role of the Global Compacts in the development of EU law concerning asylum seekers who arrive at the EU's external borders. Despite widespread violations of their fundamental rights at the EU's external borders, the new EU Pact on Migration and Asylum[20] proposes integrated border procedures as important instruments with which to "deal with mixed flows" and make the Common European Asylum System (CEAS) under art. 78 of the TFEU work. The authors underscore the fact that the EU legislature has not substantiated the claim that border procedures will contribute to achieving the aims of the CEAS, such as the creation of a uniform, fair, and efficient asylum procedure, preventing abuses. Neither does the Pact provide a solution for pushbacks and the systematic use of immigration detention, nor does it guarantee the quality of the asylum procedure. The article thus concludes that these new legislative proposals ignore the standards of the Global Compacts, and asks the following question: What role can the Global Compacts still play in the ongoing negotiations over the legislative proposals present under the EU Pact?

A second article in this strand by Vitiello (in this *Special Issue*) takes the European policy as well as practice of border "securitisation" and the governance of large movements of refugees and migrants at the EU level as a case study with which to investigate the interplay between the quest for safe, orderly, and regular migration (objective 23 of the GCM) and states' commitments to managing borders in an integrated and coordinated manner (objective 11 of the GCM). The key conceptual framework around which the analysis revolves is the dyad of "comprehensiveness-fragmentation", which frames the entire structure of the GCM and inspires its implementing actions. With a view to contributing to the debate stimulated by the first IMRF, this article elucidates the conditions under which the ambivalent interaction between the legal aspiration to regularize migration and the reality of border controls may lead to the enhancement—or (vice versa) to a further dilution—of the legal entitlements of migrants and refugees.

[20] European Commission, New Pact on Migration and Asylum, COM (2020) 609 final, 23 September 2020. Available (along with the legislative proposals presented thereunder): https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en (accessed on 2 December 2022).

2.3. Implementation and Review of the Global Compacts' Commitments: Selected Issues

Prospectively, in light of the recently held first IMRF, a pressing challenge is to ensure the effective implementation and oversight of the undertaken obligations in the Global Compacts. Unlike for the UN Agenda 2030 for Sustainable Development, where the attainment of the 17 SDGs is timed by 2030 and tracked by numerical indicators and targets, both benchmarks are absent from the GCM. Two articles of this *Special Issue* deal with the issue of monitoring the implementation of the GCM's objectives, from different perspectives.

Yildiz (2022 in this *Special Issue*) stresses that the international community failed to converge on a mechanism for benchmarking, just as the GCM's monitoring and review mechanisms fail to build sufficient peer pressure to nudge states towards facilitating human mobility triggered by disasters and climate change. A review of relevant other international legal sources, including the UN Framework Convention for Climate Chance (and the UN Convention to Combat Desertification, as well as the work of different UN Special Rapporteurs and the Human Rights Council), permits the determination of which gaps in the GCR/GCM frameworks persist. The author points to several gaps, contributing to a better understanding of the limited translation into action of states' commitments related to human mobility induced by disasters and climate change.

Another illustrative case in point for a gap in the GCM concerns immigration-detention-related commitments, representing a controversial—and very intrusive—immigration law enforcement measure. As Majcher (2022 in this *Special Issue*) argues, states have committed to using administrative detention in immigration matters only as a measure of last resort and to work towards alternatives in light of objective 13 of the GCM, drawing from eight sets of actions to attain this commitment. She uses immigration detention as a case study to suggest that the synergies between the GCM's commitments and existing IHRL regimes can boost the mechanisms for monitoring states' implementation. For instance, given the similarities between the IMRF and the Universal Periodic Review[21] under the auspices of the UN Human Rights Council, the latter could inspire legal and policy innovations working to improve the GCM's review and oversight mechanisms. She concludes that, through such avenues, objective 13 of the GCM could be used to also strengthen, more generally, its guiding principles, specifically the rule of law in global migration governance.

2.4. National and Comparative Perspectives of Implementing the Global Compacts

One paradigmatic shift in international migration policy has been ascribed to the GCM's comprehensive, "360-degree vision and its impact on host countries' migrant welfare policies. When operationalized at the national level through the "whole-of-society/government approaches", the GCM—and this is a primer in international migration policy—commits host states to subject their entire integration and inclusion policies to scrutiny by the IMRF and the International Organization for Migration (IOM). Hence, from access to essential services, the recognition of foreign credentials, remittances transfers, to diaspora relations, every covert or overt policies thus becomes subject of reviewing by the IMRF and is in full international spotlight. Through this invasive inroad to sovereignty, also the external dimension of migration policies is inextricably tied up with domestic law and policy, and by this token (finally) can be adjudicated before courts. The final two articles hosted by this *Special Issue* inquire into these different domestic ramifications, including by investigating selected instances of "unconventional" implementation of the GCR at the national level.

The article by Vankova (2022 in this *Special Issue*) explores the quest for safe pathways from the perspective of the collective responsibility of the international community for offering durable solutions to refugees—as expressly recognized by the 2016 New York Declaration and the GCR—and as an opportunity for refugee access to labor opportunities—as envisaged by the GCM. The analysis focuses on how these soft law commitments

[21] United Nations Human Rights Council, Universal Periodic Review. Available online: https://www.ohchr.org/en/hr-bodies/upr/upr-main (accessed on 9 December 2022).

contained in the Global Compacts can be embedded into national legal systems by exploring the legal and political feasibility of establishing such complementary legal pathways in two selected EU Member States: Germany and Sweden. Drawing (inter alia) on semi-structured interviews with stakeholders at the national level in Germany and Sweden, this article contends that politicians' and policymakers' traditional thinking of migration and asylum as separate domains remains the key challenge to opening work-based complementary pathways for refugees. It concludes by emphasizing that the launch of the Global Task Force and the interest in complementary pathways shown by international organizations strengthen the political feasibility of work-based complementary pathways, not least because public awareness increases jointly with more expertise becoming available.

Alexander and Singh (2022 in this *Special Issue*) analyze the impact of the GCR on Indian statutory and judicial practice over access to asylum for Afghan refugees. They caution against over-rating the benefits of the Global Compacts and of elevating the virtues of soft law therein. In the case of India, non-refoulement and access to asylum as well as to essential services for migrants and refugees only exist by virtue of India's High Courts. Without court-adjudicated acquis, migrants' and refugees' access to justice would be even more fragmented, if not factitious, underlying once more the key value of due process and the rule of law as guiding principles of the GCM. Similarly, the intake of the GCR by the Indian government has exacerbated an upfront confrontation of what happens when no domestic legislation is in place to absorb the objectives and political commitments assumed at the international level.

3. Charting the Way Ahead for the Global Compacts: What Role for the Rule of Law in Global Migration Governance?

The Global Compacts for Migration and on Refugees promise more than a compilation (and, according to Chétail 2020, a consolidation) of the existing international legal standards governing migration and refugees, even if the levels of ambition, as the IMRF 2022 revealed, differ from one group of states to others. Whereas some insist on keeping up with the soft law quality of the GCM, including Australia, stating that "the activities listed under . . . the Compact are merely illustrative of possible State practice",[22] others, notably in the Global South,[23] expect a higher level of ambition from the UN community, demanding to see more decisiveness over the direction that the commitments are taking, including a possible agreement over the stewardship of the IOM, but also expanding on certain previously undetected or underestimated thematic areas, including gender-based violence, bilateral labor mobility agreements, one-stop shops, harmonizing criteria for skills testing and recognition, and other integration measures. A third group of countries, including Egypt, Spain, and another 18 UN Member States,[24] as well as Ecuador as the champion for the 29 champion countries of the IMRF 2022, define progress as reaching coherence with other international norms, including, as discussed in this *Special Issue*, the UN Framework Convention for Climate Chance, the UN Agenda 2030, and the International Convention on Migrant Workers, over issues of validating climate-induced displacement, but also reaching

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[22] Statement by H.E. Dr Fiona Webster, Chargé d'affaires Australian Mission to the United Nations United Nations Briefing on the Global Compact for Migration: Report of the Secretary General 16 February 2022. Available online: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/australia.pdf (accessed on 9 December 2022).

[23] See Remarks from the Launch of the UN Secretary General's Report, 16 February 2022. Available online: https://migrationnetwork.un.org/sg-report-2022 (accessed on 9 Deceember 2022).

[24] Statement of the GCM Champion countries at the Briefing on the Report of the Secretary-General on the implementation of the Global Compact for Safe, Orderly and Regular Migration, 16 February 2022. Available online: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/ecuador_on_behalf_of_the_champion_countries.pdf (accessed on 9 December 2022): "When migration is safe, orderly, and regular, it represents a sustainable development opportunity. We have the 'what' in the 2030 Agenda. We have the 'how' in the GCM".

consensus over fair and ethical migrant labor recruitment, including for persons in need of protection, and drafting standards over sustainable returns.[25]

When the UN Secretary General in his Second Report on the GCM (21 December 2021) described the "[GCM]'s value as a guide and touchstone", the ambition had lowered from the original GCM acting as a tramplin for reaching a "multilateral" treaties, which the 2017 Sutherland Report ("making migration work for all") had suggested for a future GCM.

The 2022 IMRF Progress Declaration—which monitors the implementation of the GCM's first four years—has shed more light on where the under-developed concepts of the rule of law and due process might lie, hindering the overall improvement of the situation and well-being of migrants, "regardless of their status and the phase during the migration cycle". Notwithstanding, states have been given credit for "making migration work for all" as per the 2017 report of the UN Secretary General, even if much of their voluntary reporting dwells deliberately on contingent motivations, including on pandemic preparedness and relief, often to distract from more contentious and highly debatable policies and practices. Hence, the recently adopted 2022 IMRF Progress Declaration demonstrated which political commitments states are most willing to cooperate on, while shedding more light on where gaps persist. Ideally, the IMRF nudges states towards agreeing on prioritizing certain commitments and values, which would dynamically move the GCM beyond its current of "re-affirming" national and regional best practices, as critics observed during the IMRF.[26] If states were to rearrange certain commitments along a scale of "relative normativity" (Weil 1983), including by elevating human rights to a status further challenging state sovereignty (Crépeau and Atak 2016), such progress would mark a first step towards "firming up" (Merry 2015) the legal fabric of the Global Compacts. At the same time, several UN Member States took first steps to soften the narrative of "safe, orderly and regular" by calling for more "humane" and "coherent" migration policy (Morocco)[27], or to "include actionable and measurable recommendations" in view of addressing the GCM's "critical challenges".[28]

This *Special Issue* undertook a legal analysis into this juncture between the legal-like and political formats, recast and enhanced by the two Global Compacts. Drawing on the negotiating history and outcome documents from the first International Migration Review Forum (IMRF), we reason that, in many ways, the line-up and mapping of practices, in addition to the recasting of legal obligations as "guiding principles", pay tribute to the different speeds and capacities of states as well as other actors for implementing the Global Compacts. In a best-case scenario, this reframing of existing obligations achieves a fuller commitment to non-refoulement, the prohibition of collective expulsion or the right to return, and enhances existing best practices, including "firewalls"; in other cases de-legalization dilutes the protection of the human rights of migrants. Finally, the key risks involved in softening the human rights standards are linked to the absence of the ranking of priorities, both for the global and other levels. Remedial actions to mitigate these risks are also identified: first, to rely on the bridging function of the guiding principles enshrined in the Global Compacts to concretize rights and obligations; second, to interlock the Compacts'

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[25] Statement by Egypt at the occasion of the United Nations Briefing on the Global Compact for Migration: Report of the Secretary General, 16 February 2022. Available online: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/egypt.pdf (accessed on 9 December 2022); and consider also the Statement by Spain. Available online: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/spain_on_behalf_of_18_countries.pdf (accessed on 9 December 2022).

[26] Champions letter to the President of the UN General Assembly, 31 January 2022: "We believe the Progress Declaration should go beyond a mere reaffirmation of the Compact, and we are willing to test the idea of including some concrete commitments in specific areas, in line with national priorities, to accelerate progress in attaining the GCM's objectives". Available online: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/champions_letter_to_pga.pdf (accessed on 9 December 2022).

[27] Statement by Morocco at the occasion of the United Nations Briefing on the Global Compact for Migration: Report of the Secretary General, 16 February 2022. Available online: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/morocco.pdf (accessed on 9 December 2022).

[28] Statement of the GCM Champion countries at the Briefing on the Report of the Secretary-General on the implementation of the Global Compact for Safe, Orderly and Regular Migration, 9 February 2022. Available online: https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/ecuador_on_behalf_of_the_champion_countries.pdf (accessed on 9 December 2022).

commitments more tightly with international legal obligations and the United Nations Agenda 2030 for Sustainable Development.

In sum, the Global Compact for Migration, read in conjunction with the Global Compact on Refugees, has the potential to transform the grip and the profile of international soft law and thereby to rearrange the cartography of IML. Yet, more research by scholars in addition to multiplied efforts by practitioners and civil society alike are necessary to bring about the kind of meaning-making from the Global Compacts, which might serve to unearth new priorities and foster a more effective dialogue among their goals for more efficient global migration governance.

In the Guest Editors' earnest hope, this *Special Issue* will help to generate further discussions—and also shared understanding—around the multiple issues outlined above. The Guest Editors wish you all happy reading!

Funding: This research received no external funding.

Conflicts of Interest: The authors declare no conflict of interest. As concerns Tamás Molnár, the views expressed in this article are solely those of the author and its content does not necessarily represent the views or position of the European Union Agency for Fundamental Rights.

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