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Johannes Maximilian Gaechter

The Global Compact for Safe, Orderly and Regular Migration

A New Form of International Legislation or a Threat to National Sovereignty?

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'Since earliest times, humanity has been on the move. Some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still others do so in response to the adverse effects of climate change, natural disasters or other environmental factors. Many move, indeed, for a combination of these reasons.'[1]

Introduction

Since the peak of the migration crisis in 2015, the issue of migration has been ever present – sparking widespread debates in the political and social realms of Austria as well as the wider community of states. Migration of people to Europe, in particular in numbers as large as we have witnessed over the course of the past years, poses enormous risks and challenges, but – if managed correctly – may also harbour vast opportunities for our communities and economies. As such, the topic of migration and, most importantly our understanding thereof, is of vital importance to our ability to manage risks and opportunities in the most effective way possible.

This interplay of opportunities on the one hand, and fear, uncertainty and risks on the other, characterises the discussion on migration and also has an essential impact on legal regulation of this highly controversial issue. In fact, the legal questions that surround the issue of migration are manifold and touch on international human rights law, international refugee law, and general international law.[2] This article will not deal with the specific rules of migration management, but will instead focus on a very general question - whether hard law is the desirable way of dealing with the issue or whether soft law might be more adequate to successfully govern the issue of migration. And if – as in the case of the Global Compact for Safe, Orderly and Regular Migration – soft law is chosen, what implications this may have on the traditional legal sources of international law and state sovereignty.

[1] Draft outcome document of the high-level plenary meeting of the General Assembly on addressing large movements of refugees and migrants; Resolution adopted by the General Assembly on 9 September 2016 (UN Doc A/RES/70/302.

[2] See e.g. Chetail V., International Migration Law, Oxford, Oxford University Press, 2019; Jubilut L.L., de Oliveira Lopes R., Migration and International Law Strategies for the Protection of Migrants through International Law, in: Groningen Journal of International Law, vol. 5, no 1, 2017, pp. 34-56; Chetail, V., The Architecture of International Migration Law: A Deconstructivist Design of Complexity and Contradiction, in: American Journal of International Law, 2017, vol. 111, pp. 18-23; Cholewinski R. et al., eds., International Migration Law: Developing Paradigms and Key Challenges, The Hague, T.M.C. Asser Press, 2007.

Migration in the 21st century

Migration is as old as the history of humankind. Ever since the earliest of times, people have been on the move in search for a better life, a new adventure, or a challenge.[3] However, recently migration has reached an unprecedented peak. Driven by population growth and an increasing number of conflicts worldwide, the total number of migrants globally has increased by more than 51 million since 2010 and reached an estimated total of 272 million globally in 2019. As of 2019 international migrants accounted for 3.5 per cent of the global population as compared to 2.8 per cent in the year 2000. In particular, the Middle East and North Africa (MENA) region has seen a significant increase in displaced people and caused substantial migration flows into adjacent regions; more specifically, Europe. While migration flows to Europe have decreased somewhat since 2015, Europe, with a total of 82 million, continues to host the largest number of international migrants in 2019.[4]

We can observe that in 2011 the number of refugees and migrants arriving at Europe's external borders began to rise sharply. This was a result of developments fuelled by the onset of the Arab Spring, when widespread protests for freedom and democracy began to sweep across a number of Middle Eastern and North African (MENA) countries, causing a rapid increase in political instability within the region. As governments fell in Egypt and Tunisia, and as armed insurgencies took hold of Libya, millions of locals and individuals from other countries who had once before been forced to leave their homes due to conflict and come to settle in North Africa, were forced to flee across the Mediterranean sea to Malta and Italy in search of a better future in Europe. In years thereafter, political instability continued to spread across the region and Libya descended further into an ever more chaotic civil war. In 2014, this once more resulted in further increases to the number of migrants seeking the safety of Europe.[5]

In the same time span, Greece, Europe's second hotspot for the arrival of immigrants from the MENA region, experienced similar patterns. Here the rapid increase in arrivals was predominantly driven by the conflict in Syria which, too, saw its beginnings in March of 2011 before quickly descending into a brutal and prolonged civil war. As of 2015, over half of all arrivals (56%) were of Syrian nationality, followed by Afghans (24%) and Iraqis (10%).[6]
The total number of arrivals in Europe via all available routes peaked in 2015 with more than 1.5 million migrants crossing the EU's external borders. 85% of these arrivals were registered in Greece, with the majority of remaining migrants arriving via Italy.[7]

European states quickly found themselves overwhelmed by the vast numbers of people arriving at their borders, rendering them unable, and in some cases unwilling, to follow the procedures outlined in the Dublin III agreement. Implemented in 2013, this agreement requires

[3] Opeskin B., Perruchoud R., Redpath-Cross J. (ed.), Foundations of International Migration Law, Cambridge, Cambridge University Press, 2012, p. 1.
[4] United Nations, The number of international migrants reaches 272 million, continuing an upward trend in all regions, 2019, Available at: https://www.un.org/development/desa/en/news/population/international-migrant-stock-2019.html [Accessed: June 18, 2020]
[5] Ibid.
[6] International Organisation for Migration (IOM), Mixed Migration Flows in the Mediterranean and Beyond: Compilation of Available Data and Information – 2015 Annual Report, 2016, Available at: https://www.iom.int/sites/default/files/situation_reports/file/Mixed-Flows-Mediterranean-and-Beyond-Compilation-Overview-2015.pdf [Accessed: June 18, 2020]
[7] European Parliament, Addressing migration in the European Union, 2017, Available at: http://www.statewatch.org/news/2017/feb/eprs-mgration-compendium.pdf [Accessed 80/02/2020]

that the first member state in which a migrant arrives be responsible for processing of asylum applications.[8] On June 23rd, 2015, the Hungarian government, predominantly dealing with flows of migrants who initially entered the European Union via Greece, officially announced that it would no longer follow the rules outlined by Dublin III, as authorities saw themselves overwhelmed by over 60,000 immigrants that had already entered the country during the first half of 2015.[9] Repeated attempts by decision-makers in Brussels to establish coherent and effective systems for the redistribution of immigrants fell victim to hastily implemented unilateral actions and border closures by individual member states. Instead, Europe's attempts to manage its internal crisis quickly pivoted towards attempting to resolve the issue externally. By offering financial resources to neighbouring states such as Turkey in return for the retention of the majority of migrants, decision makers hoped to secure Europe's external borders and stop the flow of migrants. Whilst frequently criticised, the strategy proved somewhat effective in reducing the number of arrivals via the easterly route. Nevertheless, it did little to curb migration across the Mediterranean and left the issue of existing migrants already within European borders unaddressed.[10]

In the absence of a common asylum policy, member states were left to their own devices in granting asylum based upon their own laws and interpretations of the UN Charter and the 1951 Refugee Convention, resulting in a significant degree of uncertainty and inefficient distributions of migrants and refugees, causing greater divisions within the European Union and placing the greatest burden on those member states situated along migration routes.[11] What exacerbates this situation is the fact that different legal regulations apply to migrants, asylum seekers, refugees and immigrants. Although the terms are frequently used interchangeably in media and public discourse, it is thus of utmost importance to distinguish between the terms.

Refugees or migrants

Frequently, and particularly within media coverage, the terms '*migrants*' and '*refugees*' are being used interchangeably. It is, however, important to distinguish between the two in light of the migration flows witnessed in recent years. Such migration flows are composed of people leaving their home countries for a vast number of different reasons, not all of which may grant the status of refugees. Thus, states' obligations towards those seeking to settle in their territories may vary.

[8] Official Journal of the European Union, "Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for the international protection lodged in one of the Member States by a third-country national or stateless person", 2013, Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF [Accessed 08/02/2020]

[9] The Guardian, 'The boat is full': Hungary suspends EU asylum rule, blaming influx of migrants, 2014, Available at: https://www.theguardian.com/world/2015/jun/24/the-boat-is-full-hungary-suspends-eu-asylum-rule-blaming-influx-of-migrants [Accessed 08/02/2020]

[10] Greene, M., Kelemen, D. R., Europe's Failed Refugee Policy – The Crisis in the Mediterranean Continues, Foreign Affairs, 2016 Available at: https://www.foreignaffairs.com/articles/europe/2016-06-28/europes-failed-refugee-policy [Accessed: June 18, 2020]

[11] Kyriakopoulos, I., Europe's Responses to the Migration Crisis: Implications for European Integration, Institute for National Strategic Studies, 2019, available at: https://inss.ndu.edu/Media/News/Article/1824758/europes-responses-to-the-migration-crisis-implications-for-european-integration/ [Accessed: June 18, 2020]

The term '*migrant*' is not clearly defined under international law.[12] Traditionally, a migrant has been loosely defined as a person who makes a conscious and self-determined choice to leave their country to reunite with family members abroad, to seek a better life elsewhere, in addition to a range of other purposes.[13] Or even more generally, the term '*international migrant refers to any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence. The term includes migrants who intend to move permanently or temporarily, and those who move in a regular or documented manner as well as migrants in irregular situations.*'[14]

The term '*refugee*', on the other hand, is clearly defined in international law. This definition arises from the 1951 Convention relating to the Status of Refugees as well as the 1967 Protocol relating to the Status of Refugees, and defines a refugee as any *'person who is outside of their country or origin and finds themselves unable or unwilling to return there or to avail themselves of its protection, owing to well-founded fear of persecution for reasons of race, religion, nationality membership of a particular social group, or political opinion.*'[15]

It is further worth noting that it is not necessary for a person to have fled by reason of fear of persecution or having been persecuted. Instead, the definition is applied in a forward looking manner, meaning that a person who initially left their home country on a voluntary basis may see their legal status transition from a migrant to a refugee, as the above described 'fear of persecution' emerges during the individual's absence from their home country through events such as political change or violent conflict.

All countries that have ratified the 1951 Convention on the Status of Refugees, which to date has been done by 145 state parties, are obliged to grant refugees within their territory certain rights and provide legal protection consistent with the convention's proscriptions. At the very centre of such obligations stands the principle of 'non-refoulement', considered to have reached the status of customary international law and asserting that refugees shall not be returned to a country in which they may face serious threats to their freedom and life.[16] Pursuant to the Convention, states thus hold a legal obligation to grant asylum to all those fleeing persecution in their home countries or who find themselves unable to return out of a well-founded fear of persecution in the home country. Furthermore, the convention grants refugees the rights not to be discriminated against in the grant of protection, not to be penalised for

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[12] Long K., When refugees stopped being migrants: Movement, labour and humanitarian protection, in: Migration Studies, vol. 1, no. 1, March 2013, pp. 4–26.

[13] UNHCR, Emergency Handbook, Version 2.3, Available at: https://emergency.unhcr.org/entry/44937/migrant-definition [Accessed June 15, 2020]; Sasse G., Thielemann E., A research agenda for the study of migrants and minorities in Europe, in: J. Common Mkt., vol. 43, no 4, 2005, pp. 655–71;

[14] OHCHR's Recommended Principles and Guidelines on Human Rights at International Borders, in: report of the Secretary-General on Protection of Migrants (A/69/277) presented to the 69th session of the General Assembly held in 2014. Available at: https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf [Accessed July 23, 2020]

[15] Goodwin-Gill, G., in Fiddan-Qasimiyeh E., Loescher G., Long K., Sigona N., The Oxford Handbook of Refugee and Forced Migration Studies, Oxford, Oxford University Press, 2014, p. 38; Coleman N., Non-refoulement revised renewed review of the status of the principle of non-refoulement as customary international law, in: European Journal of Migration and Law, vol. 5, 2003, pp. 23–68. Moreover, in 2001, the International Institute of Humanitarian Law, in co-operation with the United Nations High Commissioner for Refugees has considered the principle as customary law in the Sanremo Declaration on the Principle of Non-Refoulement.

[16] Goodwin-Gill, G., The Refugee in International Law, 2nd ed. New York, Oxford University, 1996, p. 143.

unlawful entry into the country where asylum is sought, not to be expelled from the country as well as the right to minimum acceptable conditions of stay including freedom of movement, access to education and employment and ability to acquire and dispose of personal property.[17]

With regards to migrants (individuals who have made a conscious choice to leave their home country in search of a better life elsewhere) there is currently no such internationally agreed upon standard for the treatment as well as their rights and obligations. Unlike in the case of refugees, states may therefore deny asylum to migrants. However, the fact that the vast majority of migration flows consist of a combination of refugees and migrants, creates a great deal of difficulty for governments when determining which individuals are in fact to be granted asylum – frequently resulting in lengthy processes and a great deal of uncertainty to all parties involved. As pointed out before, the main element that is used to distinguish refugees from migrants is whether migration is forced (by definition applied to refugees) or voluntary (by definition applied to refugees). However, a clear-cut distinction between forced and non-forced migration seems to be a rather academic attempt as opposed to a real-world tried and tested distinction. The crucial problem is that migration implies for the most part at least some degree of constraint as, in almost all instances, decisions to migrate are taken in the light of a variety of external constraints and predisposing events.[18] Thus, the most practicable solution appears to be the provision of a (legal) framework for all people on the move, circumventing lengthy questions of definition and reducing the gap in treatment of refugees and migrants.

Challenges and opportunities

The phenomenon of migration brings with it numerous challenges but, if managed correctly, may also bring a number of opportunities for our economic and social structures. Whilst it is beyond questioning that migration has significant, and often opposite, impacts on both the destination and origin countries, this section – for the purpose of this paper – will place the greatest focus on the effects experienced by the destination countries.

Demographic: Inflows of large numbers of people into regions such as Europe are bound to influence and change the prevalent demographic as well as social structures in a number of ways. Europe, for example, has long seen its population grow older and older over recent decades whilst fertility rates have seen a decline to 1.54 by the year 2015[19] - significantly below the rate of 2.1, which is commonly understood as necessary to maintain a constant population size in developed countries.[20] As of 2016, the median age of EU-28 populations stood at 42 years while the median age of immigrants into the European Union in the same year

[17] UN High Commissioner for Refugees (UNHCR), The 1951 Convention Relating to the Status of Refugees (189 UNTS 150). See also Zetter R., Refugees and refugee studies – A label and an agenda, in: Journal of Refugee Studies, vol. 1, no. 1, 1988, p. 1–6.
[18] Turton D., Refugees, forced resettlers and 'other forced migrants': towards a unitary study of forced migration, Working Paper 94, New Issues in Refugee Research, UNHCR, Geneva, 2003.
[19] World Bank, Fertility Rate Data – European Union, Available at: https://data.worldbank.org/indicator/SP.DYN.TFRT.IN?locations=EU [Accessed June 16, 2020]
[20] Searchinger, T., Hanson, C., Waite, R., Leeson, G., Lipinski, B., Achieving Replacement Level Fertility, World Resources Institute, Working Paper, 2013, available at: https://www.ageing.ox.ac.uk/download/191 [Accessed July 17, 2020].

stood at a mere 27.5 years.[21] As such, migration flows into the European Union, as they are composed largely of younger and working age individuals, may in fact help to counteract some of the demographic deteriorations experienced in recent decades. Increased migration into Europe will also undoubtedly change its ethnic composition, introducing greater cultural, linguistic and religious diversity. However, as illustrated by historical examples, such as those of Turkish migrant workers in Germany, achieving successful integration is often difficult. Frequently, perceptions within the migrant population of a separate identity, residential segregation as well as a lack of access to education and employment have persisted beyond the immigrant generation.[22] Overcoming such challenges thus not only requires important changes to be made to politics, education and community relations but it also requires the careful and efficient management of migration flows, particularly when of a dimension as large as experienced in 2015, in order to allow the most effective and constructive integration of immigrants into local societies.

Economic: Besides having significant impacts on demographic and social structures, increased immigration will also impact the economic and financial systems of destination countries. On one hand, in the short run, the need to provide newly arrived immigrants with the necessary welfare benefits, access to education and social infrastructures, as well as the administrative costs associated with the processing of new arrivals, will likely result in greater destination countries to increase or divert a proportion of planned fiscal spending away from other uses such as infrastructure spending. In order to harness the full economic potential of immigrants, thus increasing their net contribution to the destination country, governments must first work to resolve a number of key issues faced by immigrant communities. These issues include gaps in educational achievements, low labour market participation rates, 'brain waste' resulting in high levels of over-qualification coupled with lacking recognition of foreign qualifications, as well as high risk of social exclusion and poverty. The degree to which such issues are present in any given country once again depends upon the level of integration that can be achieved, and the degree to which policies intended to address said issues can in, in fact, be implemented effectively. As Kancs and Lecca point out, if integration into the local economy is achieved, short-run costs will eventually be negated by the longrun benefits, resulting in a positive net contribution of immigrants to the local economy. Modelling EU wide effects of three different integration policy scenarios – status quo, advanced integration and full integration – results in a range of break-even time frames as well as net effects to GDP growth. Under a status quo scenario, costs – whilst overall lower than in other scenarios - are expected to remain greater than the benefit for as much as 12 years and result in an estimated annual long-run GDP effect above baseline growth of approximately 0.2%. Adopting more progressive integration policies would allow for this time frame to be reduced to as little as 8 years and result in an expected annual long-run GDP effect in excess of 1.4% above baseline growth under the full integration scenario.[23]

[21] Consortium of Migration Assisting Organisations, Migration and Demographics in Europe, European Security Journal, 2017, available at: https://www.esjnews.com/migration-demographics-europe [Accessed June 16, 2020]
[22] Coleman, D., Migration and its consequences in 21st century Europe, Vienna Yearbook of Population Research, vol. 7, 2009, pp. 1–18.
[23] Kancs, D., Lecca, P., Long-Term Social, Economic and Fiscal Effects of Immigration into the EU: The Role of Integration Policy, JRC Working Papers in Economics and Finance, 2017, available at:

Managing Challenges and Opportunities

The above described points by no means encompass any and all challenges and opportunities that may come with the phenomenon of migration. However, I argue that the effects on social economic structures will likely be most profound, and often stand at the centre of populist efforts to push for ever tighter restrictions on migration flows. Nonetheless, while the phenomenon of migration undoubtedly poses a number of social and economic challenges, these can ultimately be overcome as governments work to implement measures allowing for the effective governance of migration flows and better integration of newly arrived immigrants into local societies and economies. Doing so on a national level, however, will likely not suffice in order to find effective solutions to an issue such as migration, which by its very definition is a cross-border phenomenon. Unlike in other policy areas, multilateral cooperation beyond regional efforts such as those made within the European Union – the success of which admittedly has been rather limited in nature – has thus far been lacking.[24] Increased efforts will need to be taken to address the issue on a global level through the fostering of improved international dialogue and cooperation with regards to the management of migration flows. Ambitious projects such as the creation of the Global Compact for Safe, Orderly and Regular Migration – whilst by no means perfect and frequently slowed by states' unwillingness to cooperate meaningfully – may in fact be an important first step in such a direction. Regarding both the immense challenges and opportunities linked to migration, it becomes obvious that some kind of international (legal or other) regulation is required if the international community wishes to overcome the migration crises and not become lost in isolated, costly and unsuccessful endeavours.

In search of a (legal) regime to protect migrants

As previously mentioned, there is a consolidated international regime to protect refugees, based on the 1951 Geneva Convention as well as a designated UN Agency (UNHCR) mandated to protect their rights. There is, however, no such regime for other categories of migrants, nor is there international consensus about the responsibility of states for responding to migration. Migration has always been one of the key issues of the ILO, which has a complementary mandate to UNHCR, i.e. the protection of human rights of migrant workers.

For the purpose of this article I will examine what legal solutions might be envisaged. In order to do so, I will first examine the classic sources of international law.

Sources of international law

https://ec.europa.eu/jrc/en/publication/long-term-social-economic-and-fiscal-effects-immigration-eu-role-integration-policy-jrc-working [Accessed June 16, 2020].

[24] Farrant, M., MacDonald, D., Sriskandarajah, D., Migration and Development: Opportunities and Challenges for Policymakers, International Organisation for Migration, 2006. Available at: https://publications.iom.int/system/files/pdf/mrs_22.pdf [Accessed June 17, 2020]

Over the course of the past ten years, a time during which the international community has been facing unprecedented migration crises, it has become especially obvious that a framework for the governance of migration consisting of a set of legal rules that constrain, regulate, and channel state authority over migration, is indispensable. However, the choice of the adequate framework or more specifically, the adequate legal source, has posed a challenge.

In general, and especially from a domestic point of view, law is the primary tool for regulating and governing social relations. Law, or more precisely, its normative, directive and prescriptive rules have always played an important role in the definition and protection of relationships as well as in the control of individual and collective human and institutional behaviour. As migration is a topic that cannot be sufficiently regulated at the domestic level but needs to be addressed at an international level, we have to consider international law as a device for regulating the increasing movement of people and the challenges posed on the receiving states. The aim of international law is not only to govern inter-state relations but also to control states by directing their behaviour in relation to individuals belonging both to a third state or the own state.

The sources of international law and the international law-making process are not only some of the most essential topics in international law but also one of the most controversial amongst legal scholars. [25] The classification of sources in domestic law cannot be simply transferred to the very different context of international law due to the principle of state sovereignty and the identity between legislators and subjects of international law.[26] There is no comparable centralised and hierarchically structured law-making process at the international level, which can give rise to the norms of international law. Consequently, there is no '*Code of international law'* that we can turn to in order to identify the norms. Moreover, the existing international tribunals cannot keep up with courts and other legal authorities at the national level that could help us identifying the international legal rules. Unlike national courts, international tribunals depend on the consent of the states and a compulsory jurisdiction is unknown at the international level.

For the purpose of this article I shall refrain from entering the passionate scholarly discussion on the sources of international law and rely instead on the rare written rules on the sources of positive international law. The most important written rule in that regard is Art. 38 of the Statute of the International Court of Justice, a constitutive instrument of a permanent judiciary body. This article, dating back to 1920[27], enumerates three sources of international law: international conventions, international custom and general principles of law. These three sources find its legitimacy in the consent of states that are the primary subjects of international law. In addition, doctrine and judicial decisions are considered as auxiliary sources. However, there are both scholars and practitioners that argue that this article is not to be considered as the final and only definition of the sources of international law; some others even maintain that this article has meanwhile become "largely obsolete".[28] As Judge Shahabuddeen pointed out, '*the*

[25] Besson S., The Philosophy of International Law, Oxford, Oxford University Press, 2010, pp. 163–185; Thirlway H., The Sources of International Law, Oxford, Oxford University Press, 2014, pp. 1 ff.; van Hoof G.J.H., Rethinking the Sources of International Law, Deventer/Netherlands, Kluwer, 1983, p. 1.
[26] See e.g. Shaw M. N., International Law, 7th ed., Cambridge, Cambridge University Press, 2014, pp. 49 ff.
[27] A first definition can be found in Art. 38 of the Statute of the Permanent Court of 1920. Art. 38 reappeared in a slightly modified version in the Statue of the International Court of Justice in 1946.
[28] Besson S., The Philosophy of International Law, Oxford, Oxford University Press, 2010, p. 164.

Court is not prevented from discovering international law by other means if it can'.[29] Amongst those "other means" figure acts of international organisations, unilateral acts of states, diplomatic correspondence, etc. Unlike the three sources mentioned in Art. 38 of the Statute of the International Court of Justice, soft law comprises non-legally binding instruments. However, this does not imply that soft law is of no legal significance. On the contrary, it can for example play a crucial role in the creation of customary norms.

From legally binding instruments to new instruments

Whereas the second half of the 20th century was marked by the enthusiasm of states for the conclusion of multilateral treaties, the number of multilateral treaties that have been registered with the UN Secretary-General has declined since the year 2000 and their topics concentrate mainly on technical aspects such as transport as well as communication. Likewise, recently states have increasingly withdrawn from multilateral treaties, indicating a potential decline in the popularity of such instruments.[30] Instead, other forms of regulations or standard-setting have become more prevalent.[31] Danae Azaria summarises that the new approach likewise taken by the International Law Commission has shifted its paradigm from '*codification by convention*' to the rise of '*codification by non-binding instruments*'.[32] According to Pauwelyn, Wessel and Wouters, this trend can be explained by '*saturation with the existing treaties and changed policy preferences of states as well as the transition towards an increasingly diverse network society and an increasingly complex knowledge society*'.[33] Likewise, in the area of human rights, soft law increasingly gains new grounds and is becoming an important tool.[34]

Despite this new trend, I argue that this apparent move away from the traditional triad of sources in Art. 38 of the ICJ Statute does not bring about a total change to the traditional list of sources, at least as far as the so-called soft law is concerned. Soft law is crucial in the identification of the existence, the practice and opinio juris of States concerning the clarification of existing or future development of customary international law. Consequently, soft law is often considered as being placed between law and non-law.[35] An illustrative example is Art. 19 of Draft Articles on Diplomatic Protection. In its commentaries, the International Law Commission admits that although there is currently '*no* [customary] *obligation for a state to*

[29] Thirlway H., The Sources of International Law, Oxford, Oxford University Press, 2014, p. 3; Shahabuddeen M., Precedent in the World Court, Cambridge, Cambridge University Press, 1996, p. 81.
[30] Pauwelyn J., Wessel R.A., Wouters J., When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking, in: The European Journal of International Law, vol. 25, no. 3, 2014, pp. 733–763.
[31] Boyle A., Chinkin C., The Making of International Law, Oxford, Oxford University Press, 2007, p. 262.
[32] Azaria D., The International Law Commission's Return to the Law of Sources of International Law, in: FIU Law Review, vol. 13, no. 6, 2019, pp. 989–1006.
[33] Pauwelyn J., Wessel R.A., Wouters J., When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking, in: The European Journal of International Law, vol. 25, no. 3, 2014, pp. 738–39.
[34] See e.g. Gammeltoft-Hansen T., Cerone J. and Lagoutte S. (eds.), The Roles of Soft Law in Human Rights, Oxford, Oxford University Press, 2016.
[35] D'Aspremont J., Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules, Oxford, Oxford University Press, 2011, p. 129.

exercise diplomatic protection on behalf of a national, Draft article 19 (a) must be seen as an exercise in progressive development'.[36]

In particular in the area of human rights, strategic considerations frequently lead to preferring soft law instruments to a more traditional, binding treaty, as soft law could generate greater acceptance and enhance prospects of compliance. Moreover, it may act as a starting point for adopting a treaty or to strengthen patterns of state practice and thus for the creation of customary international law.

The legal and normative framework of international migration

There is currently no overarching legal instrument covering all the relevant rights and duties of migrants. Instead, these rights and duties are covered by a wide variety of instruments and legal norms applied at international, regional and national levels.[37] Moreover, only a few of the legally binding instruments in existence today apply to migrants in general, while the majority of the more comprehensive conventions only apply to refugees alone. Prominent examples of such are the Convention relating to the Status of Refugees, which was adopted on 28 July 1951 and entered into force on 22 April 1954, or the Convention relating to the International Status of Refugees, which was adopted on 28 October 1933 and entered into force on 13 June 1935. Both of these instruments have been ratified by a vast majority of states, thus reaching global recognition.

On the other hand, the UN Convention on the Protection of All Migrant Workers and Members of Their Families, albeit a likewise legally binding instrument, has only attracted 55 state parties. It entered into force on 1 July 2003. The European Convention on the Legal Status of Migrant Workers entered into force on 1 May 1983 but has thus far only seen ratification by 11 member states. Most other instruments referring to migrants can be characterised as being non-binding legal instruments and mainly constitute resolutions adopted by the General Assembly such as, for example, the Declaration on the Human Rights of Individuals who are not nationals of the country in which they live.[38]

Besides these instruments addressed explicitly to migrants or refugees, other more general legal instruments apply to both categories. Examples are human rights treaties or legal instruments dealing with nationality and statelessness. In addition to the rights and duties of the migrants there is a second pillar of legal principles and provisions dealing with state sovereignty guaranteeing the states' right to control immigration, to expel non-nationals and safeguard national security.

To sum up, current frameworks governing the issue of international migration are highly fragmented and all too often leave migrants with significant protection gaps. States too, find little guidance on how to deal with the increasingly complex dimensions of the migration issue

[36] Draft Articles on Diplomatic Protection with commentaries 2006, Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10). Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf [Accessed July 22, 2020]

[37] Opeskin B., Perruchoud R., Redpath-Cross J. (ed.), Foundations of International Migration Law, Cambridge, Cambridge University Press, 2012, p. xi.

[38] Declaration on the Human Rights of Individuals who are not nationals of the country in which they live. Adopted by General Assembly resolution 40/144 of 13 December 1985.

which at present '*involves hundreds of millions of people and affects countries of origin, transit and destination*'.[39] The envisaged and ideal solution in order to overcome the issues presented by migration would thus be a migration management law that adequately protects the human rights of migrants and also respects state sovereignty by protecting national security and public order.

Global Compact for Safe, Orderly and Regular Migration

In September 2016, the General Assembly decided, through the adoption of the New York Declaration for Refugees and Migrants[40], to develop a global compact for safe, orderly and regular migration. The New York Declaration endorses the concept of a '*migration management framework'* and underlines that this framework needs to take into consideration all aspects of migration encompassing and balancing both migrants' and refugees' needs as well as aspects of state sovereignty.[41] In Annex II, the goal of the Migration Pact is clearly outlined: '*The global compact would set out a range of principles, commitments and understandings among Member States regarding international migration in all its dimensions. It would make an important contribution to global governance and enhance coordination on international migration. It would present a framework for comprehensive international cooperation on migrants and human mobility. It would deal with all aspects of international migration, including the humanitarian, developmental, human rights-related and other aspects of migration.*'

The aim of the Migration Pact is to facilitate a better management of migratory flows and to strengthen the rights of those fleeing persecution in their home countries. UN member states furthermore committed themselves to the fight against discrimination against refugees and to protect those who are most vulnerable – women and children. While being ambitious in its mission and calling for the opening up of social security systems to refugees, the non-binding UN Migration Pact explicitly recognises the need to preserve national sovereignty and stresses the unviability of member states' rights to unilaterally create and implement laws governing migration. The Pact comprises 23 'objectives' in total, each of which constitutes a commitment of its own and outlines a range of actions considered to be relevant policy instruments and best practices. Regarding the content, the Compact is a comprehensive and inclusive document taking into consideration a large variety of topics and addresses both states as well as non-state actors.

During the negotiations of the Migration Pact, the issue of national sovereignty was extensively discussed. It was highlighted that state sovereignty is neither put in question by, nor incompatible with increased international cooperation and governance of migration.[42] Action group 4 summarised the issue of the national dimension as follows: '*The role of sovereign States*

[39] Strengthening of the United Nations. An agenda for further change, Report of the Secretary-General, A/57/387, para. 39.

[40] New York Declaration for Refugees and Migrants. Draft resolution referred to the high-level plenary meeting on addressing large movements of refugees and migrants by the General Assembly at its seventieth session on 13 September 2016, A/71/L.1.

[41] Ibid. See in particular paragraphs 24 and 42.

[42] The drafting history can be retraced here: https://refugeesmigrants.un.org/sites/default/files/171222_final_pv_summary_0.pdf. [Accessed July 23, 2020]

is central in the context of international migration. States have sovereign rights regarding their territories and borders and have the ultimate legislative authority to set national policy relating to migration, in line with international law, in particular the human rights frameworks. The GCM is a key opportunity for states to identify and promote effective, concrete ways to enhance safe, orderly and regular migration that are based on existing principles and frameworks with effective implementation mechanisms.'[43]

Following several rounds of preparatory discussion within the UN, the Marrakech Intergovernmental Conference, held on 10-11 December 2018, eventually adopted formally the Global Compact for Safe, Orderly and Regular Migration (short: UN Migration Pact)[44], which was endorsed by the UN General Assembly on 19 December 2018 (152 votes in favour, 12 abstentions, and five votes against, namely by the Czech Republic, Hungary, Israel, Poland, and the United States of America). An additional 24 Member States were not present to take part in the vote.

UN representatives, government leaders and human rights experts celebrated the finalisation of the text as a historic moment for people on the move. Louise Arbour, Special Representative for International Migration, is convinced that the implementation of the Compact will bring safety, order and economic progress to everyone's benefit. Moreover, General Assembly President Miroslav Lajčák stressed once again that the Pact is not a legally binding instrument and thus fully respects state sovereignty.[45]

Opposition

Between October and December 2018, Austria, Bulgaria, the Czech Republic, Slovakia, Poland, Australia and Israel announced that they would not be participating in the Migration Pact. Switzerland and Italy announced they would be abstaining pending parliamentary decisions on whether to participate.

As of 19 December 2018, Austria was amongst the abstaining states. Pursuant to the 1951 Geneva Convention Relating to the Status of Refugees, Austria holds a legal obligation to grant asylum to all those fleeing persecution in their home countries. Nonetheless, Chancellor Sebastian Kurz, at the time heading a coalition government composed of the conservative party ÖVP as well as the right-wing party FPÖ, declared the refusal to become a signatory as a necessary step to protect Austria's national sovereignty and pledged for Austria to enact its right to draft and implement its own laws governing migration.[46] On 19 December 2018, Austria also put forward a variety of arguments in its explanations of vote before the voting, a number of which will be highlighted and discussed further in the following section.[47]

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[43] Ibid.

[44] Global Compact for Safe, Orderly and Regular Migration, Resolution adopted by the General Assembly on 19 December 2018 (A/RES/73/195).

[45] Quoted in: Fella S., The United Nations Global Compact for Migration, House of Commons Briefing Paper, no. 8459, 16 August 2019. Available at: http://researchbriefings.files.parliament.uk/documents/CBP-8459/CBP-8459.pdf [Accessed July 24, 2020]

[46] See the press release of the Austrian interior minister: https://www.bmi.gv.at/news.aspx?id=384C72563179526D7267553D [Accessed May 23, 2020]

[47] Official Records, General Assembly, Seventy-third session, 60th plenary meeting, 19 December 2018, p. 18. Available at: https://undocs.org/en/A/73/PV.60 [Accessed July 28, 2020]

National sovereignty

First and foremost, national sovereignty played a key role in Austria's argumentation. Admittedly, the Migration Pact points out explicitly that it is a non-legally binding document. However, whilst in principle of a non-binding nature, some of the 23 principles set forth in the Pact call upon Member States to take actions that could impact on their sovereignty. For example, Objective no. 13 calls upon states to '*Use migration detention only as a measure of last resort and work towards alternatives*.' With regards to the states that are party to the European Convention on Human Rights (ECHR)[48], this commitment goes even further than Art. 5 of the ECHR which in letter f) allows only for '*the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'*.

Lack of differentiation

Another argument put forward by the Austrian government was that the Migration Pact blends the rights of asylum seekers and economic migrants. This concern is rebutted in point 15 of the Migration Pact, stating: '*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.*'

Migration as a human right

A third argument is Austria's particular concern that the adoption of the Migration Pact might be a first step towards the eventual recognition of migration as a human right. Although the Austrian government does not elaborate further on the term '*human right to migration*', this right is commonly understood as referring to '*a universal right held against all states not to prevent those who wish to settle on their territory from doing so.*'[49] Looking at existing international human right instruments as well as state practice and legislation, it becomes obvious that none of the existing legally binding instruments endorse a human right to migration that is intended to be understood as a universal right to cross and remain within state borders. Indeed, most international human rights treaties only acknowledge the right to freedom of movement and residence *within the borders* of a given country as well as the right to leave any country, including their own country, and to return to this country.[50] In fact, even in scholarly literature there appears to be very few voices that argue in favour of a human right to

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[48] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, ETS No.005.

[49] Miller D., Is there a Right to Immigrate?, in: Fine S., Ypi L., Migration in Political Theory: The Ethics of Movement and Membership, Oxford, Oxford University Press, 2016, On the debate in general between advocates of open borders and defenders of the state's right to control immigration see Miller D., Immigration, in: Brooks T. (ed.), The Oxford Handbook of Global Justice, Oxford, Oxford University Press, 2020,

[50] See e.g. Art. 13 of the Universal Declaration of Human Rights of 1948; Art. 12 of the International Covenant on Civil and Political Rights of 1966; Art. 4 of Protocol 4 to the European Convention on Human Rights of 1950; Art. 22 of the American Convention on Human Rights of 1969; Art. 12 of the African Charter on Human and Peoples' Rights of 1981.

migration[51], with the vast majority of scholars clearly denying such a right.[52] Moreover, state practice is likewise very reluctant when it comes to the question of migration as a human right.[53] It would thus require enormous efforts to change this status quo towards the establishment of a right to migration. It would be highly unlikely for the Migration Pact to become the very instrument to nudge the international community in the direction necessary to achieve such a change.

The Migration Pact becoming customary law

Eventually, Austria's most eminent argument is the following: '*Austria objects to the Global Compact becoming international customary law or having legal effects in Austria as soft law or by any other means. The Compact shall not serve national or international courts as a point of reference for the clarification of legal provisions.* […] *Austria explicitly declares that the Global Compact for Migration is non-legally-binding under international law. The Global Compact for Migration shall not be interpreted as opinio juris or state practice for the emergence of customary international law, nor shall any general principle of law evolve from it. In such a case, Austria would have to be regarded as a persistent objector. Should any binding provision be created or adopted on the basis of the Global Compact for Migration, Austria will not be bound under international law to any such provision.*'[54]

This argument has drawn attention to several questions regarding the Pact and its role and position within the (legal) framework regulating international migration. The Migration Pact is not a legally binding treaty and does not create any new legal obligations for the UN member states. Instead, it is – as the Pact itself points out – a '*non-legally binding, cooperative framework that fosters international cooperation among all relevant actors on migration, acknowledging that no state can address migration alone, and upholds the sovereignty of states and their obligations under international law.*'[55] Moreover, there is no provision referring to the ratification process which would need to be implemented if the pact were in fact intended to be legally binding.

Similar to recommendations, resolutions and declarations of committees, organs and special organisations of the UN or regional institutions, the Migration Pact is considered as a non-binding regulatory statement which, taken in its own right, does not give rise to enforceable claims before international tribunals, unless the standards contained in soft law reflect customary international law. Austria's concerns regarding the Migration Pact begin with this particular point. Soft law is regularly considered as an indicator of emerging legal norms

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[51] One example is Oberman K., Immigration as a Human Right, in: Fine S., Ypi L., Migration in Political Theory: The Ethics of Movement and Membership, Oxford, Oxford University Press, 2016,

[52] Miller D., Is there a Right to Immigrate?, in: Fine S., Ypi L., Migration in Political Theory: The Ethics of Movement and Membership, Oxford, Oxford University Press, 2016,; Griffin J., On Human Rights, Oxford, Oxford University Press, 2008, pp. 195–6.

[53] E.g. the current US restrictions on immigration or Viktor Orbán's fight against migration.

[54] Official Records, General Assembly, Seventy-third session, 60th plenary meeting, 19 December 2018, p. 18. Available at: https://undocs.org/en/A/73/PV.60 [Accessed July 28, 2020]

[55] Global Compact for Safe, Orderly and Regular Migration, UN Doc. A/RES/73/195, preamble 7.

of a customary nature.[56] Moreover, soft law can likewise be useful for the interpretation of vague but binding legal provisions.

The Migration Pact itself does not explicitly mention the term *'soft law'* but points out that this Global Compact presents a non-legally binding, cooperative framework that builds on the commitments agreed upon by Member States. However, during the General Assembly Session on 19 December 2016, the most vehement opponents (United States, Poland and Austria) highlighted their concern that the Migration Pact *as soft law* might one day become customary law. While scholarly literature largely confirms the view that the Migration Pact is considered as soft law,[57] views vary slightly regarding the normative impact of soft law as laid down in the Migration Pact. According to Thomas Gammeltoft-Hansen, the '*Global Compact for Migration includes a number of more technical and standard-setting norms in relation to both overall cooperation and the implementation framework, it has a norm-filling role by setting out common 'principles, commitments and understandings' in regard to existing rules and their interpretation or it may end up setting out substantively new norms in regard to international migration that may eventually pave the way for binding international law in the form of either custom or treaty*.'[58] These normative impacts, however, are nothing more than a vague glimpse of a potential future, as the Migration Pact can fulfil these promising expectations only when the international community, including states, international organisations, tribunals and courts as well as other stakeholders display the political will necessary to adhere to, and implement, their commitments.

Customary law is one of the sources of international law enshrined in Art. 38 of the Statute of the International Court of Justice. Unlike treaty law, customary law is legally binding on all states, even without their explicit agreement.[59] Or, as the ICJ puts it: '*customary 1aw rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.'*[60] For customary international law, instead of the states' agreement, two other conditions need to be fulfilled. First, the acts concerned must amount to a settled practice, and second, they must be '*carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.*'[61] The second, subjective element is referred to as *opinio juris sive necessitatis*. Whereas the state practice is an element that in the present case will

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[56] Guzman A.T., Meyer T.L., International Soft Law, in: Journal of Legal Analysis Spring, vol. 2, no. 1, 2010, pp. 171-225; Boyle A., Soft Law in International Law-Making, in Evans, M.D. (ed.), International Law, 4th ed., Oxford, Oxford University Press, p. 118.

[57] See e.g. Peters A., The Global Compact for Migration: to sign or not to sign?, in EJIL:Talk! Blog of the European Journal of International Law, November 21, 2018. Available at: https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/ [Accessed August 3, 2020]

[58] Gammeltoft-Hansen T., The Normative Impact of the Global Compact on Safe, Orderly and Regular Migration, in: Raoul Wallenberg Institute of Human Rights and Humanitarian Law (ed.), What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration, 2017, p. 8. Available at: https://rwi.lu.se/app/uploads/2017/10/RWI_What-is-a-compact-test_101017.pdf [Accessed August 3, 2020]

[59] Green J.A., The Persistent Objector Role in International Law, Oxford, Oxford University Press, 2016, p. 2.

[60] ICJ, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands, Judgment, ICJ Reports 1969, p. 3. para. 63. See also Green J.A., ibid., p. 11 ff.

[61] Ibid., para. 77; ICJ, Continental Shelf (Libyan Arab Jarnahiriya/Malta), Judgment, ICJ Reports 1985, p. 29, para. 27; ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, para. 64 ff.

depend on future actions, the *opinio juris* element was first tested at the moment of the adoption of the Migration Pact. This poses the question whether the five votes against (Czech Republic, Hungary, Israel, Poland, and the United States of America), 12 abstentions, and 24 member states not being present to take part in the vote, can be considered as a sign against the existence of an *opinio juris*? Some clarity may be provided by the ICJs comments referring to the General Resolution A/RES/1653(XVI), Declaration on the prohibition of the use of nuclear and thermo-nuclear weapons, adopted on 24 November 1961 with 55 votes in favour, votes against and 26 abstentions.[62] The ICJ stated that '*a substantial numbers of negative votes and abstentions* […in the adoption of resolutions…] *fall short of establishing the existence of an opinio juris on the illegality of the use of such weapons.*'[63]

Eventually, it could be useful to consider the Migration Pact's wording in order to determining the probability of Austria's concerns come true. In general, the Migration Pact's language is more indicative of a political statement than a legal document. It does not contain any precise obligations and the political commitments seem dominated by the idea of a lowest-common-denominator. Moreover, the wording resembles other texts drafted by the General Assembly such as the United Nations Millennium Declaration of 2000[64] or the 2030 Agenda for Sustainable Development of 2015.[65] Unlike the Migration Pact, these two documents, which were unanimously adopted by the member states, do not contain any reference to their non-binding character or soft-law. Regarding the wording of these documents, I argue that – albeit their similarity to the Migration Pact – they go further than the latter. In particular the Agenda 2030, which makes references to existing legally binding documents, admonishes member states to adhere to these obligations. Hence, despite its non-binding character, the resolution fulfils an important role in interpreting existing legally binding documents. Moreover, the Agenda 2030 requires diverse monitoring activities. On the other hand, recent legally binding treaties likewise resemble the wording chosen by the drafters of soft-law instruments. An example is the Paris Agreement of 2015[66], which despite its legally binding character consists mainly of lengthy and verbose paragraphs with weak commitments, and only contains a minimum of operational provisions.

In conclusion, it is difficult to foresee whether the Migration Pact will one day become customary international law. As pointed out, the reasons are manifold. On the one hand, the Pact lacks clear commitments and is vaguely worded. On the other hand, international migration is a highly controversial topic with diverging interests – in particular between countries receiving refugees and those from which refugee flows originate. Moreover, international migration is a continuously changing issue, spurred by events outside the realm of those countries receiving migrants.

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[62] See https://research.un.org/en/docs/ga/quick/regular/16.

[63] ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, para. 71.

[64] A/RES/55/2 of 8 September 2000 - United Nations Millennium Declaration, General Assembly Resolution 55/2.

[65] A/RES/70/1 of 25 September 2015 - Transforming our world: the 2030 Agenda for Sustainable Development.

[66] The Paris Agreement was adopted on 12 December 2015 at the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change held in Paris from 30 November to 13 December 2015.

Austria's role as persistent objector

The only way to avoid the application of customary international law is provided for by the mechanism of the persistent objector.[67] This role allows a state to exempt itself from newly emerging norms of customary international law. The mechanism is dealt with in the International Law Commission's draft conclusions on the Identification of customary international law. In Conclusion 15, a persistent objector is defined as a state that has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the state concerned for so long as it maintains its objection. Moreover, the objection must be clearly expressed, made known to other states, and maintained persistently. Eventually, the mechanism is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).[68]

In the case of the Migration Pact, Austria thus far appears to be the only state explicitly pointing out its intention to be considered as a persistent objector. In the absence of a considerable number of other states following Austria's example, thus preventing the creation of customary law, Austria's choice to rely on the persistent objector role is the only way to escape future customary rules based on the Migration Pact.[69] Austria highlighted this differentiation between unilateral and multilateral objections in its comments relating to the International Law Commission's work on the identification of customary international law in 2016. It did so by distinguishing individual persistent objections, from a situation where the objection of a substantial number of states to the formation of a new rule of customary international law prevents its crystallisation altogether.[70]

By voicing its position clearly and unequivocally, Austria has fulfilled the first part of the condition that the objection must be clearly expressed, made known to other states, and maintained persistently.[71] Doing so may provide an '*escape hatch*' for Austria from future, potentially binding, obligations which might arise out of the Migration Pact, a politically appealing prospect for the immigration critical centrist-right coalition which headed Austria's government at the time.

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[67] For a comprehensive analysis of this mechanism see Green J.A., Supra. note 59.

[68] International Law Commission, Seventieth session, August 2018; A/CN.4/L.908; Identification of Customary International; Law Text of the draft conclusions as adopted by the Drafting Committee on second reading Identification of customary international law.

[69] ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226. In his Dissenting Opinion, Vice-President Schwebel compares a "lone and secondary persistent objector" to the "practice of a pariah Government crying out in the wilderness of otherwise adverse international opinion".

[70] 78th session of the International Law Commission (2016), Identification of customary international law, Information submitted by Austria. Available at: https://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/english/icil_austria.pdf&lang=E [Accessed August 8, 2020]

[71] ILC, Text of the Draft Conclusions, n. 23, 5, Draft Conclusion 15: Persistent Objector.

Conclusion

From a general perspective, the choice made by the international community of states to adopt a non-binding Compact in order to govern international migration could be a promising new path for regulating international migration in a comprehensive manner, replacing the current fragmented piecemeal legal framework. The traditional sources of international law are increasingly criticised as no longer being adequate and apt to govern international relations effectively, which is particularly true for a topic as highly sensitive and controversial as international migration. Hence, new ways, or rather new sources of international law, are in great demand. The notion of '*governing by Compacts*' could well be one possible innovative and promising option as it leaves an open door for one of three options: first, the soft-law instrument, or parts of it, could eventually become customary international law provided that states are willing to fulfil the two conditions in that regard; second the soft-law instrument could help in interpreting existing legally binding instruments; and third, it remains non-binding and serves as a statement of political commitments.

Which of these options eventually comes to fruition, and whether or not the Global Compact for Safe, Orderly and Regular Migration is able to live up to its potential, will ultimately depend on the acceptance by the community of states as well as their implementation of commitments made under the agreement.