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Opening up a new chapter of law-making in international law: The Global Compacts on Migration and for Refugees of 2018

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Abstract

The endorsement/affirmation of the Global Compact on Migration and the Global Compact for Refugees in December 2018 has been accompanied by an intense discussion about the need to introduce new norms in these fields and about the actual legal force of the respective provisions. There was and there persists an open contrast between the openly declared non-bindingness of these Compacts and the widespread fear that they would either severely constrain national sovereignty in highly delicate areas or dilute arduously achieved standards (especially with regard to refugee law). Eventually, this whole discussion leads to the question about the meaning and the status of soft law in international law. With regard to the European Union, the transformative impact of the Global Compacts will depend on whether the EU further proceeds on its path of "emancipation" from international law while internally finding no consensus on the values here at issue.

1 | INTRODUCTION

It is difficult to overestimate the impact of the historic refugee and migration crisis of the years 2015 and 2016. It not only had enormous repercussions on Europe's political systems, provoking a "turn to conservatism", stricter border controls, the closing of "transit routes" and the slashing of social benefits for foreigners,[1] but it also engendered intense efforts to create a new international framework for the protection of refugees and the management of migration or to improve the existing provisions in these fields. These initiatives are all

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[1] P. Hilpold, 'Unilateralism in Refugee Law—Austria's Quota Approach Under Scrutiny' (2017) 18 *Human Rights Review*, 305; P. Hilpold, 'Quotas as an Instrument of Burden-Sharing in International Refugee Law—The Many Facets of an Instrument Still in the Making' (2017) 15 *International Journal of Constitutional Law*, 1188; M. Henrekson, Ö. Öner and T. Sanandaji, 'The Refugee Crisis and the Reinvigoration of the Nation State: Does the European Union Have a Common Asylum Policy?' in A. Engelbrekt Bakarjieva, K. Leijon, A. Michalski and L. Oxelheim (eds.), *The European Union and the Return of the Nation State: Interdisciplinary European Studies* (Palgrave Macmillan, 2020); R. Bauböck, 'Refugee Protection and Burden-Sharing in the European Union' (2018) 56 *Journal of Common Market Studies*, 141; S.S. Juss, *Research Handbook on International Refugee Law* (Edward Elgar, 2019).

the more remarkable as until recently all attempts at far-reaching reforms in these fields have resoundingly failed.[2]

For the successful accomplishment of these reforms, it was decisive to find the right form. For a "hard law" reform, neither sufficient time nor sufficient political clout was available so recourse was taken to "soft law" with two "Compacts" (the "Global Compact for Safe, Orderly and Regular Migration" and the "Global Compact for Refugees", respectively).

The resulting documents have provoked intense discussion in theory and practice. While, according to a traditional perspective, the provisions of these Compacts, not being able to be subsumed under Article 38 ICJ Statute,[3] should have been legally irrelevant, we must ask then why all this fuss in the quarter of the opponents of any liberalisation of migration and refugee law on the one hand, and why the rejoicing in the liberal quarter favouring more open borders and warmer welcome to migrants and refugees on the other. Either practice erred in the qualification of the relevant norms or (traditional) theory no longer delivers an adequate picture of legal reality. The outcome of this norm-setting process is somewhat awkward. The resulting documents remain vague under several terms and where they have become more concrete, they have awakened suspicion from all quarters. They affirm to be non-binding while this formula appears to be nothing more than "constructive ambiguity".[4]

At first glance, they seem to add not much substance, but it will be shown that their true importance lies mainly in the values they convey, in the process they are set to engender and the fora they introduce. These dynamic elements they are predicated upon have to be taken squarely into account when their legal nature is to be assessed. In the following, I shall try to shed light on this conundrum and to find a place for the two Compacts in the international legal edifice.

This article starts with a theoretical introduction into the nature of international law making. The findings of this inquiry will then be applied to the two Compacts in order to assess their legal quality and their practical relevance. The importance of this study for EU law is twofold. Not only does immigration law in general and refugee law in particular touch upon EU competences—in particular as far as the Common European Asylum System (CEAS) is concerned—but EU law itself, revealing in that its close kinship with international law is continuously faced with similar challenges in its norm-setting processes. At the same time, however, it has also to be taken into consideration that the values regarding migration law and identified within UN fora meet with considerable resistance within the European Union.

[2]As is well known, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (in the following "Convention on Migrant Workers"), adopted by General Assembly resolution 45/158 of 18 December 1990 and entered into force in 2003, has been ratified, up to now, by only 54 States, mostly from the area of the countries of origin of migrants and refugees. At the same time, it has not been possible to expand the international refugee protection system created by the Geneva Convention on Refugee Law of 1951 to mass flights or to internally displaced people. The UNHCR was only partly able to fill this void on the practical level.

[3]"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

As the provisions here to be discussed do not constitute treaty law, neither the provisions of the Vienna Convention on the Law of Treaties (VCLT) 1969 apply. This is unfortunate as under the VCLT very sophisticated rules on norm bindingness have been developed.

"2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto"

[4]For the notion of "constructive ambiguity" with regard to Security Council Resolutions, see 'Special Research Report No. 1: Security Council Action Under Chapter VII: Myths and Realities' (Security Council Report, 23 June 2008), retrieved from http://www.securitycouncilreport.org/special-research-report/lookup-c-glKWLeMTIsG-b-4202671.php (accessed 21 July 2020). The notion of "constructive ambiguity" is sometimes credited to Henry Kissinger: 'Constructive ambiguity' (Wikipedia, 18 January 2020), retrieved from https://en.wikipedia.org/wiki/Constructive_ambiguity (accessed 21 July 2020); B. Keller, 'Mitt and Bibi: Diplomacy as Demolition Derby', *The New York Times* (13 September 2012). In reality, however, this concept is much older as it refers to the concept of "*dilatorischer Formelkompromiss*" coined by Carl Schmitt who was again influenced in this by Hans Morgenthau (many thanks to Karine Caunes for this hint). Admittedly, this formula was coined in a period when the international law order was a very different one, when "soft law" instruments had far less relevance. Nonetheless, it gives evidence to the validity of this concept that it displays an even enhanced usefulness in the present, widely changed environment.

2 | NEW INTERNATIONAL LAW NORM-SETTING PROCEDURES IN THE MAKING?

Both international law academia and practice have grown more and more dissatisfied with the traditional "rules of recognition" for identifying binding norms. In the meantime, a series of alternative approaches has been developed that can, as it is suggested here, also be very usefully applied in the present context.

2.1 | The "traditional rules of recognition"

In the time shortly before and in the immediate aftermath of the formal affirmation of the two Compacts in 2018, an intense discussion about the specific norm-setting process and the legal value of its results started. As will be shown, the relevance of this discussion is not circumscribed to these specific situations and cases but can rather claim larger significance. It can be argued that they offer a paradigmatic insight into the state of affairs of modern law-making. In a more pronounced way, this holds true for the Migration Compact while the Refugee Compact was discussed in literature[5] only to a lesser extent under this perspective.[6]

The question whether these two Compacts constitute binding international law or have at least legal effects, in the sense explained below, can be related to a similar discussion of fundamental importance in general international law which has not yet brought about fully conclusive results. It rather seems that the more this discussion is dragging on, the more the awareness of its complexity grows while it becomes clear that the notions and categories developed to this end in national law hardly fit to international law, and neither, as a whole, to EU law, or have at least to be further qualified and specified in many senses.

As has recently been set out, following H.L.A. Hart's approach that the presence of law should be determined on the basis of "rules of recognition" or "secondary rules",[7] four different points of reference can be chosen: form, intent, effect and substance.[8] It has further been set out that these rules do not lead to really definitive results. What constitutes international law remains to a considerable extent a question of belief.[9] As argued here, if this finding holds true for general international law, this is even more so regarding the two Compacts by which new tendencies of international law setting are followed.

If we first apply the "traditional rules of recognition" to the situation of the two Compacts, somewhat awkward results are obtained. "Intent" may be the most compelling "rule of recognition" but what if, as in the present case, there is strong evidence that the real intent is a different one than the proclaimed one? While both Compacts declare themselves to be non-binding, it is obvious that acting differently would have endangered the whole project. The option was to have norms (and may they be only norms of an indeterminate status) or no norms at all. Especially if a text is characterised by "constructive ambiguity", as can be assumed in the present case, there is next to no possibility to state objectively what the "real intent" of the parties was.[10] It is rather the case that in such a situation the parties intended to postpone the fixture of a consensus on relevant issues, while, at the same time, establishing a procedure that would steer the relevant discussion in this direction.

[5]As to this discussion see, *inter alia*, the contributions in the special issue of the journal *International Migration*, vol. 57, issue 6, 2019, and those in *International Journal of Refugees and Migration*, vol. 30, issue 4, 2018.

[6]Nonetheless, perplexities were voiced in the literature also in this context when reference was made to the contrast between the strong language on the one side (mentioning, *inter alia*, also "commitments") and the intent to exclude legal commitments on the other. Overall, this conflict was left as it was by most authors, as no way was found to settle it.

[7]H.L.A. Hart, *The Law as a Union of Primary and Secondary Rules* (Oxford University Press, 1961).

[8]J. Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?', in J. Pauwelyn, R.A. Wessel and J. Wouters (eds.), *Informal International Lawmaking* (Oxford University Press, 2012).

[9]*Ibid*., p. 139.

[10]Christine Chinkin characterised relying on the intent of the parties as a "myth". See C. Chinkin, 'Normative Development in the International Legal System', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, 2000).

The next "rule of recognition" one could resort to is "form", but again the drafters of these texts did not intend to make life easy for the interpreter. The two documents are not named "treaties" but "compacts", a relatively new term in international law of unclear contours with no agreed definition. One could only look at the practice to see what the legal status of the documents for which this term was used so far was. However, also the results of this approach are inconclusive. The term "Compact" or "Pact" is sometimes used for binding instruments[11] but more often, and in particular in recent times, this term is taken recourse to to qualify non-binding documents. Without doubt, the most important document of this kind is the "UN Global Compact" of 2000,[12] a document intended to reach out to corporations in order to convince them to adopt sustainable and socially responsible policies. Other examples of non-binding international documents named or dubbed "Pacts" are the "Paris Pact" of 2003, a "Partnership to Combat Illicit Trade in Opiates Originating in Afghanistan"[13] or the International Labour Organization's Global Jobs Pact of 2009.[14] By this measure, one would be inclined to characterise the two Compacts of 2018 as non-binding, although, as will be shown below, also in this regard care must be taken not to rush to hasty conclusions.

Two more "rules of recognition" remain to be tested: "substance" and "effect", both of some promise in this context. Here, not the—often elusive—appearances of form nor the—often uncertain and contested—meaning of intent is resorted to, but rather elements that are more tangible, objective and concrete. What is the real "material tissue" of the norm? What are the stimuli it emanates? What are its repercussions on the societal reality in which it has to operate?

There can be no doubt that both of these "rules of recognition" hint strongly at a legal character of at least some parts of the two Compacts. They attempt to regulate States and in general social behaviour in two important areas of international, European and national reality. The provisions contained in these two documents in part are closely related to binding provisions already in force[15] or they are aiming at profound changes in fields of international law that have been widely neglected to date or are at least under-regulated.[16] This substance permeates the whole text of both documents even if the States adopting them contented themselves with effects materialising only later in time. As will be shown, the procedural elements insert dynamic forces into these documents that are clearly zeroing in on a future normative setting that should considerably diverge from the present one.

Thus, already by taking avail of these "traditional rules of recognition", a considerable substance of normativity can be sensed in these two Compacts. Nonetheless, as already mentioned at the beginning of these considerations, on the whole, these dogmatic paths do not lead to really definite results. Much would remain on the level of prospective analysis and assumption, of legality "as a belief". As set forth in the following, in the meantime, different instruments of analysis are available that evidence more strongly the bindingness and normative character of these two Compacts.

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[11]See the "Pact of San José" as the American Convention on Human Rights of 1969 is also named.
A. Peters, 'The Global Compact for Migration: to sign or not to sign?', EJIL: Talk!, 21 November 2018. Retrieved from https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/ (accessed 21 July 2020).

[12]United Nations Global Compact, 'Ten Principles of the Global Compact'. Retrieved from https://www.unglobalcompact.org/what-is-gc/mission/principles (accessed 21 July 2020). Rahmatullah Khan, 'Global Compact', *Max Planck Encyclopedias of International Law* (Fall edn, 2011). Retrieved from https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1586 (accessed 21 July 2020).

[13]United Nations, 'The Paris Pact Initiative—What is it?', 15 August 2019. Retrieved from https://www.unodc.org/unodc/en/drug-trafficking/paris-pact-initiative.html (accessed 21 July 2020).

[14]According to the ILO, this Pact is intended to counter the consequences of the financial crisis on the job markets and "to provide an internationally agreed basis for policy-making designed to reduce the time lag between economic recovery and a recovery with decent work opportunities. It is a call for urgent worldwide action: national, regional and global." International Labour Organization, 'About the Pact', August 2019. Retrieved from https://www.ilo.org/jobspact/about/lang–en/index.htm (accessed 21 July 2020). I. Roele, 'What are the Forms of UN International Agreements/Understandings and What is Their Legal Effect?', in T. Gammeltoft-Hansen, E. Guild, V. Moreno-Lax, M. Panizzon and I. Roele (eds.), *What is a Compact?* (Raoul Wallenberg Institute, 2019). She also refers to the fact that in the meantime within academia this term has been taken up to qualify proposed normative texts. *Ibid*., p. 12, with reference to E.U. Petersmann, 'Time for a United Nations "Global Compact" for integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2000) 13 *European Journal of International Law*, 621.

[15]This holds true in particular for the Refugee Compact. G. Gilbert, 'Indicators for the Global Compact on Refugees' (2018) 30 *International Journal of Refugee Law*, 1.

[16]Reference can here be made to the ambition of the Migration Compact to introduce an international migration management in a perspective that sees migration prevailingly positively. This may also be a political goal enjoying considerable support but it can hardly be considered as expression of an existing "hard" international norm.

2.2 | New approaches to explain bindingness and normativity of the two Compacts "in the making"

In view of this situation, it is immediately perceptible that traditional international law analysis can give only inadequate answers as to the legal value of these Compacts' provisions. While they surely do not fit into one of the categories by Article 38 of the ICJ Statute (naming an uncontested but not exclusive array of international law sources), it can neither be assumed that they are legally irrelevant. Even the staunchest legal positivist, subscribing to an extreme traditionalist thesis according to which in international law there is only law and non-law, where law is more or less delimited by Article 38 of the ICJ Statute, while all the rest is legally irrelevant and the term "soft law", a misnomer insofar as it contains the expression "law",[17] must be assailed by some doubts when he tests his theoretical framework on the two Compacts. In fact, he has to ask himself why all these efforts were undertaken when the result is a non-binding proclamation of no legal relevance. Why, then, this tough resistance by a plethora of immigration countries against the Migration Compact?[18] Why all these networking and reporting efforts when all these initiatives should end up in results without legal substance? Traditional legal analysis must miss something important of legal reality. As has been aptly said, in the past "scholars have considered the theoretical legal effects of non-binding norms[19] without examining whether in fact such norms are followed".[20]

An intriguing solution to the "bindingness dilemma" can be found by taking recourse to the concept of "global governance exercising public authority".[21] If this activity by international institutions determines individuals and other private and public members of society (both nationally and internationally), legal relevance of such acts[22] can be assumed, even if the constraining effect is not determined by provisions of binding character in a traditional sense.[23] To this end, of pivotal relevance is the question whether an institution or norm is able to constrain the behaviour of subjects on a factual, empirical level, without taking regard of the question whether we are in the presence of a norm formally and explicitly touted as legal. While in national law the requisite of legal certainty usually requires a clear and specific relationship between legal command and expected effect, at the international level global governance approaches integrate also multi-level and multi-actor cause-and-effect situations whereby networks or systems are playing a decisive role.[24, 25] Neither does the "global governance approach" require the

[17]P. Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law*, 413; R. Jennings, 'What is International Law and How do We Tell It When We See it?' (1985) 19 *The International Lawyer*, 103.

[18]For an overview on various contestations against this Compact, see D. Thym, 'Viel Lärm um Nichts? – Das Potential des UN-Migrationsrechts zur dynamischen Fortentwicklung der Menschenrechte' (2019) 4 *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 131.

[19]In the following, when referring to "non-bindingness" of norms associated with their apparent "non-irrelevance" in legal reality, also the term "soft law" shall be used. This is not the place to engage in a fully-fledged analysis of the concept of "soft law". It may suffice to point out that the term "soft law" is generally used to design rules of conduct that—if placed in a continuum running from non-legal positions to legally binding and judicially controlled commitments—lie somewhere in between. See, in particular with regard to EU law: F. Terpan, 'Soft Law in the European Union—The Changing Nature of EU Law' (2015) 21 *European Law Journal*, 68.

[20]D. Shelton, 'Law, Non-Law and the Problem of "Soft Law"', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, 2000). For an extensive analysis of the international migratory governance with the traditional "soft law" tools, see V. Chetail, *International Migration Law* (Oxford University Press, 2019).

[21]A. von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' (2008) 9 *German Law Journal*, 1909.

[22]On "legal relevance" as a specific characteristic of the whole discussion on "soft law", see D. Thürer, 'Soft Law', *Max Planck Encyclopedia of Public International Law* (Fall edn, 2009). Retrieved from https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1469 (accessed 21 July 2020).

[23]A. von Bogdandy, P. Dann and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law Journal*, 1375.

[24]*Ibid*., p. 1388.

[25]As to EU law, it stands somewhere in between these extremes. On the one hand, EU law still reveals its international law foundation and the still existing close interaction with international law leads to a continuous "refreshing" of these characteristics. This is true, in particular, in the area of external relations and with regard to the Common Foreign and Security Policy (CFSP). On the other hand, the ever increasing demands as to the rule of law requisites of this norm system—in particular when EU law actually or potentially enters into conflict with core values of national constitutional orders (see recently the "PSPP" judgment of 5 May 2020 by the German Constitutional Court, 2 BvR 859/15)—leads to a permanent "hardening" order (in both procedural and substantial senses) so as to better reconcile with the standards of the respective national constitutional orders. An important role is played, in this regard, also by the European Court of Justice, through the process of "judicialization of EU Governance". See A.S. Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) 5 *Living Reviews in European Governance*, 2.

provision of specific judicial sanctions for a norm to be qualified as legally relevant. Behaviour of subjects can rather be influenced, constrained and guided by a multitude of different instruments.[26]

Another force equalling traditional sanction-based legal effects results from "discursive motivation".[27] Also "soft law" may engender expectations, guide the ensuing norm-setting process and influence and change the language of the relevant discourse. As has been stated, governance instruments far beyond "hard" legal norms define the range of possible arguments.[28] They channel the subsequent discourse, setting limits and giving direction to it. They are creating something like a "legal forecourt" where not only constraints are perceptible as to what can become law in this field but in a more positive, active vision, soft law can also implant drivers in this forecourt promoting the creation of specific norms in this area.

If we apply these notions to the two Compacts, it is immediately perceptible that many elements of these documents denote situations of exercise of public authority as part of a value-driven process intended to influence the norm-setting process in this field. As will be seen, both Compacts, while being humbly characterised as "non-binding" and "political", are replete with commitments, procedural provisions designed to further clarify and concretise the concepts here at issue and, with clear working programmes, no State having adhered to these documents can stay outside in the future.[29]

The drafting and the adoption of the two Compacts, analysed from the perspective of global governance as a whole, can be seen as an endeavour of global governance exercising public authority and thereby creating new "provisions" of legal relevance. Generally, this particular norm-creating process is retained to be based on three elements: an axiological one based on guiding values, a formal one relating to process and a substantial one referring to the novelties introduced that provide the seeds for new legal developments.

As to the axiological component, the presence of guiding values enjoying broad adherence exercises strong moral pressure for accepting related commitments and for implanting a "norm belief" in a community confronted with claims sustaining the need to further regulate social behaviour. The substantiated reference to the "common good" may create a solid ground for advancing regulative claims.[30] As will be shown, both Compacts strongly rely on professed values and moral claims, purportedly directed at the fulfilment of the "common good".

Process is a further legitimising factor, formally separated but factually strongly related to the value element. In fact, while process seems to be neutral and aseptic, the recognition of its norm-setting capacity as well as its very design are again based on value decisions. The mere fact that a norm-concretisation attempt is running through a formally recognised process may be of enormous legitimising power. While in national law the rigid predetermination of norm-creating processes reflects its effects also as to the value of the resulting provisions, the situation in international law is different. There, the absence of a closed, constitutionally predetermined norm-setting system combined with freedom of form create large grey areas where it is possible to play with ambiguities and to use procedures with the resemblance of recognised norm-creating mechanisms—with the attempt to create provisions that are at least admitted to the "waiting room" for normativity.[31]

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[26]Some examples are named reputation, peer pressure and market forces; see M. Goldmann, 'Sources in the Meta-Theory of International Law', in S. Besson and J. d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford University Press, 2017).

[27]*Ibid*.

[28]*Ibid*.

[29]It may be interesting to remark that even the International Organization on Migration on her homepage qualifies the Migration Compact as "the first inter-governmentally negotiated agreement, prepared under the auspices of the United Nations, covering all dimensions of international migration in a holistic and comprehensive manner". IOM UN Migration, 'Global Compact for Migration'. Retrieved from https://www.iom.int/global-compact-migration (accessed 21 July 2020).

[30]von Bogdandy et al., above, n. 23, at 1383: "for our purpose, we consider an act as public when the enabling norm requires the actor to pursue the common good. Hence, we define an exercise of authority as public if the actor claims that the legal basis of the act mandates him to advance a public interest."

[31]If looking at the recognised sources of international law is, according to M. Reisman ('International Lawmaking: A Process of Communication', (1981) 75 *American Society of International Law Proceedings*, 101–120), nothing else than a myth created by international legal doctrine and practice, it is also to say that apparently this myth works well and formal processes are a valid instrument to take advantage of this myth. In international law, the peculiarities and the imperfections of a norm-setting process may, differently as in national law, disappear over time in the mist of the past, when the norm receives broader acceptance and is recognised as useful.

This play with form and process was very pronounced in the drafting process of the two Compacts, starting with the very designation of these documents alluding to recognised normative texts and using the forum of the General Assembly to provide the atmosphere of a norm-deliberating body. The declaration that these documents are formally not binding may easily get lost to the broader public. It is worth mentioning that the use of the relatively unknown term "Compact" may find some explanation by the extraordinary success an equally labelled endeavour had and is continuing to have: the UN Global Compact of 2000.[32] Also, this document, when adopted in 2000, hardly seemed to be suited to nudge a norm-creating process which brought about the Guiding Principles on Business and Human Rights endorsed in 2011 by the Human Rights Council. Since then, these principles, whose legal nature was deliberately left open by their author, Professor John Ruggie,[33] have received wide appraisal and generated effects that were in many senses similar to those of "hard" legal norms. The secret of this success lies most probably in the fact that the Guiding Principles did not impose new legal obligations in the traditional sense for which no consensus was in the offing. Rather, a framework for a multi-stakeholder consultation process bringing together all social actors—States, businesses, and civil society—was created.[34] This framework is loose enough to permit a dialogue on equal terms and to integrate new issues as it is deemed necessary. At the same time, the results are precise enough to influence the behaviour of the relevant actors in a perceptible way. The "Guiding Principles" have become a "common language" spoken by different actors present on the scene of business and human rights and expectations by the relevant stakeholders are shaped accordingly.[35]

The two Compacts of 2018 are designed to operate in a very similar way. They set a framework for an inclusive dialogue among the most relevant stakeholders dealing with migration and refugee protection. As to the Refugee Compact, the Global Refugee Forum (to be held every four years, starting in 2019[36]) shall lead to concrete pledges and contributions and, with regard to the Migration Compact, the International Migration Review Forum (to be held every four years, starting in 2022) shall fulfil an analogous function by providing transparency to the implementation process and enhancing it at the same time. A series of additional international, European and national procedures shall foster this process such as a UN capacity-building mechanism designed to support efforts of Member States to implement the Migration Compact,[37] a biannual reporting obligation by the Secretary General to the General Assembly as to the implementation of the Migration Compact[38] and an annual reporting obligation by the UN High Commissioner for Refugees with regard to the Refugee Compact.[39]

Finally, the substantial component is of equal importance for fostering bindingness, at least over time. If there is a broadly felt need for new norms regulating social behaviour—here in the field of refugee law and migration—a further important impulse is given to provide authority to the norms resulting from the relevant rule-creating processes. If there is a perceived lacuna in a norm system, at play is at least a presumption that a norm based on accepted values and drafted according to generally recognised procedures operates for the common good and has therefore to be attributed authority.

As will be shown, the two Compacts feature all these characteristics. The dearth of norms regulating international migration and refugee protection is palpable. The situation has worsened dramatically since 2015 and

[32]See U. Hößle, 'Compliance im UN Global Compact', in A. Kleinfeld and A. Martens (eds.), *CSR und Compliance* (Springer Gabler, 2018), 105.

[33]Although declaring them as "non-binding" in substance, their legal value was not defined. In particular, it became clear that to assess their legal value it was necessary to look beyond the traditional source catalogue stated in Article 38 of the ICJ Statute. OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011). Retrieved from https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (accessed 21 July 2020).

[34]See Human Rights Council, "Protect, Respect and Remedy: a Framework for Business and Human Rights", A/HRC/8/5 of 7 April 2008, para. 7s. P. Hilpold, 'Maßnahmen zur effektiven Durchsetzung von Menschen- und Arbeitsrechten—Völkerrechtliche Anforderungen' (2020) 50 *Berichte der Deutschen Gesellschaft für Internationales Recht*, 185

[35]B. Choudhury, 'Balancing Soft and Hard Law for Business and Human Rights' (2018) 67 *International & Comparative Law Quarterly*, 961. Roele (above, n. 14) who interpreted the term "Compact" as "coming together of actors" (*ibid*., at 15). It might be interesting to note that in this field attempts are under way to create international instruments which, at the moment, lies on the table as a—much contested—"Zero Draft".

[36]UNHCR, '2019 Global Refugee Forum'. Retrieved from https://www.unhcr.org/programme-and-practical-information.html (accessed 21 July 2020).

[37]Migration Compact, para. 43.

[38]*Ibid*., para. 46.

[39]*Ibid*., para. 105.

therefore a specific urgency has emerged to find new norms in these areas. All these elements, by application of the global governance conceptual framework, operate in favour of providing authority to the results of the norm-setting procedures here to be analysed.

3 | THE TWO COMPACTS OF 2018: A FIRST ASSESSMENT OF THEIR NORMATIVE QUALITY ON THE BASIS OF THE GLOBAL GOVERNANCE MODEL

In the following, the insights gained from the above inquiry into "new international law norm-setting procedures" shall be applied to the discussion about the norm-quality of the two Compacts. To this end, first of all, some distinctions have to be made between these two documents. Subsequently, the two Compacts shall be the subject of a separate examination.

3.1 | Preliminary considerations: uniting, dividing and blurred lines between the two Compacts

The two Compacts have common roots and in many ways they are interconnected. Both documents evidence, however, also distinctive autonomous features and their public acceptance has also been widely different. An examination of their norm quality requires, therefore, a preliminary assessment whereby particular attention shall be paid to the discussion process leading to the adoption of the two documents and to the different normative environments in which these Compacts are respectively embedded.

As has been said, the prescribing of a policy as authoritative for a community is a process of communication.[40] This proposition fits well also with the global governance model of authoritative norm-setting as the three components of this model described above are closely interdependent and exercise their function in a process of reciprocal sustaining and exchange. Furthermore, such a process can be observed not only in relation to each Compact but in their reciprocal interactions as well. This in turn creates a spill-over momentum, which may lead to the recognition of a normative quality to both Compacts despite their differences.

The Refugee Compact and the Migration Compact have come into being in a relatively short period of time. Already in October 2015, under the immediate impression of the migration crisis in Europe getting out of control, the then Special Representative of the Secretary-General for International Migration, Peter Sutherland, advocated for an international conference that should promote solidarity, both in terms of funding as with regard to a larger acceptance of refugees on a fairer basis, and provide more intense protection for migrants in vulnerable situations.[41] This plea was actually heard and resulted in a "High-Level plenary meeting on addressing large movements of refugees and migrants" on 19 September 2016 at the UN Headquarters in New York.[42] The preceding year had been characterised by intense discussions between the most prominent institutions acting in this field and other stakeholders on the attribution of competences and functions and on the definition of the aims and goals and the delimitation of the area where the newly created mechanisms should operate.[43] Thereby, the whole endeavour underwent a shift of focus in its aims and geographical reach. The UNHCR kept its prominent role in this project but other actors

[40]See Reisman, above, n. 31, 105; B.S. Jackson, *Semiotics and Legal Theory* (Routledge & Kegan Paul, 1985).

[41]See "Protecting and Welcoming Refugees in Europe: Responding to an unprecedented refugee crisis", Report of the SHARE Network Final Conference, held in Brussels on 20 October 2015. Retrieved from https://resettlement.eu/sites/icmc.tttp.eu/files/SHARE%20Network%20conference%20report.pdf (accessed 21 July 2020).

[42]On this occasion, the "New York Declaration for Refugees and Migrants", A/71/L.1 of 13 September 2016 was adopted.

[43]General Assembly, 'New York Declaration for Refugees and Migrants' (19 September 2016) A/RES/71/1.

took centre stage as well: first of all States, but also other institutions like the International Organization for Migration (IOM), which became an organisation "related to the UN" at the New York summit of 19 September 2016.[44]

Thereby, what was first a problem foremost originating in Syria and affecting in last instance Europe had become a far more encompassing task involving the State community as a whole. Consequently, the main focus could not be limited to the refugee issue but had to be extended to migration. The Heads of State and Government and High Representatives meeting in New York on 19 September 2016 adopted a "Declaration for Refugees and Migrants",[45] bringing together what States had previously tried to keep clearly separate. The adoption of such a holistic approach was, first of all, a personal success for Peter Sutherland who had taken such a broad and positive vision of migration over a long period of his personnel career. For Sutherland, a liberal approach towards migration, the overcoming of borders and barriers, had become a central instrument for tackling fundamental societal problems. At the same time, the problem Europe was confronted with could no longer be considered a mere and traditional refugee problem. The core challenge consisted, in fact, in telling refugees from migrants. While there are many instruments in place aiming exactly at this goal, many uncertainties persist in this field and national practice in this area often seems to be inconsistent and erratic.

The Declaration of 2016 affirmed that the treatment of these two phenomena was governed by different legal frameworks but, at the same time, the same universal human rights and fundamental norms were at issue. Common challenges and similar vulnerabilities would have to be addressed. This approach was no doubt revolutionary and unthinkable—at least at governmental level—before the outbreak of the refugee crisis of 2015–2016. This crisis had become so extreme as not only a refugee problem was mixed with mass migration but the refugee phenomenon itself had become a mass flight. Attention was therefore required for both phenomena in their reciprocal interaction. The axiological underpinnings of the two Compacts was the glue that would allow for a holistic approach to these phenomena and to the issue of their normative quality.

From a strict legal-technical perspective, however, both aspects had again to be separated as the legal foundations on which they could be based were profoundly different. In fact, refugee law is regulated in some detail, at least to the extent that the individual protection of subjects is concerned, in the Geneva Convention on Refugee Law of 1951,[46] while global rules in the area of migration are in place only in a disparate, uncoordinated form, for example in international trade law (GATS), in the ILO conventions, the law of the sea and of civil aviation, in transnational criminal law, and, of course, human rights law. The result was two compacts quite different in nature, exactly because of the profoundly different legal frameworks they were built upon.

The Refugee Compact can be considered a stocktaking on international refugee law that draws heavily on the Geneva Convention of 1951.[47] The substance of this body of law is not developed further so that some feared that this Compact would constitute backtracking, a step back, a "banalisation"[48] in relation to what was achieved in particular at the regional level.[49] As will be shown, however, the real innovative aspect introduced by this Compact lies in the procedures foreseen that are poised to further develop also the substantive norms.

[44]L. Doyle, 'Summit on Refugees and Migrants Opens as IOM Joins United Nations' (IOM, 20 September 2016). Retrieved from https://www.iom.int/news/summit-refugees-and-migrants-opens-iom-joins-united-nations (accessed 21 July 2020).

[45]General Assembly, 'New York Declaration for Refugees and Migrants', above, n. 43.

[46]United Nations Treaty Series, vol. 189, 1954, I, Treaties and International Agreements, 137–220, No. 2545.

[47]D.J. Cantor, 'Fairness, Failure, and Future in the Refugee Regime' (2018) 30 *International Journal of Refugee Law*, 627.

[48]M. Gavouneli, 'Legislating by Compacts? – The Legal Nature of the Global Compacts' (EJIL:Talk!, 28 February 2019). Retrieved from https://www.ejiltalk.org/legislating-by-compacts-the-legal-nature-of-the-global-compacts/ (accessed 21 July 2020).

[49]J. Hathaway has characterized the Refugee Compact as a "thin approach", a "minimalist effort"; see J. Hathaway, 'The Global Cop-Out on Refugees' (2018) 30 *International Journal of Refugee Law*, 591. For A. Aleinikoff, "the big problems have gone largely unaddressed"; see A. Aleinikoff, 'The Unfinished Work of the Global on Refugees' (2018) 30 *International Journal of Refugee Law*, 611. According to T. Gammeltoft-Hansen, the Refugee Compact represents, in both form and substance "a step back from international law as the otherwise preferred language of international relations"; see Thomas Gammeltoft-Hansen, 'The Normative Impact of the Global Compact on Refugees' (2018) 30 *International Journal of Refugee Law*, 605. For B.S. Chimni, the Refugee Compact is "a flawed text for several reasons. It avoids mention of the principal cause of recent refugee flows; dilutes established principles of international refugee law; may weaken the protection of children and women; is short on real mechanisms for responsibility sharing; is myopic in stressing 'specific deliverables' (para. 43) in speaking of future academic work; and leaves to the United Nations High Commissioner for Refugees (UNHCR) the task of supervision which it is not equipped to perform (as the Compact itself, which it helped draft, demonstrates)"; B.S. Chimni, 'Global Compact on Refugees: One Step Forward, Two Steps Back' (2018) 30 *International Journal of Refugee Law*, 630.

The situation with regard to the Migration Compact is very different. In view of the dearth of international norms in this area, any attempt to regulate this subject had necessarily to go beyond the status quo. As no consensus existed at the international level, the resulting conflict between norm-creation and lack of normative power would have to be bridged by the exclusion of a norm-creating intent. The result of this difficult endeavour was necessarily a contradictory one, which—as will be shown—would be open for widely different readings. And it was this situation that triggered a specific academic interest for the whole initiative.

Closely connected with this circumstance is the fact that a legal discussion about refugee protection can take place on a more consolidated basis, while discussion about migration seems to be more strongly politically coloured and often more ideologically charged. At the end, also the widely different receptions of the two Compacts by States—in itself, at first glance, a puzzling fact as both Compacts are grounded on the same declaration of 2016—can be seen as an expression of these differences.

In fact, the Refugee Compact was put to a vote at the request of the United States and affirmed on 17 December 2018 by the UN General Assembly with 181 votes in favour, two against (Hungary and the United States), and three abstentions (Eritrea, Liberia and Libya).

In the two-stage process that gave international authority to the Migration Compact, the approval rate by States was even lower. At the Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration of 10 December 2018 in Marrakech, 164 States voted in favour of this document. At the UN General Assembly, which would provide ultimate authority to this Compact by a vote of endorsement, the number of States voting in favour of the relevant resolution shrank to 152 with the United States, Hungary, Israel, the Czech Republic and Poland voting against it and 12 countries abstaining. Twenty-four UN Member States were not present at the vote. The difference in the intensity of the consensus undergirding the two Compacts seems therefore to be conspicuous. Within the EU, the vote was split three ways: 19 Member States voted in favour, three voted against (Czech Republic, Hungary, Poland), five abstained (Austria, Bulgaria, Italy, Latvia and Romania) and one (Slovakia) did not vote. Of 193 UN Member States, 41 did not endorse the Migration Compact.[50] Thereby the Union demonstrated its deep division as to this question, a division that is conspicuous.

Lastly, with the two Compacts being drafted within diverse normative environments, it could be assumed that both areas would be easily distinguishable and clearly separated. This is, however, not the case. As will be shown, the Compact on Migration covers an extremely broad area where in many senses a consensus for "hard", detailed norms seemed not to be in reach. The Refugee Compact, for its part, concentrates on a core concept of refugee, as it was conceived in 1951, leaving open to future developments the issue of an extended protection to refugee-like situations.[51] Even though these "grey areas" are located at the outer margins of the Refugee Compact and at their core the two Compacts remain substantively disparate, there are strong dynamic elements within both Compacts whose effects are yet to be seen in the years to come. It could be that their borders will evolve and their normativity reinforced in the process. In the following it will be examined what forces and considerations are undergirding these developments.

3.2 | The case for normativity of the Migration Compact

The Compact on Migration received much more international attention than the Compact on Refugees exactly because it entered largely uncharted waters and tried to regulate a matter for which no regulatory consensus yet

[50]J. Wouters and E. Wauters, 'The UN Global Compact for Safe, Orderly and Regular Migration: Some Reflections', in K. Lemmens, S. Parmentier and L. Reyntjens (eds.), *Human Rights with a Human Touch. Liber Amicorm Paul Lemmens* (Intersentia, 2019). L. Vosyliūtė, 'What is the EU's Role in Implementation of the Global Compact for Migration?' (CEPS Paper in Liberty and Security, December 2019). Retrieved from https://www.ceps.eu/download/publication/?id=26033&pdf=LSE2019-12-What-is-the-EU%E2%80%99s-role-in-implementation-of-the-Global-Compact-for-Migration.pdf (accessed 21 July 2020).

[51]C. Costello, 'Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?' (2018) 30 *International Journal of Refugee Law*, 643.

existed. There were attempts to overcome this problem by relativising the normative strength of the prepared text but the continuing resistance against this text is proof that this attempt was only partially successful. In the following, the components of the "case of normativity" according to the "global governance approach" as developed above shall be applied to the Migration Compact.

Regarding the value component of the Compact on Migration, it can be noted that the drafters set themselves ambitious goals. According to them, this Compact "offers a 360-degree vision of international migration and recognizes that a comprehensive approach is needed to optimize the overall benefits of migration, while addressing risks and challenges for individuals and communities in countries of origin, transit and destination."[52] This statement can be seen as emblematic for the substantive orientation of the whole Compact. While surely not being oblivious to the worries of, and possible downsides for, communities in countries of destination—they are mentioned several times in this document—there can be no doubt that the overall attitude is pro-migration in the sense that the benefits of migration are given far more room and emphasis than the drawbacks.

This can be clearly seen in the following introductory statement in para. 8 of the Compact:

> Migration has been part of the human experience throughout history, and we recognize that it is a source of prosperity, innovation and sustainable development in our globalized world, and that these positive impacts can be optimized by improving migration governance. The majority of migrants around the world today travel, live and work in a safe, orderly and regular manner. Nonetheless, migration undeniably affects our countries, communities, migrants and their families in very different and sometimes unpredictable ways.

The gist of this general vision is that migration is a boon to humanity, but its positive effects can even be further enhanced by improving migration governance. In this introductory statement, negative effects of migration are not even mentioned explicitly. Only in a very understated form, possible negative effects of migration are hinted at ("affects", "sometimes unpredictable ways").

National sovereignty in this area is on the one hand affirmed but on the other hand a passionate plea for international cooperation in migratory issues is made, while so far, quite to the contrary, the absence of international regulatory instruments in this field has been justified by the sovereign right to abstain from such an agreement.[53] The commitment to enhance the availability and flexibility of pathways for regular migration[54] carries this attitude to its extreme.

Thereby this whole project refers back to a pivotal political driver for this endeavour, a driver that before long had acquired considerable legal weight: the 2030 Agenda for Sustainable Development Goals of 2015, a rather complex document of 17 goals and 169 targets that should lead the international development agenda up to year 2030.[55] Often cited but widely unknown in its real content (also as a consequence of its inherent complexity), this document takes a decisively positive stand in favour of migration as a tool to foster development. In Target 10.7 of Goal 10, States commit to "[f]acilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies"[56]

There can be no doubt that on this basis, migration is generally set in a positive light; migration should actually be promoted and not curbed. One might wonder how such a far-reaching and contentious objective could have found entrance in a document adopted by consensus at a UN Summit in New York in September 2015. One reason

[52]See Migration Compact, para. 11.
[53]*Ibid*., para. 15.
[54]*Ibid*., para. 21.
[55]P. Hilpold, 'EU Development Cooperation: A Stock-Taking and a Vision for the Future' (2018) 20 *Austrian Review of International and European Law*, 189.
[56]See M.K. Solomon and S. Sheldon, 'The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly and Regular Migration' (2018) 30 *International Journal of Refugee Law*, 584, with reference to further targets also addressing migration issues. See also F. Crépeau, 'Towards a Mobile and Diverse World: "Facilitating Mobility" as a Central Objective of the Global Compact' (2018) 30 *International Journal of Refugee Law*, 650.

may be found in the complexity of this document which resulted from a multi-level international consultation procedure which mirrors an ever-growing awareness of the complexity of the development issue itself. In respect to their predecessors, the Millennium Goals of 2000,[57] which have missed their objectives set for 2015, by far constitute a further step of development in technicality, number of details and systematic connection so that there might not be many experts understanding this system in all its details. And in any case, single elements, even if contested or at least much-discussed when presented autonomously, might find here an inconspicuous place to stay.

Implanting this pro-migration posit into the fundamental UN migration framework, whether it happened by accident or deliberately, can therefore be seen as a first step in a longer-lasting normative endeavour that found its most recent expression in the Compact on Migration[58] which forcefully takes up the "facilitation" idea.[59]

On the whole, the migration subject is presented in the light of and attached to values of high moral standing[60] thereby further enhancing and strengthening the norm-setting process. In this regard, the Compact on Migration also contains—like the Compact on Refugees—a series of procedural norms whose relevance may even be more prominent than that of its sibling.[61] At the centre stands the "International Migration Review Forum" that, being an offspring of the "High-level Dialogue on International Migration and Development", shall take place every four years and "discuss the implementation of the Global Compact at the local, national, regional and global levels, as well as allow for interaction with other relevant stakeholders with a view to building upon accomplishments and identifying opportunities for further cooperation".[62]

Alongside the quadrennial meetings, an annual informal exchange on the implementation of the Global Compact, and the reporting of the findings, best practices and innovative approaches to the International Migration Review Forum are envisaged.[63] The IOM (as well as other fora) are invited "to contribute to the International Migration Review Forum by providing relevant data, evidence, best practices, innovative approaches and recommendations".[64]

Incidentally, also the procedural provisions reconnect to the development issue when they point out that the "Progress Declaration" resulting from the International Migration Review may be taken into consideration by the high-level political forum on sustainable development.[65]

Lastly, regarding the substantive component of the Compact on Migration, it is worth stressing that broad regard is given to migration as a consequence of natural disasters on the one hand, and climate change and environmental degradation on the other hand. As a consequence of the first situation, practices for "admission and stay of appropriate duration"[66] are foreseen. As to the second, more problematic issue, cooperation "to identify, develop and strengthen solutions"[67] is considered. It is interesting to note that during the drafting process of the two Compacts, there was an intense discussion[68] on where to locate this subject. There were attempts to deal with this issue within the Refugee Compact and in fact there are evident parallels between the situation of a person fleeing from political persecution and that of a person under existential threat due to climate change. To consider persons fleeing from

[57]United Nations, 'We can end poverty'. Retrieved from https://www.un.org/millenniumgoals/ (accessed 21 July 2020).

[58]The Migration Compact was hailed in literature to be "in many ways the beginning for the global regulation of migration": J. McAdam, 'The Global Compacts on Refugees and Migration: A New Era for International Protection?' (2018) 30 *International Journal of Refugee Law*, 571.

[59]As F. Crépeau (above, n. 56) points out, the Migration Compact uses words derived from the verb "facilitate" 62 times (at 651–652). As he rightly states: "This cannot be an oversight" (*ibid*., at 652).

[60]And, in fact, some first comments about this Migration Compact are over-enthusiastic about migration, as if this Compact had introduced a wholly new perception on migration, unthinkable in this thrust only a few months before. See Crépeau (above, n. 56), according to whom "the vast majority of migrants" should be seen as welcome and admissible (at 652). It is doubtable whether this assessment reflects a common consensus within the state Community.

[61]See Migration Compact, para. 48ff. As Wouters and Wauters point out, procedural instruments—in the form of informal and non-binding dialogues on an interregional basis—are traditionally of elementary importance for norm-setting (sort of) in migration law. See Wouters and Wauters, above, n. 50, at 375f.).

[62]See Migration Compact, para. 49 lit (d).

[63]*Ibid*., para. 51.

[64]*Ibid*., para. 52. The first International Migration Review Forum will be held in New York during the first half of 2022. See https://www.un.org/development/desa/en/news/population/international-cooperation-on-migration.html

[65]See Migration Compact, para. 49 lit (e).

[66]*Ibid*., para. 21 lit (g).

[67]*Ibid*., para. 21 lit (h).

[68]Crépeau, above, n. 56; Solomon and Sheldon, above, n. 56.

climate change or environmental degradation as refugees in the legal sense would have opened up attractive new legal perspectives—a development host countries wanted, however, to impede at any cost. At the end, to deal with this group in the context of migration appeared to most States the better solution as in this context no binding obligations would ensue. The result was a Compact which would not confirm or introduce *ex novo* restrictive legal distinctions but address, first of all, needs of effective protection, considering thereby also situations of "mixed migration" and migration of vulnerable persons who may factually come close to the category of refugees without necessarily fulfilling the relevant legal requisites.

As a first result, it can therefore be maintained that the components of a "case for normativity" as identified above according to the "global governance approach" can be clearly identified in the "Migration Compact" and it is highly probable that their effects will materialise in their reciprocal interaction at least in the medium term.

3.3 | The case for normativity of the Refugee Compact

In this section, the components of the "case of normativity" according to the "global governance approach" as developed above shall be applied to the Refugee Compact.

As already set out, the Refugee Compact, affirmed on 17 December 2018, is a document mainly elaborated by the UNHCR in a broad international consultation process and widely reflecting the status quo of refugee law as it has been developed on the basis of the 1951 Geneva Refugee Convention. It tries, in particular, to give substance to the following preambular paragraph: "considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation." However, as will be shown, this status quo or least common denominator which allowed for the Compact to be adopted is accompanied by dynamic elements which open the door to further developments.

Who is a refugee is defined in the 1951 Geneva Convention.[69] Over the years, this definition has undergone an extensive interpretation but in substance it still sticks to the idea of a person in need of protection abroad due to individual persecution in his home country. In this regard, the Refugee Compact mirrors the Geneva Convention (in its present day interpretation) and concentrates on a core concept of refugee, as conceived in 1951, leaving aside the further developments that extended protection to refugee-like situations, in particular where temporary, complementary or subsidiary protection is needed.[70] To be sure, the actual practice by the UNHCR and other international institutions has formed out of an enlarged refugee concept that has been partly transformed into hard law by the European Union's Common European Asylum System (CEAS).[71] Nonetheless, the Refugee Compact neglects this reality.[72] The UNHCR's mandate does not cover either internally displaced people (IDP), although on a factual basis this institution might provide humanitarian assistance also in such situations.[73] Neither are persons fleeing

[69]As is well known, in other documents, such as the UNHCR's statute, the OAU convention and the Cartagena Declaration, slightly different definitions can be found.

[70]Costello, above, n. 51.

[71]In particular, subsidiary protection to persons not qualifying as a refugee in the stricter sense but facing a real risk of suffering serious harm is provided by the CEAS but not by the Refugee Convention 1951. "Qualification Directive", art. 15 2011/95 EU. As is well known, the CEAS is hardly able to manage the asylum problem the EU is faced with. So it has been argued that the CEAS may be flexible but still not flexible enough to counter the extraordinary challenges associated with the refugee crisis starting in 2015. Recently, it has been argued that this system should be more politicised and "de-legalised" so as to gain additional flexibility. Also, this approach could be seen as an attempt to look for new ways of norm-setting. F. Schorkopf, 'Das Dublin-Recht in EU-Gesetzgebung und Anwendungspraxis—Strukturprobleme und Perspektiven', in M. Ludwigs and S. Schmahl (eds.), *Die EU zwischen Niedergang und Neugründung* (Nomos, 2020), with reference to Luuk van Middelaar who sustains in substance that the European Union, faced with a "polycrisis" should be more "politicized", see L. van Middelaar, *Alarums and Excursions: Improvising on the European Stage* (Agenda Publishing, 2019).

[72]Costello, above, n. 51.

[73]UNHCR, Mandate of the High Commissioner for Refugees and his Office—Executive Summary (27 July 2019). For a somewhat more prudent statement, saying that UNHCR "does not have a general or exclusive mandate", rather than no mandate at all, see https://emergency.unhcr.org/entry/55600/unhcrs-mandate-for-refugees-stateless-persons-and-idps. IDPs receive only marginal mention in the Refugee Compact (paras. 12, 89) and none in the Migration Compact. Aleinikoff, above, n. 49, at 5.

environmental degradation or adverse effects of climate change covered by the UNHCR's mandate.[74] Thus, for the time being, a clear gap between the need for effective protection and relevant international instruments at hand exists. This was a hotly disputed issue in the drafting process of the Refugee Compact and the approach finally chosen leaves it up to the States to close this gap so that those "in need of international protection" would effectively be covered by protective measures.[75]

This is, no doubt, an unsatisfactory situation but nor can there be any doubt that extending the notion of refugee so as to include explicitly IDPs and persons fleeing from environmental degradation and the consequences of climate change would have been a bold, revolutionary step, putting at peril the whole normative endeavour. Therefore, a seemingly conservative approach was chosen that leaves open the possibility of further developments conducive to a broader definition of protected refugees. The seeds for such developments are ingrained in the very wording of the Refugee Compact.

Never before have so many people been on the move against their will as presently. According to the UNHCR, we have 79.5 million forcibly displaced people worldwide, 45.7 million internally displaced people, 26 million refugees and 4.2 million asylum seekers.[76] There are radically different views on how to tackle this issue, i.e. whether the State community would be allowed only to address the immediate humanitarian challenge by providing help to the individuals affected, or whether it should adopt a comprehensive approach and—on a priority basis—the root causes of the problem.[77] Should the State community opt for the second alternative, again narrower and broader measures of intervention are conceivable. The drafters of this Compact decided to steer a middle course. They identified in climate change, environmental degradation and natural disasters at least elements interacting with the root causes and the drivers of the refugee movements.[78] This was surely a bold step as these events are by themselves highly contested as to their causes, their extent and their effects.

By a broad enumeration of possible root causes, a comprehensive approach has been taken that could lead in the future to a further extension of the refugee concept or at least to an explicit enlargement of the UNHCR's mandate in this sense. This constitutes a strong dynamic element within the substance of the Refugee Compact whose effects may yet be seen in the years to come. It could be that the borders of the refugee concept or the definition of the protected right-bearer will have to be redrawn continuously. Furthermore, the Refugee Compact itself hints at the possibility for the relevant stakeholders to look beyond the traditional areas of refugee protection.[79]

All in all, it can therefore be said that the Refugee Compact addresses the refugee problem in an open, modern fashion that goes far beyond the original perspective concentrated on protection from individual persecution. In particular, reference to climate change, environmental degradation and the 2030 Agenda for Sustainable Development opens up a total new horizon whereby the dividing line between refugee law and migration law has to be

[74] J. McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012). Although the issue of climate refugees and refugees from environmental degradation is given some prominence compared to IDPs.

[75] See para. 61 of the Refugee Compact: "Mechanisms for the fair and efficient determination of individual international protection claims provide an opportunity for States to duly determine the status of those on their territory in accordance with their applicable international obligations (A/RES/72/150, para 51), in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it." It has been criticised that thereby it is left to the discretion of States to provide protection, moreover on the basis of State law, in situations that are of international relevance. Aleinikoff, above, n. 49, 1.

[76] See UNHCR, Global Trends, Forced Displacement in 2019. Retrieved from https://www.unhcr.org/globaltrends2019/ (accessed 26 November 2020).

[77] Of course, at first sight, it would seem intriguing to make every effort to address, first of all, the "root causes" and it may be no coincidence that not only the staunchest opponents of further refugee inflows in European countries justify their restrictiveness by such a plea, but also advocates for a general opening of borders present similar requests. The reason for this apparent contradiction lies in the fact that this concept defies any consensual definition. And in fact, the concept of "root causes" often means different things to different people and the real challenge lies in the identification of such root causes that can be argued with some degree of persuasiveness to be really at the basis of present migratory flows.

[78] See para. 8 of the Refugee Compact.

[79] See para. 63 of the Refugee Compact according to which also "other protection and humanitarian challenges" could be addressed: "where appropriate, stakeholder with relevant mandates and expertise will provide guidance and support for measures to address other protection and humanitarian challenges. This could include measures to assist those forcibly displaced by natural disasters, taking into account national laws and regional instruments as applicable, as well as practices such as temporary protection and humanitarian stay arrangements, where appropriate". It is true, that this provision, as Aleinikoff notes (above, n. 49, at 5), refers only to natural disasters and not to climate change, but the reference mentioned is only made by way of example and further drivers for an enhanced role of the relevant stakeholders are not excluded.

redrawn.[80] Of course, as of yet, no new individual rights have been stated in this area but the identification of new root causes of the refugee problem could be the first step in this direction.

Another substantial lacuna could, at first sight, be identified within the Refugee Compact which could possibly be compensated by further developments thanks to its dynamic elements. If the extent of the refugee issue in international law has to be delimited, the two extreme poles are probably the purported right to asylum on the one hand, and the right to return asylum seekers not fulfilling the conditions for refugee protection on the other. As is widely uncontested, in general international law, a right to asylum does not exist,[81] only a right to non-refoulement in the State of persecution does, while the return of asylum-seekers not fulfilling the conditions of the 1951 Convention is permitted, albeit often being very difficult to implement due to the non-cooperation of the countries of origin and other practical obstacles.[82] The Refugee Compact does not bring substantive innovations in this delicate area, neither restricting nor extending the rights and obligations here in question. The only attempt was to render the application of these rules smoother and balancing conflicting interests.

Regarding the right to asylum, no affirmation of such a right can be found in the text of the Compact. Only in note 5 is reference made to a right to seek asylum according to Article 14 of the Universal Declaration of Human Rights of 1948. A "right to seek asylum" is, however, different from a right to asylum proper. On an extreme point, it has been sustained in literature that "[t]he principal goal should have been to strengthen the protection system by *inter alia* calling for the dismantling of the existing non-entrée regime established by developed nations."[83] It goes without saying that such a proposition would have been absolutely unrealistic. Much emphasis is put, however, on voluntary repatriation—as it is specified "in conditions of safety and dignity" and "in full respect of the principle of non-refoulement".[84] At the same time, however, it is also pointed out that "voluntary repatriation is not necessarily conditioned on the accomplishment of political solutions in the country of origin".[85]

On the whole, there can be no doubt that the Refugee Compact, while guaranteeing any possible support to the countries of origin in order to make repatriation possible, has in mind, first of all, the challenges the refugee problem creates for the host countries. As stated, with this initiative, started in 2015, it was attempted to keep the refugee issue separate from migration in the larger sense. That people are trying to flee from countries where life-threatening situations prevail is seen as a given that as such has neither to be fostered nor curbed.

Here again, reference to the root causes may have the function to create a broader understanding of the needs of refugees and hopefully lead to improvements on the ground, albeit it is realistic to expect them to happen only in the longer run. In the shorter run, it has to be ensured that the host countries are not overwhelmed by the refugee problem so that they continue to fulfil their important role. The recipe to achieve this result is repatriation for those not in the immediate need of protection, and relocation of those who can no longer be realistically supported by States hosting refugees in disproportionate number. The great challenge will be to make this ambition true. To this end, the Refugee Compact refers to new procedures and mechanisms which are, however, conceived in a rather vague form.

As to the root causes proper, the text of the Compact follows a two-stage approach which is sensitive towards the sovereignty of States and reminiscent of the ideas standing behind the concept of the Responsibility to Protect: "In the first instance, addressing root causes is the responsibility of countries at the origin of refugee movements".[86]

[80]To connect the refugee issue with the 2030 Agenda for Sustainable Development appears to be fully in line with the recent attempt to address the development issue as a multi-faceted challenge strongly related to good governance, environmental protection and human rights. All the previous attempts to address development as an isolated, independent question have in fact failed dramatically.

[81]Of course, a different picture results from national rules. A series of countries (most prominent Germany, Art. 16 *Grundgesetz* and France, Art. 120 of its Constitution of 1793, and also the European Union, according to the Common European Asylum System, are granting a right to asylum. Further, it shall not go unmentioned, however, that for some academics the view that the Refugee Convention does not grant a right to asylum is no longer tenable. See A. Edwards, 'International Refugee Law', in D. Moeckli, S. Shah and S. Sivakumaran (eds.), *International Human Rights Law* (Oxford University Press, 2018).

[82]In Germany, little more than 10% of asylum seekers not qualified for asylum or subsidiary protection can actually be repatriated. See Schorkopf, above, n. 71, at 63.

[83]See Chimni, above, n. 49, at 631.

[84]See Refugee Compact, para. 87.

[85]*Ibid*.

[86]*Ibid*. The Refugee Compact affirms the primary responsibility and sovereignty of States in para. 33; the Migration Compact in paras. 7, 15.

But the Compact does not fail to point out that there is also something like a subsidiary responsibility ("matters of serious concern") by the international community in this field. As failures by States to come up to their primary responsibility in this area are apparent, no temporal sequencing of the respective acts is required and the international community could and should come up to their responsibility with immediate effect. The individual root causes are named only by way of example. To summarise them at least indirectly, it could be said that upholding UN law, human rights and international law in general, fighting against discrimination of any kind, guaranteeing the rule of law and providing development assistance in line with the 2030 Agenda for Sustainable Development could eradicate the refugee problem at its roots.[87]

For some, this approach did not go far enough and they would have preferred singling out more specific root causes,[88] for example by blaming acts of humanitarian intervention, in particular by Western states, for example against Afghanistan, Iraq, Libya and Syria.[89] It is clear, however, that such a statement would have been not only highly divisive, rendering vain any hope for a somewhat consensual document with broader adherence also by Western States, but also from a strictly technical viewpoint, such a position would hardly be arguable. In fact, in cases of a humanitarian crisis due to human rights abuses by an oppressive regime or a civil war prompting a humanitarian intervention, it is next to impossible to tell what would have been the losses and the suffering without an intervention and to balance the two situations in a mathematical way. Generally, notwithstanding all the arbitrariness happening in this field, not too much but too little intervention is bemoaned.[90]

It appears that the real innovatory traits of the Refugee Compact are the identification of new root causes of the refugee problem as well as the introduction of new procedural settings through which the concept of solidarity can be further developed. This can be seen as a "hidden invitation" to connect these two elements and to give to refugee law "new substance through value-guided procedure".[91]

Regarding these new procedural settings, the Refugee Compact consists of two parts: the Comprehensive Refugee Response Framework (CRRF) annexed to the New York Declaration of 2016 and Program of Action (PoA) contained in the 2018 document. While the CRRF relates specifically to large refugee situations,[92] at the centre of PoA stand arrangements for burden and responsibility sharing.[93]

On a procedural-institutional level, a Global Refugee Forum and a set of arrangements (National Arrangements, Support Platforms, Regional and subregional approaches) are envisaged. The Global Refugee Forum shall be held every four years and involve not only all United Nations Members States but also further relevant stakeholders. It shall "announce concrete pledges and contributions towards the objectives of the global compact".[94] The first Forum was held on 17–18 December 2019 in Geneva where a series of pledges and contributions were announced.[95]

Global measures shall be supported by national arrangements, determined by host States and directed at devising a comprehensive plan. These national arrangements can again be reconnected to the universal level by the activation of a "Support Platform" that should "enable context-specific support for refugees and concerned host countries and communities".[96] Criteria for activation of Support Platforms (also with the assistance of the UNHCR) include "a large-scale and/or complex refugee situation where the response capacity of a host State is or is

[87] *Ibid*.
[88] Chimni, above, n. 49, at 630.
[89] *Ibid*.
[90] It should also be noted that the R2P concept as it was adopted by consensus at the World Summit of 16 September 2005 (UNGA/RES/60/1) includes a "responsibility to react", i.e. the possibility to intervene by forcible measures, albeit on the condition that the intervention is authorised by the UN Security Council (see para. 139 of Res. 60/1). By the way, R2P also offers an opportunity to relate the refugee problem with environmental questions on the basis of existing law provisions.
[91] Hathaway, above, n. 49, at 591.
[92] Para. 12 of the Refugee Compact.
[93] *Ibid*., para. 11.
[94] *Ibid*., para. 17.
[95] Summary of the first Global Refugee Forum by the co-convenors. Retrieved from https://www.unhcr.org/uk/events/conferences/5dfa70e24/summary-first-global-refugee-forum-co-convenors.html (accessed 26 November 2020).
[96] See Refugee Compact, para. 20ff.

expected to be overwhelmed"; or "a protracted refugee situation where the host State(s) requires considerable additional support, and/or a major opportunity for a solution arises (e.g. large-scale voluntary repatriation to the country of origin)".[97] The first Forum in Geneva featured the launch of Support Platforms for the regional refugee responses in Central America and Mexico, in the East and Horn of Africa and the Solutions Strategy for Afghan Refugees.[98]

A further ad-hoc measure could be a solidarity conference, designed to "garner broad-based support for host States or countries of origin, encompassing States, development actors, civil society, local communities and the private sector".[99]

All these initiatives and measures are conceived against the backdrop of, and should be conducive to, a comprehensive burden- and responsibility-sharing plan. Alas, as is widely held, this may be at the same time the kingpin and the weak point of the whole Compact. On this issue, the Compact is both extremely wordy and devoid of concrete substance.[100] There is simply no willingness within the State community to live up to a common solidarity model and, even more substantially, there is not even a common understanding on what solidarity actually means.[101] The most glaring demonstration of this current lack of preparedness to take on a substantial solidarity commitment, at least in one of the most crucial areas, can be seen in the fact that EU Member States were not even able to implement a relocation plan for (originally) 160,000 refugees at the height of the asylum crisis.[102]

Nonetheless, these past failures do not justify a purely negative attitude towards the Refugee Compact. This approach might be seen as a manifestation of a new form of norm-setting that overcomes the ever-growing difficulties of finding consent for "hard" norms in a universal community by creating the appearances of non-bindingness while at the same time flirting with the idea of measures of equivalent effect, i.e. they are designed to achieve, over time, the same result as "hard" norms. By further developing this technique, the relevance of the Refugee Compact goes most probably far beyond the mere refugee issue. It is contended here that this may be a more effective way of law-making than the search for new "hard" international law rules which have to be identified through an arduous, and often highly contentious norm-setting process, leading to a set of provisions which would still have to undergo a ratification process of unsure success.

Thus, it can be stated here that the factual circumstances characterising the refugee problem on an international scale may be in many senses different than those operating with regard to the migration question but nonetheless the elements identified as decisive for a norm-creating process according to the global governance approach are set to create pre-conditions that are well suited for setting in motion such a development over the next few years.

4 | CONCLUSIONS

On the political level and in academia, there has been a strong reaction to the two Compacts, and in particular to the Migration Compact. There was a widespread feeling that something important had happened by the adoption/endorsement of these texts, even though legal analysis conducted by the traditional tools could not rightly explain all the ado as an analysis conducted on the basis of Article 38 ICJ Statute would qualify these documents as non-

[97] *Ibid*., para. 24.

[98] See Summary of the first Global Refugee Forum by the co-convenors, above, n. 95, para. 11.

[99] *Ibid*., para. 27.

[100] M. Ineli-Ciger, 'The Global Compact on Refugees and Burden Sharing: Will the Compact Address the Normative Gap Concerning Burden Sharing?' (2019) 38 *Refugee Survey Quarterly*, 115: "The Compact has so far failed to introduce any clear mechanism or concrete measure to ensure adequate compensation to the States hosting or supporting more refugees than others. Hence, although much depends on how the Compact will be implemented in practice, it is nevertheless unlikely that the Compact, as it is, will be able to address the normative gap on burden sharing in an adequate and a comprehensive manner." *Ibid*., p. 138. And, as J. Hathaway (above, n. 49, at 594) puts it: "the clearest output of the Compact is that there will be lots and lots of meetings to chat about how best to respond to 'large' refugee movements".

[101] P. Hilpold, 'Understanding Solidarity within EU Law: An Analysis of the "Islands of Solidarity" with Particular Regard to Monetary Union' (2015) 34 *Yearbook of European Law*, 257.

[102] P. Hilpold, 'Quotas as an Instrument of Burden-Sharing in International Refugee Law—The Many Facets of an Instrument Still in the Making' (2017) 15 *International Journal of Constitutional Law*, 1188.

binding soft law. Most authors had, however, to admit that whatever traditional tools of analysis might say about these two Compacts, they were surely not legally irrelevant.[103] It was tried here to show that new streams of legal analysis, and in particular the concept of global governance, are offering a new perspective that brings legal analysis better in line with empirical sensation. In this way, also a less cynical picture is offered of those States that opposed the Migration Pact (or refused to adhere to it). To qualify this attitude as merely opportunistic or primarily directed at pleasing a xenophobic constituency would not really do justice to this policy, which was directed at entering commitments that had a high probability to harden to law in the proper, traditional sense. Of course, one might be of the opinion that this attitude was politically wrong but this is a different subject than the technical question whether these Compacts are designed to have legal effects or not. As shown, this latter question has to be answered in the affirmative. Interestingly, also those seeing in the Compacts a step backwards as to the legal status achieved emphasise the potential bindingness of these documents.[104] In future, no State adhering to these Compacts will be able to abstain from the discourse it has contributed to engender or to take an openly contrarian position without incurring heavy political costs.[105]

And, finally, it has to be highlighted that also academic discourse about the sources of international law and, more generally, law-making in this area has been enormously enriched by these two Compacts and their process of formation. In an international society confronted with challenges that have so far defied detailed regulation such as the management of migration but also "common goods" such as development, equality of wealth distribution, the environment or the climate question, Compacts could become a pivotal regulative tool that should get more attention and be at the centre of more intense dogmatic analysis by an academic community that is still too attached to a catalogue of sources created a century ago and reflective of an international society that in the meantime has undergone widespread and radical changes.[106]

If we return to our starting point: to the question whether we should look for a new understanding of normativity in international law (with all the repercussions this has also on EU law), we see that the global governance approach can offer new insights which reference to the traditional concept of "soft law" is not able to provide. In a certain sense, the term "soft law" is nothing more than a means to give expression to the fact that arguing solely on the basis of Article 38 of the ICJ Statute leaves open many questions. But the term "soft law" is nothing more than a "dummy" of no substantive, explanatory value. In this sense, the approach chosen here is better suited to fill this lacuna. This process- and situation-oriented perspective opens up new spaces for the identification of normativity where the feeling prevails that something must be out there we cannot explain within the self-constructed limitations of our perspective.

Where does the European Union stand in this whole discussion? Although this global governance discussion is primarily developed at the intersection between international law and national law, the proposition is that EU law

[103]It is interesting to compare this situation with that of the UDHR of 1948. Also in that context, States were eager not to adopt a binding text as they feared an excessive impingement on their sovereignty. While in the meantime large parts of this document are considered to constitute international customary law, there is still no real consensus about the bindingness of each specific norm. At the same time, this document uncontestably wields enormous authority as a whole. It was said that "the emphatic and repeated denials that the UDHR had legal force were probably part of the efforts that were necessary for its acceptance by the 48 states in the first place". See E. Bates, 'History', in D. Moeckli, S. Shah and S. Sivakumaran (eds.), *International Human Rights Law* (Oxford University Press, 2018), 3 at 19, citing also H. Lauterpacht, *International Law and Human Rights* (Praeger, 1950) for an outspoken academic critic of this document.

[104]As to the Refugee Compact, see Chimni, above, n. 49, at 634.

[105]F. Schorkopf, 'Der Deutsche Bundestag und der Migrationspakt—Anlass zur Stärkung parlamentarischer Beteiligung an völkerrechtlichen Soft Law-Prozessen?' (2019) 39 *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 90. It would be tempting to compare the present norm-setting tendencies with those of the 1960s and the 1970s regarding the attempt to create a "New International Economic Order" (NIEO). As is well known, these attempts failed (although they surely influenced our present thinking about international justice, solidarity and development). One main difference between these two situations may lie in the fact that the two camps—the advocates and the opponents of a NIEO—were clearly separated and in fierce conflict. On this subject, see the masterly piece by T.W. Waelde, 'A Requiem for the "New International Economic Order"', in G. Hafner, G. Loibl, A. Rest, L. Sucharipa-Behrmann and K. Zemanek (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in honour of his 80th birthday* (Kluwer Law International, 1998), 771. See also P. Hilpold, 'Reforming the United Nations: New Proposals in a Long-Lasting Endeavour' (2005) 52 *Netherlands International Law Review*, 389, 417.

[106]See, also, V. Türk, 'The Promise and Potential of the Global Compact on Refugees' (2018) 30 *International Journal of Refugee Law*, 575, who notes, with reference to the Refugee Compact, that once such a regulative attempt would have taken the form of an additional protocol to the Refugee Convention while "[t]he progressive development of international law and standards has of late, however, taken different forms." *Ibid*., at 582.

and EU reality is affected in manifold ways by this discourse. Both national and international law are inscribed into the genome of the European Union.[107]

EU law knows detailed norm-setting procedures that resemble very much that of its Member States and at the same time its outlook on law is strongly influenced by the international legal order. This influence is exercised both directly and in very subtle ways. It has already been mentioned that in the field of external relations and in that of CFSP, the EU is both shaping and implementing international law. As to the EU norm-setting processes, the activities of the European Court of Justice (ECJ) is giving constant contributions to the further development of EU law. In particular, in areas such as migration and refugee law, whose basis is nested in international law, it goes without saying that the ECJ, when looking for guidance for its evolving jurisprudence, regularly takes inspiration from this legal order. And here, one particularity applies. In fact, as to the values the ECJ has to take into consideration in this process, the Court has to look both inwards at the situation in the various Members States as well as outwards to the international legal order. Although the EU Member States in the vote of 19 December 2018 have evidenced broad discordance,[108] the Court, up to now, has adopted a rather liberal approach directed at the protection of individual rights in the best possible way.[109] It remains to be seen what the result will be of this balancing of values in the longer run and what position will be taken by the ECJ in this regard.

It could be that in this field a new chapter in the ongoing attempts to emancipate EU law from international law is opened up.[110] In such a situation of competing claims of authority between local and global constitutionalism, difficult acts of balancing and accommodation have to take place[111]—a challenge of enormous dimension if values of such weight as those in the areas of migration and asylum are at play.

As shown above, the "axiological component" is of decisive relevance for the formation of new binding norms through global governance processes. In the fields we have dealt with, different perceptions of what defines the "common good" prevail. As long as no consensus can be found within the European Union in this area, at least the Compact on Migration may exercise a form of attenuated bindingness against an "emancipated" and internally divided European Union.

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[107] J. Wouters, 'The Tormented Relationship between International Law and EU Law', in P.H.F. Bekker, R. Dolzer and M. Waibel (eds.), *Making Transnational Law Work in the Global Economy* (Cambridge University Press, 2010); B. de Witte, 'European International Law', in R. Schütze (ed.), *Globalisation and Governance* (Cambridge University Press, 2018).

[108] See above, n. 50 and accompanying text.

[109] In its judgment of 2 April 2020, in Joined Cases C-715/17, C-718/17 and C-719/17, *European Commission v. Poland, Hungary and the Czech Republic*, ECLI:EU:C:2020:25, the ECJ ruled that these three Member States were in noncompliance with the temporary mechanism for the relocation of applicants for international protection and thus in violation of their obligations under EU law. In the words of K. Lenaerts, "[t]he refugee crisis […] showed that the EU is, first and foremost, a 'Union of solidarity based on the rule of law' where Member States may not forget their obligations under EU law." In K. Lenaerts, 'The Court of Justice of the European Union and the Refugee Crisis', in K. Lenaerts, J-C. Bonichot, H. Kanninen, C. Naômé and P. Pohjankoski (eds.), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Bloomsbury, 2019). Interestingly, nearly concomitantly, the European Court of Human Rights has taken a restrictive approach in the case over rapid deportations of asylum seekers in Ceuta and Melilla following Spain's appeal against a judgment of condemnation in the first instance, ECHR 063 (2020) 13.02.2020. On the characteristics of the CEAS in relation to the two Compacts, see U. Brandl, 'Der Migrations- und der Flüchtlingspakt der Vereinten Nationen: Entstehung, Inhalte, Rechtsnatur und Potenzial für die Zukunft', in U. Brandl, R. Feik, H. Randl and K. Watzinger (eds.), *Neuere Entwicklungen im Europäischen Asylrecht* (Jan Sramek Verlag, 2020).

[110] See, in this regard, the landmark *Kadi* Case, Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-635. G. de Burca, 'The EU, the European Court of Justice and the International Legal Order after Kadi' (2010) 51 *Harvard International Law Journal*, 1.

[111] D. Halberstam, 'Local, Global and Plural Constitutionalism: Europe Meets the World', in G. de Burca and J. Weiler (eds.), The Worlds of European Constitutionalism (Cambridge University Press, 2012).