Routledge
Taylor & Francis Group

Interventions

International Journal of Postcolonial Studies

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/riij20

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To cite this article: François Boucher & Johanna Gördemann (2020): The European Union and the Global Compacts on Refugees and Migration: A Philosophical Critique, Interventions, DOI: 10.1080/1369801X.2020.1854108

To link to this article: https://doi.org/10.1080/1369801X.2020.1854108

Published online: 15 Dec 2020.

THE EUROPEAN UNION AND THE GLOBAL COMPACTS ON REFUGEES AND MIGRATION: A PHILOSOPHICAL CRITIQUE

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Ethics of immigration

European Union

global compacts

migrants

refugees

sovereignty

In this essay, we critically examine how the EU has attempted to shape the Global Compacts and how it positioned itself vis-à-vis the Compacts. We draw on the resources of legal and political philosophy to develop a moral critique of the EU's position on the Compacts. We reconstruct the philosophical perspective underpinning the EU's view of the Compacts and we raise various objections to it. Our analysis draws on a distinction between an approach to migrant and refugee protection based on voluntary assistance and one based on human rights and their correlative duties. We defend two claims: first, that the EU's dominant conception of international migrant and refugee protection is based on a notion of voluntary humanitarian assistance, and second, that the international regime of migrant and refugee protection should rather be based on a logic of human rights that imposes binding legal obligations.

interventions, 2020
https://doi.org/10.1080/1369801X.2020.1854108
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Introduction

In September 2016, the UN Member States adopted the New York Declaration for Refugees and Migrants. The Declaration expresses solidarity towards all migrants, recognizes their special vulnerability and carries the promise of a strengthened international cooperation for the protection of the rights of all migrants and the promotion of the potential for development linked to large human movement. The Global Compacts (UN 2018c, hereafter GCM and UNHCR 2018, hereafter GCR) both result from the commitments made by the UN members in the New York Declaration.

The Declaration and the Compacts articulate the views of the UN General Assembly on "how the international community should best respond to the growing global phenomenon of large movements of refugees and migrants" (UN 2016, §2). The Declaration has a strong human rights and international law orientation, it asserts a willingness to "fully protect the human rights of all refugees and migrants, regardless of status; all are rights holders" and to fully respect "international law and international human rights law and, where applicable, international refugee law" (§5). However, while much of the spirit of the Declaration oriented the process leading to the Compacts, the kind of protection that the Compacts grant to persons on the move, whether they are migrants or refugees, has proven difficult to qualify. The term "Global Compact" is rather new in the realm of UN international agreements, which created some confusion regarding the kind of instrument the Global Compacts are from a legal perspective (Guild and Weatherhead 2018). The term "Global Compact" first appeared in 2000, when the UN adopted the United Nations Global Compact, a non-binding pact developed to encourage corporations to adopt best practices reflecting ten principles of corporate sustainability (United Nations 2000). Much in line with this logic of voluntary cooperation, the Global Compacts avoid creating new legally binding obligations and limit themselves to developing non-binding principles and voluntary guidelines for states and NGOs. As we will explain, this voluntariness is a core element of both Compacts. In this essay, we argue that this aspect of the Compacts is morally problematic and largely reflects the EU's vision of global cooperation in the field of asylum and migration.

The EU stands in a paradoxical relation *vis-à-vis* the Global Compacts and, more broadly, with the ethics of immigration. On the one hand, the New York Declaration was clearly propelled by a feeling of emergency fueled, at least in great part, by the 2015 migration and refugee crisis in Europe. On the other hand, of all the world's regions, Europe seems to be the one where opposition to the Compacts was the strongest. Indeed, it contains the largest number of countries that did not vote for the GCM.[1] More

broadly, the EU has both been enthusiastically praised and harshly criticized for treatment of migrants and refugees. Indeed, although in the 2000s the EU was celebrated for its openness and promotion of human rights of all human beings regardless of nationality and perceived as a novel political entity leading the world on the path towards cosmopolitanism (Habermas 2001; Rifkin 2004), several scholars attentive to the EU's restrictive asylum and migration policies are now questioning the cosmopolitan character of the EU. In the era of Fortress Europe, European cosmopolitanism is now often depicted as a form of "enlarged particularism" in which postnational solidarity is often reduced to shared efforts to strengthen the borders of Europe (Kamminga 2017; Bhambra 2017; Edmunds 2017, 83–108).

In this essay, we critically examine how the EU has attempted to shape the Global Compacts and how it positioned itself *vis-à-vis* the Compacts. Drawing on the literature on the ethics of international relations and of migration, we mobilize central concepts in legal and political philosophy to develop a moral critique of the EU's position on the Compacts. We reconstruct the philosophical perspective underpinning the EU's view of the Compacts and we raise various objections to it. Our analysis draws on a distinction between an approach to migrant and refugee protection based on voluntary assistance and one based on human rights and their correlative duties. We defend two claims: first, that the EU's dominant conception of international migrant and refugee protection is based on a notion of voluntary humanitarian assistance, and second, that the international regime of migrant and refugee protection should rather be based on a logic of human rights that imposes binding legal obligations. In defending the first claim, we look at the role the EU played in the elaboration of the final draft of the GCM and its position regarding the text of the GCR. We explain that the dominant view among EU institutions was that the Global Compacts should remain purely voluntary and should not create new legally binding international obligations. We also highlight that, in the EU's official discourse, this voluntarist conception of protection mostly applies to destination countries of the Global North, while states of the Global South are demanded to observe legally binding obligations. We then go on to defend the second claim. We highlight the philosophical contrasts between the humanitarian assistance and the human rights approaches to global or transnational ethics. We explain why the first is limited to voluntary assistance, while the second focuses on claimable rights and their corresponding legally binding obligations. Finally, we explain why such a human rights-based approach is more desirable than the assistance-based approach and discuss the main objection to the former, namely, that it is incompatible with state sovereignty.

1 Among the five countries that voted against the GCM, three were EU Member States (Hungary, Czech Republic and Poland), five of the twelve countries that abstained from the vote were EU Member States (Austria, Bulgaria, Italy, Latvia and Romania) and Slovakia did not vote. One of the two countries voting against the GCR is an EU Member State (Hungary, the other country is the United States).

The EU and the Global Compact for Safe, Orderly and Regular Migration

After the New York Declaration, the UN embarked on an extensive negotiation and stocktaking mission to elaborate the draft of the GCM. Various regional conferences were organized with representatives of UN Member States as well as conferences on specific themes gathering together several stakeholders, including NGOs, state actors, scholars, corporations and sub-state actors.

Early on in this process, the European Consensus on Development, a joint statement made by the Council of Europe, the European Commission and the European Parliament, affirmed the EU's willingness actively to support the elaboration of the Compacts called for in the New York Declaration (Council of Europe, European Commission and European Parliament 2017). Although at the early stage of the drafting process it was not clear who should have the mandate to represent the EU within the UN-led process of drafting the Compacts (Guild and Grant 2017; Melin 2018), various European committees discussed a list of themes related to the content of the Global Compacts (European Parliament 2017). Within the UN, the European External Action Service (EEAS) represented the EU in the negotiations leading to the GCM. It delivered "EU coordinated statements through the EU delegations in the consultative and stocktaking phase" and commented on early draft versions of the GCM; an input the European Commission deemed satisfactory as it claimed the GCM "largely reflects EU *acquis* and policy, and reflects the Union's objective to promote multilateral solutions to common problems" (European Commission 2018). However, as there already is an existing legal framework of international refugee law and as the drafting of the GCR was mostly in the hands of the UNHCR, the EU was less involved in the process leading to the GCR, but it nonetheless had the chance to express its views regarding its content. In what follows, we show that two visions of migrant and refugee protection underlie the position of EU institutions during the drafting of the Global Compacts, one based on a discourse of human rights, the other based on the ethics of voluntary humanitarian assistance. Those two visions often reflect dissonances between the Parliament and the EEAS. Ultimately, as the EEAS was the organ responsible for providing input on behalf of the EU during the drafting phases of the GCM, its vision prevailed over that of the Parliament. Similarly, as we explain in the next section, the view of the EEAS regarding the GCR is the one that best matches the final text of the GCR.

With regard to the Global Compact on Migration, the European Parliament framed its position along the lines of a human rights-based approach centred on the rights of all human beings, especially the most vulnerable. In a resolution addressing refugee and migrant movement (adopted on

5 April 2017), the European Parliament calls for the "establishment of a genuine, human-rights-based common European migration policy" and emphasizes the need to pay special attention to the needs and vulnerabilities of women and unaccompanied children (European Parliament 2017, 11). Yet, when the European External Action Service provided input prior to the elaboration of the original draft (the "Zero Draft", see UN 2018a), it clearly emphasized the need for the future Compact on migration to be a non-legally binding document that should not lead to the creation of any new institutional structure (EEAS 2017). As we explain below, this view reflects an approach to migrant protection based on humanitarian assistance standards, which sets desirable but non-mandatory policy goals, rather than on human rights standards in which claimable rights are linked to corresponding binding duties. Moreover, when it commented on the original draft of the Compact, the EEAS insisted on two points. First, it insisted on the incorporation of a clear distinction between regular and irregular migrants and requested that the drafts be revised to better enshrine this distinction, insisting on the negative effects of irregular migration and claiming the text "should avoid any language that might be interpreted as justification or even an incentive for irregular migration" (EEAS 2018a). Second, the EEAS demanded clearer recognition of the responsibility of states in addressing the root causes of migration (for instance, by fostering international development cooperation) and their duty to readmit their nationals unconditionally and to facilitate returns and readmissions (EEAS 2018a).

Both demands expressed by the EEAS were included in the revised draft of the Compact (Draft revision 1; see UN 2018b) and were kept in the final draft (UN 2018c). Whereas the Zero Draft already included a reference to "national sovereignty" being a guiding principle, the revised and final versions specify that the national sovereignty principle includes the right of states to distinguish between regular and irregular migrants:

> Within their sovereign jurisdiction, States may distinguish between regular and irregular migration status, including as they determine their legislative and policy measures for the implementation of the Global Compact, taking into account different national realities, policies, priorities and requirements for entry, residence and work. (UN 2018c, §15)

Similarly, whereas the Zero Draft already indicated a commitment to the view that states should work towards the goal of facilitating returns and readmissions, the revised and final versions now include a reference indicating that return and readmission are a legal obligation under international law (UN 2018c, §37). Guild and Weatherhead (2018) highlight the irony of this situation: while the EU's official position insists on the non-binding general

nature of the Compact, it asks for the recognition of an international legal obligation to readmit nationals.

Combined, those two amendments to the draft produce the view that although rich destination countries of the Global North should be free to determine who is a regular migrant and who is an irregular migrant (and to take measures to prevent irregular migrants from entering and remaining within their territory), departure countries of the Global South should observe strict duties to readmit those who have been denied entry in a destination country. This represents a significant shift away from the commitment to protect the human rights of all human beings, especially those of the most vulnerable. Indeed, irregular immigrants are often denied social services, such as healthcare, a situation which can result in violation of their fundamental human rights, such as the right to life (see, for instance, the *Toussaint v. Canada* decision of the United Nations Human Rights Committee 2018). Yet the protection of human rights should not tolerate any discrimination, not even on the basis of the legal residency status of a person. In the EU, accessing social benefits can already be a very challenging exercise for regular migrants; those in an irregular situation are especially vulnerable to exclusion from those benefits (Facchi, Parolari and Riva 2019, 92–93). Moreover, as irregular migrants are already often reluctant to claim access to vital services for fear of detention and deportation (Carens 2008, 2013, 132), strengthening the distinction between regular and irregular migrants while pressurizing origin countries to readmit nationals can only further marginalize irregular migrants.

The EU and the Global Compact on Refugees

EU institutions were also interested in influencing the architecture of the GCR. The aftermath of the 2015 EU refugee crisis and the ongoing fragmentation in EU asylum policy led to the participation of several high-ranking EU officials at the UN Summit in New York in 2016, such as the Vice-President of the Commission, Frans Timmermans, the President of the Council, Donald Tusk, and the High Representative of the EU for Foreign Affairs and Security Policy, Federica Mogherini (European Commission 2016). It is no surprise that, prior to the GCR, the New York Declaration itself already contained and reflected elements of several restrictive EU migration policies, such as attempts to prevent people from irregularly crossing (EU) borders (NY Declaration §24, §70), or promoting the securitization of migration instead of creating safe and regular pathways for refugees (NY Declaration §36). However, the main element of EU asylum policy reproduced in the GCR concerns the weak understanding of international solidarity

underpinning the proposal of a comprehensive response framework of refugee protection.

One of the challenges faced by EU asylum policy is the implementation of a principle of solidarity requiring the fair sharing of responsibilities to protect refugees between EU states. Article 80 of the Treaty of the Functioning of the European Union prescribes Member States to share responsibilities to protect refugees, including the financial implications of such protection. Yet the EU never agreed on a formula specifying how responsibilities were to be allocated between states. The idea of a fair sharing of those responsibilities to protect includes money transfers to states who are overburdened by the arrival of asylum seekers and the relocation of refugees from such countries to other countries with a lesser proportion of refugees per inhabitants and greater financial and integrative capacities (Bauböck 2018; Holtug 2016). Recently, in the EU, southern states (such as Italy, Greece and Malta) have been disproportionately affected by a large influx of asylum seekers, which not only seems unfair to those states but also jeopardized the level of protection afforded to refugees located in those countries that see their integrative and protective capacities stretched beyond their limits (Karageorgiou 2016).

The EU attempted several times since the 1990s to implement burden-sharing mechanisms designed to assist states disproportionately affected by a sudden influx of refugees. In the 1990s, facing the arrival of large numbers of refugees from ex-Yugoslavia and the former Soviet Union, the EU attempted to distribute refugees between states according to GDP, population and size. Yet the Union was only able to reach an agreement on a watered-down, non-compulsory declaration in which admissions could be traded against participation in peacekeeping operations (Betts, Costello, and Zaun 2017, 81). As a response to the 2015 refugee crisis, the EU set on the objective of relocating 160,000 refugees located in Greece and Italy (European Commission 2015), but only a quarter of those have been relocated so far (Betts, Costello, and Zaun 2017, 86). The EU Commission proposed a mandatory quota system in May 2016 (European Commission 2016), but this initiative was blocked by countries from the Visegrád Group, who instead proposed the concept of "Flexible Solidarity", enabling "Member States to decide on specific forms of contribution taking into account their experience and potential" (Visegrád Group 2016). This means countries could provide financial assistance instead of taking in their fair share of refugees. Trading refugee admissions against financial contributions is particularly problematic, since interstate solidarity transfers are currently managed by the Asylum, Migration and Integration Fund, which covers a large range of issues including border protection and the prevention of irregular migration (Betts, Costello, and Zaun 2017, 84; Karageorgiou 2016). Thus, the financial contribution of states wanting to avoid admitting more refugees can actually be used to prevent asylum seekers and migrants

entering EU border states. EU countries have in general opposed mandatory burden-sharing mechanisms when they perceived those mechanisms would force them to receive more refugees than they currently do (Thielemann 2018; Zaun 2018) and dilute their sovereignty by placing admission decisions in the hands of a transnational body (Betts, Costello, and Zaun 2017, 84). Such a failure to agree on how to distribute refugees within the EU has adversely affected the EU's capacity to provide protection to asylum seekers attempting to enter the EU.

In addition to this, the EU has embarked on several foreign relations actions aimed at controlling migrants and asylum flows, like the EU–Turkey Statement or Mobility Partnership Frameworks. These have been the object of criticism and concern, as they tend to diminish refugee protection within Europe, to externalize EU border controls and to replace responsibilities to grant asylum by development aid to countries hosting large numbers of refugees (Castillejo 2017; Collett and Ahad 2017). The EU has been rather shy, to put it mildly, in extending solidarity beyond its borders and protecting the human rights of refugees attempting to obtain refuge on its territory, a reluctance also demonstrated by the EU's restrictive positions regarding the GCR.

Similar to EU statements on the GCM, the EU's positions regarding the GCR were characterized by the same line of conflicts between a human rights-based approach and a voluntary assistance approach which were expressed in dissonances between the Parliament and the EEAS. In a resolution, the EU Parliament argued for a Compact based on human rights norms and called for EU Members States to take their share of responsibility to protect refugees:

> [The EU Parliament] welcomes the draft Compact on Refugees and its human rights- and people-centred approach; … calls on all countries to make commitments to a more equitable sharing of responsibility for hosting and supporting refugees globally and urges the EU and its Member States to recognize and honour their own share of responsibility; calls for the adoption of a global responsibility-sharing mechanism, supporting a human rights-based approach for the proposed Compact. (European Parliament 2018)

Whereas the Parliament opted for a strong human rights language linked to a call inciting Member States to take their share of responsibility, the EEAS, in its communications with the UNHCR, put forth a much weaker vision of solidarity towards refugees and states disproportionately affected by recent inflows of refugees. In a statement at a UNHCR briefing in New York, the EEAS expressed its support for the process leading to the Compact, but underlined that the document needed to be considered in light of humanitarian and voluntary action:

> As the New York Declaration, the Global Compact on Refugees is, and requires to be, grounded in a strong multilateral and political will to address collectively and globally refugee issues with a renewed commitment. The program of action itself is a non-legally binding document meant for humanitarian and non-partisan purposes: protecting and assisting refugees and their hosts … The Global Compact on Refugees is not about imposing additional standards or burdens. (EEAS 2018b)

The EEAS's position disfavouring the strengthening of existing legal obligations to protect refugees was, ultimately, the view that came to be reflected in the final draft of the GCR. The Compact does reassert the importance of the Geneva Refugee Convention of the legally binding principle of non-refoulement. The Compact does, in addition to that, lay out the details of an international arrangement for the sharing of responsibilities to protect refugees (UNHCR 2018, §14–48). Yet the core of this arrangement is the creation of a global forum for the coordination of the voluntary efforts to resettle refugees through discretionary pledges, not mandatory quotas, and the sharing of financial resources through discretionary contributions. Just as EU countries with a small refugee population have resisted burden-sharing efforts that would have led them to accept more refugees, the EU taken as a whole seems to resist international burden-sharing attempts that could lead them to welcome more refugees from around the world. Indeed, with actually only 6 per cent of the world's refugee population and the highest GDP per capita, any mandatory mechanism for the fair sharing of refugees would require the EU to admit more refugees than it does (Bhambra 2017, 396).

This arrangement reproduces the same kind of double standard as observed in the case of the EU's position towards the GCM: legally binding obligations for countries of the Global South and a voluntary regime of cooperation for the EU. Protecting refugees is a matter of customary international law and a legal obligation assumed by the countries that have ratified the 1951 Geneva Refugee Convention. The Convention imposes a range of obligations on these states, most importantly the principle of non-refoulement, which prohibits them from returning refugees to a situation of risk. However, duties to protect refugees flowing from non-refoulement are unequally distributed worldwide. Indeed, more than 85 per cent of the world´s refugees are in low- and middle-income countries located near zones of conflict (UNHCR 2017). This has not emerged by chance. Rather, it reflects a situation in which responsibility for refugees is distributed between states on the basis of proximity (to refugees-producing countries, as potential refugees need to be territorially present to make an asylum claim) rather than on capacity to provide protection: states have obligations to those refugees who arrive at or within their territorial boundaries. Given that states must observe non-refoulement duties while there is no similarly binding duty to protect refugees who already enjoy protection in another

country and while there are not many safe and legal pathways to enter Europe, many refugees stay in countries neighbouring conflict zones. This could, of course, be corrected by a legally binding international mechanism of responsibility sharing, but this is precisely what the EU wanted to exclude from the GCR. The current mixture of voluntary responsibility sharing and mandatory observance of non-refoulement duties shovels most legal obligations to protect refugees to countries neighbouring conflict zones.[2]

The European Union sees itself as an important actor in promoting human rights and the rule of law, but there is a tendency that EU diplomacy and foreign relations are not coherently matched by domestic policies (Gatti 2016). Whereas the EU is substantially divided when it comes to the adoption of a working Common European Asylum System, Europe is surprisingly united in making migration deals with states outside the EU aiming at preventing entry to the EU and influencing the governance of refugee and migrant movements abroad. The EU's stance on the GCR reflects this discrepancy between diplomacy and domestic policy. While the EU is keen to remind its neighbours about the obligation of non-refoulement and respect for human rights, it only offered to participate to a scheme of non-mandatory responsibility sharing.

2 As Betts, Costello and Zaun note (2017, 80), it is also this combination of a strong institutionalization of the non-refoulement principle with the weak institutionalization of burden-sharing mechanisms that created an unfair allocation of refugees within the EU itself.

Two forms of protection: humanitarianism and human rights

As explained in the previous sections, the EU has been keen on promoting international obligations for states when the most concerned states were non-EU Member States (promoting the duty of readmission and the duty of non-refoulement), whereas it emphasized national sovereignty and voluntariness when its Member States were concerned (with regard to the determination and treatment of irregular migrants and to international mechanisms for the sharing of responsibilities to protect refugees). We believe that behind these double standards lay two views regarding protection, one based on a logic of humanitarian assistance and the other based on a genuine human-rights approach.

A humanitarian approach to the ethics of international relations views the obligations of a state towards foreigners through the prism of a duty to assist those in dire need. Assisting those in need sets a desirable (but not a mandatory) goal to be pursued through various policies.[3] By contrast, a human-rights approach to the ethics of international relations views the human rights of foreigners as constraints limiting the legitimate policies that states can implement in the pursuit of whatever goals they deem desirable.[4] For instance, in relation to the struggle against global poverty, proponents of a

3 On the logic of the ethics of assistance, see Chatterjee (2013).

humanitarian approach to the alleviation of poverty suggest wealthy states and individuals have a positive duty to assist the poorest individuals and societies that they can discharge by transferring resources to the global poor (Rawls 1999; Singer 1972), whereas proponents of a human-rights approach view severe poverty as a negative human rights violation perpetrated by an unjust global institutional structure enabling predatory conduct by powerful states, corporations and individuals (Pogge 2008, 2012). In relation to migration, and especially with regard to refugee protection, some commentators have embraced a humanitarian view, claiming, for instance, that asylum seekers are particularly needy persons abandoned by their country of origin and whose situation is "tantamount to that of a baby who has been left on someone's doorstep in the dead of winter" (Wellman 2011, 120).[5]

In practical terms, the distinction between humanitarian assistance and human rights protection is very significant. Humanitarian assistance usually belongs to the category of charity, that is, the part of morality concerned with actions that are supererogatory. Such actions are praiseworthy and desirable, but they are not mandatory and subject to sanctions in case of non-compliance. Human rights protection, by contrast, belongs to the realm of justice and concerns actions (or omissions) that are mandatory, enforceable and subject to sanctions in case of non-compliance (Cherem 2016). In other words, the pursuit of the goals set by the ethics of assistance is much less binding than human rights norms. As H. L. A. Hart highlights, rights belong to a very specific subset of our moral concepts. Drawing a famous distinction made by Kant in the *Metaphysics of Morals* between the Doctrine of Right and the Doctrine of Virtue, Hart asserts that by contrast with other moral ideals specifying what character traits and conducts are virtuous or admirable, the specific role of rights is to "determine what actions may appropriately be made the subject of coercive legal rules" (1955, 177). Indeed, one of the most important features of a right is "that the possessor of it is conceived as having a moral justification for limiting the freedom of another" (178). To put this differently, rights provide their bearers with a valid claim to impose a duty on someone else to do or to avoid doing certain things (for instance, my right to life provides me with a justification to force you not to kill me and your duty not to kill me corresponds to my right to life).

The asymmetry between the categories of assistance and rights is rooted in the different relations (1) between the recipients of assistance and the providers of assistance and (2) between right bearers and right addressees (those agents whose conduct is limited by the legitimate claims of right bearers). Recipients of assistance do not have valid claims to force specific agents to act in certain ways (or to refrain from acting in certain ways) because in situations of assistance no principled reason can be given to identify a specific

4 On the contrast between human rights and the humanitarian duty of assistance, see Pogge (2008, 2012). On the distinction between desirable collective goals and the stronger standards set by rights understood as constraint on the pursuit of such collective goals, see Dworkin (1978, 90–94).

5 Schacknove also defines refugeehood on the basis of unmet basic needs: "refugees must be persons whose home state has failed to secure their basic needs" (1985, 281).

agent responsible for delivering assistance. For instance, it is certainly a nice thing for you to make a donation to a person in a difficult economic situation. However, it is difficult to explain why you should be the one donating to that person rather than someone else who has the economic capacity to assist. It also seems difficult to find a non-arbitrary justification for why you should make a donation to that specific person rather than to another one who faces similar difficulties. In general, providing assistance to those in need is without any doubt something morally laudable, but it is not the subject of mandatory and binding duties corresponding to rights, as there seems to be no non-arbitrary way to assign (binding) positive obligations to assist specific needy persons to specific potential duty bearers.[6] By contrast, respecting the physical integrity of someone you run by on the street is a matter of justice and basic human rights, as it is easily feasible to specify whose conduct should be limited by the rights of that specific person: everyone should respect the physical integrity of that specific person and the rights of that person place binding constraints on how others can treat her.

By insisting the Global Compacts should remain purely voluntary and refrain from creating new binding obligations, the EU views the Compacts as tools specifying desirable goals to be achieved through cooperation rather than as binding constraints on the way states pursue their asylum and migration policies. As such, it places the Compacts within the category of voluntary assistance rather than viewing new tools regulating global cooperation in the field of migrant and refugee protection as rights-based instruments.

Many commentators have expressed concern and disappointment with regard to the merely voluntary character of the Compacts. For instance, Chimni (2019, 632) complains that the GCR does not set effective measures and obligations to share responsibilities and burdens, which maintains a broken status quo. Similarly, Hathaway criticizes the GCR proposal for responsibility-sharing as being too "minimalist" or too "thin", for "merely paying lip service to burden-sharing" and for being "an endless procession of voluntary pledges" as well as a "bureaucrat's dream [doing] nothing that comes even close to dependably addressing the operational deficits of the refugee regime" (2018, 594–596). Guild (2018, 662–663) praises the GCM for recognizing the need to protect the human rights of migrants, but finds the GCM's commitments to human rights too vague and weakened by the lack of recognition that migrants are the target of discrimination, as their human rights are not granted the same level of protection as those of citizens. However, many objects to those complaints by asserting the voluntary character of the Compacts constitutes a wise pragmatic solution, given an unfavourable context. For instance, Cantor (2019, 628–629) claims the non-binding nature of the GCR is the best outcome possibly achievable in a "politics of the possible" and highlights that it nonetheless has the positive

6 This still leaves the door open for claiming that the state should be responsible for assisting people in difficult socioeconomic conditions and that this is a matter of justice and not mere charity. Hence, certain authors assert that rights do not only have negative corresponding duties (duties not to harm others), but also positive duties (duties to provide a good for another person). Yet rights have such positive corresponding duties when an agent is clearly identified as the bearer of positive obligations to provide goods (e.g. the welfare state). Positive duties do not necessarily fall into the category of supererogatory charity. See Gilabert (2005), Ashford (2007).

impact of putting the issue of responsibility-sharing on the agenda. Much in the same line, Doyle (2018, 624–626) claims the GCR must be seen as a necessary, yet non-sufficient, step in the right direction and the ambition of the UNHCR with regard to the GCR was restricted by a global political context marked by the rise of national populism and non-compliance with refugee law.[7] In the next section, setting aside the difficult question of assessing what was realistic under current circumstances, we explain why the voluntariness of the Compacts should not be seen as an endpoint in the development of a global regime of migrant and refugee protection. Although the Compacts make a step in the right direction, they do not go far enough, since the assistance-based vision of migrant and refugee protection they embody is problematic. We argue a global regime of asylum and migration should go beyond the assistance-based approach and implement a human rights-approach to protection.

7 Answering this objection, Hathaway (2019) claims the best way to meet such pragmatic constraints is not to set minimalistic targets but to explain how a more ambitious scheme of responsibility-sharing can be feasible under current circumstances and provide benefits to all. For a more optimistic view regarding he potential for change contained in the GCR, see Betts, 2018.

Defending the human-rights approach to protection: sovereignty and non-domination

Should the global regime of immigration and asylum view the protection of migrants and refugees as a matter of assistance or as a matter of human rights? One may claim it should be a matter of humanitarian assistance because destination countries are not responsible for the situation of those who have willingly come to their territory and of those who had to flee their home countries. In this view, it is certainly a worthy goal to pursue the improvement of the living conditions of those people, but it would be a mistake to view destination states as bearers of strict duties to do so. Although those states should indeed refrain from violating the basic human rights of those displaced persons (such as the rights not to be tortured, not to be killed or detained indefinitely without charges), offering assistance to displaced persons is more a matter of charity, it is a supererogatory act: one that is good and laudable, but not morally required. As sovereign states, they should keep the prerogative to determine whom they wish to help and to what extent. Obligating them to assist non-citizens would violate their sovereignty. In this section, we argue this sovereignty-based defence of the humanitarian assistance approach to migrant and refugee protection is mistaken. In doing so, we provide an argument in support of a human rights-based approach. Such a human rights approach entails that international standards in the field of migrant and refugee protection should be understood as legally binding standards. Preserving sovereignty against potentially binding international legal obligations was central in the justifications given by European countries that voted against the GCM,

such as Hungary, Austria, Czech Republic and Poland, but it was also central in the opposition to the Compact that emerged in countries that signed the GCM, such as Belgium, France and Germany (Boucher and Gördemann 2019). In Belgium, for instance, members of the N-VA Flemish nationalist party stated their "house of democracy is located in Brussels and not in Marrakesh" (N-VA 2017).[8] Austrian Chancellor Sebastian Kurz initiated a wave of withdrawals of EU Member States from the Compact with his announcement to reject the GCM at the end of October 2018. Based upon a misguided interpretation of the 1951 Geneva Refugee Convention as being a purely humanitarian tool to protect some vulnerable individuals that has been instrumentalized by EU directives to broaden refugee status and foster illegal migration, some Austrian politicians expressed concern that the GCM might have the potential of being turned from soft law into hard law. Following the Austrians, German right-wing populist party AFD highlighted the risk of seeing the GCM become a normative point of reference slowly incorporated into national legal practice, and even appealed to the collective right to cultural self-determination of peoples to argue for the necessity of protecting German culture from mass migration (AFD 2018). Thus, in Europe, nationalist opposition to the Global Compacts feared the Compacts would eventually create new binding obligations, which they saw as a threat to sovereignty. Of course, EU institutions and their representatives who commented and influenced the drafting of the Compacts did not appeal to such strongly nationalist views. Nonetheless, as we explained, they also insisted on the non-binding nature of the Compacts and militated for the inclusion of a stronger and more clearly defined principle of national sovereignty in the text of the Compacts.

8 The GCM was adopted by UN Member States in a meeting in Marrakesh in December 2018.

It might seem intuitive to think that a binding version of the Compacts would directly contradict the importance given to national sovereignty. However, the narrative of national sovereignty deployed to justify the rejection of a human rights-based approach to migrants and refugee protection centred on binding obligations contains several shortcomings. To begin with, there is something problematic in appealing to national sovereignty in order to claim the unbridled freedom from legally binding international obligations to protect migrants and refugees. Indeed, state sovereignty itself is a construction of international law and of the international order. Its germs appeared in the Peace of Augsburg, which enabled German princes to decide which religious orthodoxy would be enforced in their territory, and its proclamation culminated with the Treaty of Westphalia (Philpott 2001). It is an institution put in place at a certain point of human history and maintained by conventional international practices and legal norms. It is the international modern state system that organizes the world in states possessing exclusive and final authority over a given territory. As sovereignty is constituted, in the first place, by a certain international legal regime, there is

something fallacious in simple and direct assertions that any expansion of the reach of international human rights law trespasses on state sovereignty and deprives states of their legitimate freedom to enact any policy they wish. Such a view neglects the interdependence of national sovereignty and international recognition and cooperation.

Perhaps one may claim that, even if this is correct, having legally binding migration and refugee Compacts would defeat the very purpose of state sovereignty, namely, to ensure states' right to self-determination. Self-determination is a democratic ideal according to which the members of a political community should be able to choose the form of their government and decide how to organize their common life. It may seem obvious or intuitive to claim self-determination entails that states should be able to decide unilaterally who enters their territory and becomes a full member.[9] As Walzer claims:

> admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them there could not be *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life. (1983, 61–62)

This suggests a nationalist account of self-determination according to which states must be able to control (unilaterally) the terms of admission and membership and, in order to be able to maintain and promote their national identity, exclude migrants (see also Miller 2016). Yet proponents of the nationalist account of self-determination do not go as far as suggesting the preservation of national identity authorizes states to exclude migrants permanently from equal legal protection and to refuse to offer asylum to those seeking it (Miller 2016). This is because only weak, non-coercive and rights-respecting forms of nation-building are compatible with liberal and democratic values and principles. Thus, although states may promote their national culture by adopting an official language for public administration and public schools and promote symbols of national unity, they cannot force linguistic minorities completely to abandon their language or enforce a religious orthodoxy. For similar reasons, the interest of states in maintaining a national identity may enable them to require migrants to learn a national language and learn about the history and culture of the host nation, but it does not entitle them to deny migrants access to vital social services or permanently exclude them from the full protection of citizenship; nor does it entitle them to refuse to admit refugees.

However, nationalism does not constitute the only ground for connecting self-determination with the right to exclude foreigners. In recent philosophical debates about the normative foundations of migration policies, authors who establish a connection between self-determination and the right of

9 For a critical discussion, see Fine (2013).

states to exclude would-be migrants have also appealed to the value of freedom of association and the right of states not to associate with would-be migrants (Wellman 2011), to the community of citizens' collective ownership of their legal and political institutions and its right to exclude outsiders from the enjoyment of this property (Pevnick 2011), and to states' right to refuse to acquire new duties to protect people who happen to be under their territorial jurisdiction (Blake 2013). Yet all of these accounts recognize migrants' interests are weighty enough to require states to grant migrants full membership rights if they are not mere visitors coming for a short time. They also all assert that refugees' interests are strong enough to trump the right to exclude. For Wellman (2011), the associative freedom of states does not authorize them to disregard their responsibilities to protect refugees.[10] Similarly, for Pevnick (2011), the collective owners of political institutions cannot exclude refugees from benefiting from those institutions. In addition, the jurisdictional account of Blake (2013) makes it particularly clear that once migrants reach a territory, their human rights ought to be protected and fulfilled just as much as those of citizens, and states cannot exclude persons fleeing rogue states violating their human rights or failed states unable to protect and fulfill their human rights.

10 Although, for Wellman (2011), states can choose to discharge their responsibilities by sending money to other states receiving refugees.

Enabling collective self-determination does not require granting states unilateral control over issues of migration and refugee protection. Another reason to reject granting states such unilateral control over migration issues has to do with the fact that the vulnerability of people on the move is socially and politically constructed. It is something that is not independent from the way humans have organized their societies on a territorial basis. State borders are not natural entities. They are human-made and so is the vulnerability of people crossing them. More to the point, the vulnerability of people who cross boundaries is a product of the very international order that carves the surface of the Earth into the territories of distinct sovereign states. This is particularly clear in the case of refugees. The state system assigns each human being to a state responsible for the protection of his or her human rights. Even though refugees are those persons whose basic human rights are violated by the very state which was responsible for their protection, the vulnerability and need for protection of refugees is not merely caused by rogue states persecuting their own citizens. They are, in a deeper sense, attributable to the very international order that assigned responsibility to protect humans to sovereign states in the first place (Carens 2013, 196). Thus, the institution of refugeehood plays a fundamental role in preserving the stability and legal certainty within the international state order, as refugees subjected to non-conforming states are offered protection without colliding with the principle of state sovereignty and non-intervention (Owen 2016, 275). This political legitimacy account to refugeehood recognizes refugee protection as a necessary legitimacy condition of the international states system itself.

In quite a similar way, the vulnerability of migrant persons also stems, ultimately, from the modern state system. It is because this system ties together nationality, citizenship, territory and sovereignty that people who move to another country find themselves in precarious situations in which they risk being deported or face many obstacles denying them access to social services and equal working conditions. The vulnerabilities of migrant persons are in the first place attributable to the international institution of territorialized national sovereignty and this institution should be responsible for offering remedies to those vulnerabilities. The duty to remedy those failures should not be seen as a mere duty of assistance to be delivered by the most benevolent and capable states, but rather as a human rights constraint placed on the design of the international state system itself.

As we have seen, state sovereignty is valuable because it enables collective self-determination. Self-determination is a democratic ideal, as it consists in the capacity of citizens to govern themselves and decide the terms of their association. As such, if one is genuinely concerned with self-determination, which is the moral value underpinning sovereignty, one must grant migrants and refugees even more than a global regime ensuring that states will protect their rights by enabling migrants and refugees to contribute to the decision-making procedures that set the terms of such a global regime. One can appreciate this by looking at the connection between non-domination and democratic voice.

Without the establishment of a comprehensive international framework of rights and enforcement mechanisms placing constraints on what states and other powerful actors can do to them, persons on the move risk finding themselves caught in relations of domination. Domination, in political theory, is usually understood as an asymmetrical power structure in which someone can arbitrarily control another's life. As Philip Pettit explains, such relations of domination occur when one actor has the capacity to interfere in someone else's life arbitrarily, where an arbitrary interference is one that does not "track the interests and ideas of the person suffering the interference" (1997, 55). Similarly, Iris Marion Young asserts domination is constituted by a set of

> institutional conditions which inhibit or prevent people from participating in decisions and processes that determine their actions and the conditions of their actions. Persons live within structures of domination if other persons or groups can determine without reciprocation the conditions of their actions. (1990, 37)

Therefore, domination is tied to arbitrary uses of power that unilaterally impose duties and obligations and the terms of cooperation (Bohman 2007, 9, 23–28). This lack of control over one's life is what happens when people on the move must rely on the benevolence of states to grant them

the permission to stay, to access social services, or to be relocated to a country with a sufficient integrative capacity. This vulnerability is left untouched by voluntary pledges to protect persons on the move, as providers of assistance occupy the position of praiseworthy charitable donors who retain the capacity to withdraw their support without having to justify themselves or be blamed for violating obligations.

Focusing on domination also leads us to pay more attention to how the goal of providing protection is achieved. The outcomes of the establishment and the administration of a global framework of migrant and refugee protection matter as much as decision-making procedures leading to them. Theorists of non-domination usually understand the remedy to domination to be the implementation of democratic institutions and civic practices enabling the inclusion of the voices of marginalized groups in public deliberations (Young 1990), or securing their capacity to exercise "discursive control" (Laborde 2008, 167–169), to engage in democratic contestation (Pettit 1997, 185–205), or to initiate deliberation (Bohman 2007, 53). The general idea is that people are protected against domination and potential arbitrary interferences when they have a political voice and participate in the decisions that affect them. For Bohman (2007), this also applies at the transnational level, as foreign states, corporations and individuals, as well as transnational institutions, all have the capacity to interfere arbitrarily in people's lives (see also Held 1995; Tully 2009; Young 2007). This point is particularly relevant for migrants and refugees, whose lives are severely impacted by the architects of the global refugee and migration governance regime. For instance, when it comes to global cooperation in the field of refugee protection, establishing a global forum, acting pretty much like a market to trade responsibilities, to coordinate voluntary pledges to relocate refugees or to contribute financially to sharing the burdens of refugee protection, risks reproducing forms of domination if refugees are not able to participate in the decisions shaping the global framework of cooperation designed to protect them. More broadly speaking, identifying refugees as objects of humanitarian concern (of non-mandatory assistance) is not a constraint to arbitrary uses of power. It actually depicts refugees and migrants, not as the bearers of claimable rights, but as supplicants and, thereby, establishes asymmetrical relationships between donors and recipients. In such relationships, the latter, due to their unequal standing and power, always have the potential to be subjected to arbitrary interferences from powerful actors. Therefore, the democratic inclusion of migrants/refugees in the decision-making procedures leading to global instruments of migration governance should also be a legitimacy constraint of the global order.

Concerns for state sovereignty in the field of migration governance are not necessarily based on ethnic chauvinism and xenophobia. As we have seen, such concern can be based on a desire to preserve the condition that makes

it possible for political communities to exercise democratic self-determination collectively. Yet, as we argued, the value of self-determination hardly justifies handing each state the capacity to exclude outsiders unilaterally from their territory and from legal protections associated with citizenship. Moreover, if one is concerned with democratic ideals, the way forward is a better inclusion of migrant and refugee voices in the deliberations shaping the global governance of migration.

Conclusion

Although we can applaud the EU for supporting the Global Compacts, which do represent a step towards strengthening global cooperation in the field of migrant and refugee protection, many Member States opposed at least one of the Compacts (especially the GCM). Moreover, the EU has favoured a voluntary approach that enables it to shovel much of the responsibilities towards persons on the move to other countries. As we explained, while it was keen to ensure sovereignty was a key principle of the GCM connected to the ability to categorize certain persons as irregular migrants, the EU framed readmissions in terms of duties. In addition, it supported the view that international mechanisms for the sharing of responsibility to protect refugees ought to be voluntary while coexisting with binding non-refoulement duties, an arrangement in which rich countries of the Global North express their commitments to share responsibilities on a voluntary basis, while less developed countries neighbouring conflict zones must abide by strict binding duties to admit refugees. Criticizing this view of protection, we argued that invoking the value of sovereignty and self-determination does not justify limiting the emerging global regime of migrant and refugee protection to voluntary assistance.

Acknowledgements

The authors also wish to thank participants in the Global Compacts, Mixed Migration and the Transformation of Protection workshop held at the Refugee Law Initiative, University of London, March 29, 2019 for their useful comments on an early draft. We also greatly benefitted from comments by Christina Oelgemöller and two anonymous reviewers.

Funding

The authors of this article have benefited from funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No. 770330 – NoVaMigra (Norms and Values in the Migration and Refugee Crisis).

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