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COMPLIANCE WITH 'SOFT LAW' AND MULTILATERAL COOPERATION IN GLOBAL GOVERNANCE OF MIGRATION: A CASE STUDY OF THE GLOBAL COMPACT FOR SAFE, ORDERLY AND REGULAR MIGRATION

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Abstract

In 2018 the UN General Assembly endorsed a non-legally binding Global Compact for Safe, Orderly and Regular Migration establishing that way the first of its kind framework for governing multilateral cooperation of states in international migration. However, there can be found academic opinions expressing doubts regarding its implementation and states' compliance with it due to its 'soft law' nature.

This research assesses through qualitative approach the implications for compliance and multilateral cooperation in a global governance of migration by means of 'soft law' on the example of the Compact. The main research question is on how the 'soft law' nature of the Compact may impact states' compliance and which are the implications that can be drawn from the process of elaboration of the Compact, states' positions on it and the norms included in the Compact, to assess the potential compliance.

From the analysis, it can be suggested that the Compact managed to embrace almost all the advantages established through previous studies of the use of 'soft law' instruments in global governance. Its nature, all else equal, should have a positive impact on further implementation and compliance with the Compact, just as on multilateral cooperation of states in global governance of migration. The main obstacles that can be encountered in compliance may be related to substantial changes in pay-offs; lack of capacities; loss of political support at domestic level and to finding the remedy to address non-compliance given the ambiguity of verification and monitoring mechanisms established by the Compact.

1. Introduction

International migration is not a new phenomenon, since it has existed in any historical period. At the same time, its nature has been gradually changing over time. The number of international migrants increased to 258 million in 2017 (3,4% of the world's population) from 173 million in 2000 (2,8% of the world's population) (UN 2017b). Recent reports show that more and more countries become simultaneously countries of origin/transit/destination; that migrant flows change their destination and routes, and smugglers adapt to these changes and modify their modus operandi (IOM 2019c; Mixed Migration Centre 2019). Against this background, most of the states, international organizations and academic scholars agree that certain issues arising from international migration cannot be addressed unilaterally or exclusively on a bilateral basis. In 2016 New York Declaration for Refugees and Migrants and 2030 Agenda for Sustainable Development states recognized migration as a relevant global phenomenon requiring coherent and comprehensive global approaches and global solutions and called for greater international cooperation to assist host countries and communities (UNGA 2016). In the academic literature in regard to global governance of migration, some scholars support the idea that migration is a matter of common interest requiring global governance (Koser 2010; Betts 2011; Crepeau, Idil 2016; Chetail, Bauloz 2014; Goodwin-Gill 2016; Chetail 2019), while there are skeptical opinions about the possibility of governing migration on a global level (Geiger and Pecoud 2010, 2012); some raise a question on whether global governance of migration requires a special institution (Newland 2010; Crepeau, Atak 2016; Jubilut, Lopes 2017) or a single legal framework (Betts 2010; Jubilut, Lopes 2017).

An important breakthrough in terms of global governance of migration was done in 2018 when the UN General Assembly (UNGA) endorsed a non-legally binding Global Compact for Safe, Orderly and Regular Migration (Compact) establishing that way a framework for governing multilateral cooperation of states in international migration. The Compact has not generated a lot of academic opinions so far due to its newness, but there can be found some works expressing doubts regarding its implementation and states' compliance with it due to its 'soft' nature, and doubts regarding governing of international migration on a global level overall (e.g. Crépeau 2018; Guild 2018; Newland 2019; Klein Solomon, Sheldon 2019). Compliance and implementation of 'hard law' and 'soft law' instruments for regulating cooperation have been discussed in academic literature in a more general sense and for a particular field. Advantages and disadvantages of 'soft law' and 'hard

law' instruments have been framed by Abbott, Snidal (2000); Raustiala (2000); Shelton (2003); Guzman (2004); Guzman, Meyer (2010); Shaffer, Pollack (2011); Pauwelyn, Ramses, Wouters (2012); Demin (2018). Factors that affect compliance have been defined by Raustiala (2000), Charney (2003), Haas and Bilder (2003). The use of 'soft law' in interstate cooperation and its impact on further compliance and implementation has been studied in regard to environmental cooperation (Shelton 2003; Redgwell 2006; Ciplet 2015), trade (Shelton 2003), human rights (Shelton 2003; Cole 2009; Lagoutte, Gammeltoft-Hansen, Cerone 2017), security (Shaffer, Pollack 2011). What concerns international migration governance by means of 'soft law' and 'hard law', there is not so much studies on it, mostly due to the absence of any significant 'soft law' instrument in that area before the Compact has been adopted. Still, some basic observations can be found in works of Betts (2010) and Chetail (2014, 2019). Doubts regarding the implementation and states' compliance with the Compact due to its 'soft' nature have not been supported yet by any substantial academic analysis.

Therefore, this thesis will assess the implications for compliance and multilateral cooperation in a global governance of migration by means of 'soft law' on the example of the Compact. The main research question is on how the 'soft law' nature of the Compact may impact states' compliance and which are the implications that can be drawn from the process of elaboration of the Compact, states' positions on it and the norms included in the Compact, to assess the potential compliance. The hypothesis is that particular features of the Compact will promote compliance which in turn will have a positive impact on multilateral cooperation in this field.

Review of existing researches on compliance and implementation of 'soft law' instruments demonstrates that overall the patterns are similar regardless of the sphere of governance. Therefore, conclusions from the thesis may be to certain extent used in future researches on compliance with 'soft law' in general terms. Besides, pertaining to the sphere of migration, conclusions of the thesis may be used for the analysis of the future 'soft law' instruments on migration governance to define which factors can impact compliance and impede it as well as multilateral cooperation. The implications derived from the analysis may also be helpful for further practical implementation of the Compact.

2. Methodology

This thesis is based on a qualitative approach drawing on interdisciplinary perspectives from international law, international relations and global governance. The Compact will be analyzed as a single case study, which has been selected as one-of-a-kind 'soft law' multilateral framework for a global governance of migration or as IOM (2018a) defines it 'the first inter-governmentally negotiated agreement, prepared under the auspices of the UN, covering all dimensions of international migration in a holistic and comprehensive manner'. The characteristics of the given case and the research question indicate that the use of the case study is the preferred one, since 'case studies are considered to be a preferred research method when how and why questions are posed, the investigator has little control over events, and the focus is on a contemporary phenomenon within a real-life context' (Yin 2009). Since this is the case involving a novel situation (Yin 2009) in the sphere of migration, the Compact has been chosen as a single case.

Compliance is taken as a dependent variable, while the nature of Compact, its contents and states' positions on it are considered as independent variables. According to the theories derived from existing researches on 'soft law', compliance and interstate cooperation, there has been compiled a theoretical framework to explore the relationship between those variables. Thus, a multidimensional analysis of different aspects of the Compact is carried out through the existing theories and is divided into two sub-questions: whether the Compact has more advantages or disadvantages being a 'soft law' in projection of compliance and implementation, and considering the contents and states' positions which is a possible scenario for the compliance (which factors can impact further compliance with the commitments taken under a 'soft law' instrument). The research includes content analysis of the documents related to elaboration and adoption of Compact such as states' and other stakeholders' positions (proposals, objections) and key challenges that have appeared in the course of elaboration thereof; the evolving versions of the drafts of the Compact with its final version; reports of international organizations as well as some positions and policies applied by states that are relevant for further compliance with the Compact and further multilateral cooperation. In view of the research question, that analysis helps to derive states' intentions and expectations towards the Compact and compliance with it, as well as specific factors that may be important for further compliance and implementation.

The data was obtained from open sources of International Organization for Migration (IOM) and the UN as the main coordinators of the Compact's elaboration and

implementation, states' official web pages and also research institutions dealing with particular aspects of migration. A central focus was placed on the Compact per se and states' positions on the commitments under the Compact presented during the Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration (Marrakesh conference) and during the endorsement of the Compact in the UNGA (121 positions in the first case and 57 positions in the second). It should be also noted that conclusions made in the thesis should be considered as am assessment of a potential scenario, rather than a prediction, since other variables which were not controlled in this research can also affect the evolution of compliance and implementation of the Compact and multilateral cooperation deriving from it.

3. Theoretical framework

3.1. Concepts

The key concepts referred to in the thesis are global governance of migration, migration, 'soft law', 'hard law' and compliance. Experts in migration topic tend to narrow the concept of the global governance in relation to migration from general ones, e.g. of Finkelstein (1995) or Commission on Global Governance (1995). The one that can be seen in many relevant academic researches is that of Betts (2011, 4), who defines it as "norms, rules, principles and decision-making procedures that regulate the behaviour of states (and other transnational actors)". IOM (2019, 136) refers to this concept as to "frameworks of legal norms, laws and regulations, policies and traditions as well as organizational structures and the relevant processes that shape and regulate States' approaches with regard to migration in all its forms". For the purposes of this research global governance of migration is analyzed from the side of regulatory framework (norms).

Neither the Compact, nor any other international act establishes a formal definition of migration. The Compact refers to migration in general terms, thus this thesis also addresses migration accordingly, using the IOM definition that is "movement of persons away from their place of usual residence and across an international border to a country of which they are not nationals" (IOM 2019a).

There are different variations (although with a similar meaning) of definitions for the terms 'soft law' and 'hard law' (e.g. Guzman and Meyer 2010, 174; Abbott and Snidal 2000, 421). International Law scholars usually distinguish these concepts straightforwardly through the lens of agreements. Thus, from the work of Evans (2014, 168), for instance, there can be derived a definition of 'soft law' as international acts that may assume the form of international agreements but which were never intended to create legal obligations, implying therefore that international agreements which are intended to create legal obligations can be considered as 'hard law'. For the purpose of the thesis, these concepts will be understood from the latter perspective.

What concerns compliance with international agreements, some scholars use the concept in a general way embracing implementation, effectiveness and other aspects. Others, like Raustiala (2000, 392), differentiate the concepts, defining implementation as "a process of putting international commitments into practice", effectiveness as "the degree to which a given rule induces changes in behavior" and compliance as "conformity between behavior and a legal rule or standard". In this thesis a more common view observed in academic

literature is followed, and compliance is used in a more general sense, since all the three elements seem to be highly interconnected.

3.2. Theories

As indicated in methodological part, in order to develop a multidimensional theoretical framework to further analyze the Compact and address the research question, there have been posed two sub-questions. Existing academic literature proposes different theories regarding these questions, but a comprehensive review thereof leads to a conclusion that the most cited works are those of Abbott and Snidal (2000), Shelton (2003) and Haas and Bilder (2003).

In terms of compliance with binding and non-binding international agreements the research of Raustiala (2000) seems the most comprehensive so far.

Regarding advantages and disadvantages of 'soft law' in projection of compliance and implementation it must be mentioned that most academic scholars (Abbott, Snidal 2000; Guzman and Meyer 2010) agree, that 'hard law' in general is more credible and has more probabilities to be complied with than 'soft law'. Abbott and Snidal (2000, 428) claim that 'states care about their reputation also at domestic level, where law observance is important both in national and international dimensions, and efforts to justify international violations create cognitive dissonance and increase domestic audience costs'. In practice, legally binding international agreements usually require modification of national legislation in order to implement them. Additionally, legislation in most states requires taking measures at national level in compliance with a binding agreement, so once the state commits, compliance becomes even more controlled within it. This can be considered as the main drawback of 'soft law'. One of the biggest challenges inherent to 'soft law' is also that it is not recognized as a source of international law and cannot be enforced. However, the matter of enforcement of international legal norms is a separate complex topic, since many examples of states' responsibility from breaching their international legal commitments show that enforceability is complicated in both types (Chetail 2019). Either way, in 'hard law' the capacity for enforcement is bigger and the law of state responsibility (e.g. authorized countermeasures) can be applied to address violations (Abbott and Snidal 2000), whereas for 'soft law' agreements the matter of compliance is more under states' discretion.

At the same time 'soft law' has a lot of advantages compared to 'hard law' and depending on the instrument of governance can have certain features that may increase

compliance. Among the common major advantages of 'soft law' frequently mentioned in academic literature is its flexibility. 'Soft law' instruments usually are flexible and can adapt to a fast changing and technology driven environment (Reincke and Witte 2003). Empirical research on environmental issues confirms that 'soft law' achieves widespread participation fairly quickly (Stein 2008), and ambitious norms are more easily included in 'soft law' than in 'hard law' (Skjærseth, Schram Stokke, Wettestad 2006). Most importantly, the more burdensome is 'hard law' the less likelihood there is that the state will commit to it at all (Stein 2008).

'Soft law' in general exacts lower transaction costs for the parties involved, e.g. costs related to negotiation, ratification, monitoring, enforcement, modification and exit (Abbott and Snidal 2000; Reincke and Witte 2003; Pauwelyn, Wessel, Wouters 2012). As Abbott and Snidal (2000, 434) specify, "hard legalization reduces the post-agreement costs of managing and enforcing commitments, but adoption of a highly legalized agreement entails significant contracting costs, so softer forms of legalization will be more attractive to states as contracting costs increase". 'Soft law' is also preferable when sovereignty is concerned, since as Abbott and Snidal (2000, 437) explain, the potential for inferior outcomes, loss of authority and diminution of sovereignty makes states reluctant to accept hard legalization, especially when it includes significant levels of delegation. And sovereignty costs are usually the highest for states (Guzman and Meyer 2010). 'Soft law' instruments are open to all interested parties (including transnational private actors that could have not participated in the making, implementation, and enforcement of 'hard law') and 'inability to comply is not a critical barrier to entry in contrast with the rigid in-or-out mechanism of most legally binding agreements' (Reincke and Witte 2003, 93). Another research shows that 'soft law' is more effective when there is a need to promote certain behavior, while it would not be that useful for restriction or prohibition (Langille 2016). 'Soft law' also has an advantage of a faster "entry into force" (Raustiala 2000, 423).

From the analysis of the use of 'soft law' instruments in human rights field, Shelton (2003, 462) draws a conclusion that 'soft law' is useful and preferable in enunciating broad principles in new areas of lawmaking, when details of obligation remain to be elaborated, when unanimity is lacking in state practice; and that as compliance increases 'soft law' may serve to pressure the few non-consenting states to comply with the majority views. Altogether, scholars agree that 'soft law' can be a pathway to further 'hard law'. Non-binding agreements can be a helpful tool to facilitate compromise between weak and powerful states (Abbott and Snidal 2000), to initiate global public policy and a process of transnational law-

making (Reincke and Witte 2003) and to facilitate transition of specific concepts from 'soft law' to 'hard law' (Lagoutte, Gammeltoft-Hansen, Cerone 2016). Another interesting opinion regarding 'soft law' use is that it can become binding through the general principle of estoppel (principle of international law according to which a state may be bound by a recommendation when its conduct gives rise to reasonable expectation of compliance on the part of other state that have acted upon these expectations) (Pauwelyn, Wessel, Wouters 2012; Chetail 2019).

The second sub-question is which is a possible scenario for compliance (which factors can impact further compliance with the commitments taken under a 'soft law' instrument). Based on international relations theory, Haas and Bilder (2003) developed theoretical framework through the lens of realism, institutionalism and social-constructivism.

From a realists' perspective, states seek to protect territorial integrity above all other goals and, thus, compliance patterns should vary depending on the extent to which such integrity is at risk and whether there is a powerful state to enforce it or deter non-compliance (Haas and Bilder 2003). Expanding on that, Haas and Bilder (2003, 52) point out that 'compliance will only occur if there is a powerful dominant country that exercises some pressure on a country to comply, either through rewards for compliance or threatened sanctions for breach; but due to the need of constant vigilance compliance would be spotty when the matter of the agreement is contentious and has been agreed upon through pressure from a dominant state, and have less impediments if it is a voluntary agreement'.

Based on the ideas of institutionalism theories of Keohane (1989) that state's choices can be influenced by international institutions, Haas and Bilder (2003, 53 –58) suggest that 'powerful international organizations (institutions) may perform functions inducing states to comply, in particular, through *monitoring* (reports on compliance submitted by the states parties are most likely to be accurate and command political attention when they are collected, disseminated and verified by impartial third parties), *verification* (prompt information about other states' actions or similar reduces the fear of free riding, increases the likelihood of detection, and, thus, deters non-compliance and increases compliance) and *capacity-building* (provision of various capacity-building resources accrued as a consequence of compliance like technology, training, financing, etc., or the anticipation of such resources, or fear that such resources may be withheld for non-complying, may induce compliance)'.

From a constructivist's perspective, according to Haas and Bilder (2003, 62) 'compliance is more likely if there exist relevant widely shared causal beliefs about the operation of the issue to be controlled, and such beliefs and ideas are developed and

disseminated by transnational networks of policy professionals who share common values and causal understandings and who seek to introduce national measures consistent with their beliefs, and utilize the enforcement mechanisms of the bureaucratic units in which they operate'.

Raustiala (2000) in his research on compliance draws on three theories: rationalist, norm-driven and liberalism. From the rationalist perspective states would cooperate and comply when they are better-off while cooperating than without it, and do not comply when they are better off deviating from it, and well-elaborated enforcement mechanism and punitive measures in that case can change the pay-offs in coordination game and induce compliance (Raustiala 2000, 400 – 405). In view of norm-driven theories, the rules will be complied when they are perceived as legitimate by those to whom they are addressed, and not complied with when there is a lack of administrative or financial capacity, ambiguity in treaty terms, or unforeseen changes in conditions; and to induce compliance there should be used not punitive measures, but rather provision of information, technical and financial assistance, or interpretive dialogue aimed at resolving interpretive disputes (Raustiala 2000, 405 – 409). Expanding on liberal theories, (Raustiala 2000, 409 – 411) points out that states willing to submit to the rule of law at the domestic level are more likely to submit to their analogues at the international level, and, thus, such aspects of domestic structure as constitutional design, political tradition, and so forth may directly influence compliance levels.

Another elaborated theoretical framework in terms of the factors that in particular impact compliance, has been developed from a series of case studies by Charney (2003, 118) pointing to the following features:

- the linkage between the norm and hard law established by the international legal system or by domestic legal systems ('soft law' instruments linked to a binding obligation were more likely to be complied with than were those not so affiliated, and even where they are not directly linked to a binding instrument, their placement within the context of a complex international regime may enhance compliance);

- the linkage of the norm to other 'soft' norms;

- the relationship of the norm to past practices;

- the transparency of the norm, and its implementation, including:

a. the clarity of the obligation (be it is fixed or flexible),

b. the ability of others to determine whether the target of the norm is in compliance or not, and

c. the presence and nature of verification systems;

- the degree of political, economic and/or military support for the norm;

- the foreseeable consequences of non-compliance, including sanctions and dispute settlement procedures (institutional mechanisms for monitoring and supervising compliance with 'soft law' obligations are crucial; and

In the context of compliance with 'soft law', Shelton (2003) just as Raustiala (2000), Abbott and Snidal (2000), Charney (2003), confirms from the case studies that if it is costly to comply with 'soft law', either because of economic costs or the lack of technical, administrative, or other capacity, compliance is less likely. Charney's (2003) case studies also add the nature of the states' domestic legal systems (e.g., stability/war, liberal democracy/dictatorship) as an important factor impacting compliance. Compliance with international obligations may also depend on economic interests (in particular trade issues), where states may choose to comply when their economic interests are at stake (Lupu 2016).

4. Analysis

4.1. Overview of the Compact's structure and elaboration process

The Compact is a non-legally binding, cooperative framework, which includes 23 broad objectives and a range of actions to achieve safe, orderly and regular migration and deals with the matters related to migration in such thematic areas as human rights of migrants, drivers of migration, irregular migration and regular pathways, contributions of migrants and diaspora to sustainable development, smuggling of migrants, trafficking in persons and contemporary forms of slavery, international cooperation and governance of migration (UNGA 2018).

The idea of the Compact dates back to 2016, when representatives of 193 UN Member States adopted the New York Declaration for Refugees and Migrants recognising the need for a comprehensive approach to migration and agreeing to cooperate in the elaboration of the Compact. The process of elaboration started in 2017 and was divided into three phases: consultation phase, stocktaking phase and negotiation phase (OHCHR 2020).

The main aim of the consultation phase held with the participation of relevant stakeholders from global, regional, national and local levels was 'to gather substantive inputs and concrete recommendations for the development of the Compact in particular thematic areas' (Migration Data Portal 2020). The key objective of the stocktaking phase was 'to review and distill the wealth of information gathered in consultation phase and to engage in comprehensive analysis in order to foresee the process going forward for intergovernmental negotiations' (Migration Data Portal 2020) and as an output the Secretary General of the UN provided concrete recommendations in his report "Making Migration Work for All". The last phase of intergovernmental negotiations consisted in negotiations on the draft of the Compact which went from the Zero Draft to the Final Draft released on July 11, 2018.

The final version of the text was agreed and adopted at a special conference in Morocco on December 10, 2018 and formally endorsed in the UNGA on December 19, 2018. The votes on the Compact in the UNGA session split as follows: 152 States in favour, 5 against and 12 abstentions. The US withdrew from the process before intergovernmental negotiations commenced and voted against the Compact at the UNGA (along with the Czechia, Hungary, Israel and Poland), while Algeria, Australia, Austria, Bulgaria, Chile, Italy, Latvia, Libya, Liechtenstein, Romania, Singapore and Switzerland abstained from voting (Newland, Mcauliffe, Bauloz 2019). Both during Marrakesh Conference on adoption of the Compact and endorsement of the Compact at the UNGA session states supported their

national positions on the Compact with formal clarifications of certain provisions, commitments and intentions.

It should be noted that states recognized and emphasized through the whole process of the Compact's elaboration and adoption that it's not legally binding, thus, they *a priori* assumed the absence of a legal obligation to comply with it. For instance, during Marrakesh conference on adoption of the final draft (UN 2018c), Colombia clarified that 'the Compact is flexible and can be implemented according to capacities and necessities of each state'; Denmark confirmed that 'the list of actions under each commitment constitutes examples which may contribute to the implementation of the Compact, but that each state can decide how and whether to draw from these examples'; Liechtenstein pointed out that 'it would not aim at full implementation of all the objectives'; Madagascar picked directly its priority objectives to implement; Norway stated that 'its legislation is functioning well and do not call for any changes based on the Compact'; Papua New Guinea stressed that 'since the Compact is clearly legally non-binding, national implementation of its content is voluntary'. Thus, the key question here is about the nature of compliance under such conditions.

4.2. Results of the analysis

Analysing the Compact through the list of advantages and disadvantages of 'soft law', there can be defined the following features. Indeed, it succeeded in terms of achieving widespread participation. While a 'hard law' instrument such as 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, have managed to acquire 55 states parties in 30 years (UN 1990), the Compact have been signed by 164 states. Its flexibility can be seen as an advantage since it allows states to find their ways of implementation according to their capacities. The fact that the Compact embraces a lot of ambitious norms (e.g. prevent, combat and eradicate trafficking in persons; ensure that all migrants have proof of legal identity and adequate documentation) makes it fit better into 'soft law' framework, although, this is a questionable advantage in terms of further compliance with such ambitious norms. The Compact also incorporates very complex areas of migration like protecting human rights, addressing the root causes of migration, irregular migration, smuggling, human trafficking and other issues, that could require separate agreement each. Thus, 'soft' nature of the Compact is partly inevitable since states would, most probably, not commit to such burdensome 'hard law' and with such high transaction costs related to the adoption of the Compact as presented in theoretical framework. 'Soft law'

nature of the Compact allowed to avoid a long procedure of entry into force of traditional binding agreements which can take years and also to avoid the situation where the rigid norms enter into force when some matters regarding migration governance are not relevant anymore as presented in the example by Pecoud and de Guchteneire (2006) of the UN Convention on Migrant Workers' Rights.

A stumbling block in the course of elaboration and adoption of the Compact was sovereignty issue. From the analysis of the states' positions in Marrakesh conference, it can be seen that most states particularly emphasized their sovereign right to determine and develop their national migration policies or to govern migration (UN 2018c). Considering this, the Compact stipulates a guiding principle that it 'reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law' (UNGA 2018). In this sense, since sovereignty is involved, 'soft law' nature of the Compact is a significant advantage.

'Soft law' nature of the Compact made possible participation of diverse interested parties, that most probably could not have participated in a normally closed process of elaboration of a 'hard law' agreement. Thus, in consultation phase, for example, states submitted 129 written responses and made 740 interventions, while other stakeholders submitted 126 written responses and made 183 interventions during the thematic sessions, which according to the Concept note of the meeting (UN 2017a) 'served to bridge the gap between perceptions and reality before intergovernmental negotiations'.

It can be seen that the overwhelming majority of actions included in the Compact are aimed at promotion of taking certain measures by states related to gathering and sharing information, developing strategies, establishing mechanisms for managing and regulating certain issues, which also fits into the findings of Langille (2016) that 'soft law' is more effective to promote behavior rather that prohibiting. The Compact conforms with the attributes of the advantages of 'soft law' instruments in human rights field provided by Shelton (2003), since it is used as a tool to establish broad principles in an area of global governance of migration when there is no unanimity in state practice, and it may serve to push the few non-consenting states to comply with the majority views when compliance increases with the time.

The Compact can be recognized as a tool to promote transition from 'soft law' to 'hard law'. In the history of international lawmaking there exist various examples where initially non-binding agreements later became binding (e.g. the ones in human rights field on discrimination, women's and children's rights, torture, disability issues). Considering that

'soft law' can become binding through the general principle of estoppel or as a customary norm, notwithstanding that the Compact does not include this clause, some states particularly emphasized in their statements during the adoption of the Compact (UN 2018a) 'that it does not seek to establish international customary law' (e.g. Norway, Croatia and Denmark). Moreover, some other states even abstained from voting or adoption of the Compact for that reason. Austria, for instance, did not support the endorsement of the Compact, because it was specifically objecting to the Compact becoming customary international law, which could be interpreted as *opinio juris* (UN 2018a). The US also expressed concerns that 'the Compact supporters sought to use it as a long-term means of building customary international law or so-called "soft law" in the area of migration' (UN 2018a).

Going to the second sub-question on which factors can affect further compliance with commitments by states in international agreements, it was defined the following. First, through international relations perspective of Haas and Bilder (2003), in view of realists' perspective that 'compliance happens when there is a powerful dominant state that can exercise pressure on others to comply', it can be noted that the process of elaboration of the Compact, as well as states' positions on the Compact provide an idea that the sphere of global governance of migration lacks a powerful dominant state able to perform that function. The US, for example, did not participate in the negotiations, did not sign the Compact, tried to persuade negotiating states not to sign it and blamed the UN for interfering into the sovereign rights of the states (US Mission to the UN 2018). The European Union (EU), which is the strongest proponent of multilateralism, lacked unanimity within the EU, since Hungary, the Czech Republic and Poland voted against the Compact, while several other member-states like Austria, Italy, Latvia, Romania and Slovakia abstained from voting (UN News 2018). BRICS states[1], which are considered rising global powers, in current state of affairs prefer selective involvement and are constrained by their internal challenges and personal interests that shape their unwillingness to take the responsibility of being a 'central governor' in manifold global matters (Nadkarni and Noonan 2013) and in migration as well. Analysis of states' positions from Marrakesh conference, as well as from elaboration phases, shows that states are in a common agreement that there should be multilateral cooperation on migration matters, but it may be suggested that there is no potentially dominant state who would push for compliance. The positive element here, however, is that, as Haas and Bilder (2003, 52) denote, 'when the matter is agreed voluntarily without the pressure of a dominant state,

[1] association of five major emerging national economies: Brazil, Russia, India, China and South Africa

compliance is supposed to be higher'. As Charney (2003) also established from case studies, consensus about the norms positively affected compliance. In the case of the Compact, it can be seen that states that were disagreeing with the norms either did not participate in elaboration or did not adopt/endorsed the text of the Compact.

Estimating compliance with the Compact through the lens of institutionalism theories (Keohane 1989; Haas and Bilder 2003), that powerful international institutions may induce states to comply through monitoring, verification and capacity-building, there can be suggested the following. The first issue is the absence of a powerful institution that is in charge of global governance of migration. Within the UN system migration issues to certain extent are scattered between different specialized agencies like International Labour Organization, Office of the United Nations High Commissioner for Human Rights, United Nations High Commissioner for Refugees and some others.

IOM is supposed to be the central and leading international organization on migration matters, and on the matters arising from the Compact as well. However, it has several constraints. It does not have the same status as UN agencies and the UN regulations (e.g. treaty obligations, immunities) are not directly applied to it (UNGA 2016a). One of the biggest constraints in all IOM activities is that according to its Constitution (IOM 1954) its budget is funded by contributions, where the biggest part is earmarked for specific projects or reimbursements for services provided and that funds cannot be used for purposes other than those specified by the donor (IOM 2019b). From the budget plan for 2020, it can be seen that the highest earmarked contributions for 2020 were programed to come from the US, the EU, Australia and Canada, and from the total of 858 321 000 USD only 5 317 000 USD were unearmarked (IOM 2019b). That creates concerns where IOM may act primarily in the interest of those who pay and, thus, overlook important migration issues that are not in the range of interests of the main contributors. To this point may be added that analyzing IOM projects (IOM 2019b), it can be observed that they are mostly dealing with such technical aspects of migration as border management, assistance in return, increasing capacity-building of officials involved in migration management, training border police and are rather directed at prevention of migration than at ensuring protection of the rights of migrants. The plan for 2020 (IOM 2019b) also did not include any substantial activities related to the Compact.

Still, the Compact does establish mechanisms for monitoring, verification and capacity-building. First, there is a capacity-building mechanism in the UN that is meant to support efforts of Member States in Compact's implementation and allows Member States, the UN and other relevant stakeholders to contribute technical, financial and human resources

on a voluntary basis (UNGA 2018). The Compact also provides mechanisms of monitoring and verification through the established UN network on migration to ensure effective and coherent system-wide support for implementation (UNGA 2018). According to the Compact, the Secretary-General is responsible for reporting to the GA on a biennial basis on the implementation of the Compact (UNGA 2018). On top of that, the Compact envisages follow-up and review mechanism, according to which the progress made at all levels in implementing the Compact in the framework of the UN will be reviewed every 4 years through a State-led approach and with the participation of all relevant stakeholders (UNGA 2018). It is yet to be seen, how these mechanisms will function and whether they will be able to deter non-compliance and increase compliance when necessary. What can be assessed at this stage is again the absence of a strong central 'governor' who could 'govern' all these structures and induce compliance as it suggested in institutionalism theory. Moreover, as pointed out in the latest report by IOM itself (2019c), 'a lot of government funded researches on migration are sometimes simply justifying certain immigration policies, academic works are mostly produced only from developed countries and some think tanks that are supposed to provide unbiased evidence-based information and analysis, are sometimes also driven by political ideologies and agendas'. Thus, the need for a strong impartial institution to monitor is obvious. From the analysis of those mechanisms, designated roles and procedures specified within each mechanism, it can be suggested that they are highly dependent on pro-active approach from interested actors. As Haas and Bilder (2003, 55–56) suggest 'verification may indirectly deter noncompliance by increasing the likelihood of detection, where the publicity generated by non-governmental organizations can be sufficient to inform recipient governments of violations of which they may have been unaware, as well as pressuring them to enforce their international commitments and to refuse entry of such products'. So, there is a probability that the stakeholders concerned with particular objectives will perform the function of verification and monitor compliance, which may be beneficial for compliance. Regional governors that can monitor compliance at least at the regional level should not be disregarded as well. For instance, as Maiyegun (2019, 269) shows in his research, 'the African Union is better placed to hold its member states accountable for the implementation of commitments they have undertaken under the Compact, because most of them are also commitments contained in the regional governance frameworks'.

Estimation of compliance with the Compact through constructivist's perspective (Haas and Bilder 2003), based on the idea that compliance is higher when there are widely shared causal beliefs about the operation of the issue to be controlled, there can be observed the

following. The fact that 164 states signed the Compact, their statements when the Compact was adopted on the importance of international cooperation on migration matters and on willingness to work on implementation of the Compact, lead to an assumption that there exists a common shared idea on how to act for making migration work for all. However, from the analysis of states' positions and the documents from the three phases there can be observed differences in ideas between states when it comes to more specific issues.

Some countries were concerned about particular commitments like fighting irregular migration (Croatia, Denmark, Germany, Mali, Spain, UK, Algeria, Lebanon), climate change issues (e.g. Cabo Verde, Grenada, Haiti, Marshall Islands, Monaco, St. Kitts and Nevis, Tuvalu); remittances (Canada, Guyana, Lesotho, Kenya, Mali, Moldova, Nepal, Rwanda, St. Kitts and Nevis, Tuvalu, Tunisia) or border management (Montenegro, Norway, Panama) (UN 2018c). Some considered migration as a right (Honduras, Paraguay, Bolivia) and some explicitly claim that it is not a right (Denmark, France, Liechtenstein, Norway, France, Estonia, Lithuania) (UN 2018c). One block of states underlined the importance of human rights: e.g. Bolivia, Bangladesh, Cameroon, Colombia, Comoros, Cuba; Ethiopia; Ghana (called for more human rights protection in the Compact); Greece (agreed to protect the lives of migrants and safeguard their human rights); Haiti; Iceland; Indonesia; Lesotho; Luxembourg; Macedonia; Monaco; Pakistan; Paraguay; Peru; Philippines; Portugal; Suriname; Uruguay (UN 2018c). At the same time, the other block of countries placed a big emphasis on readmission, sometimes ignoring human rights issues: e.g. Finland, France, Norway and the Netherlands pointed to the countries' crucial obligation under the Compact to readmit their own nationals; Slovenia claimed that 'all states have an obligation to readmit their own nationals, which is essential element of a well-functioning global migration system' (UN 2018c). In essence, some countries emphasized certain objectives' importance, while ignoring the others. Like Croatia, for instance, stating that 'illegal migration should be combated, borders should be controlled and states have to readmit their citizens while all migrants must have proof of legal identity and hold valid travel documents, but Croatia will decide itself when and how to grant rights to migrants' (UN 2018c). Similarly, Denmark emphasized that 'the Compact provides a clear and universal confirmation of states to readmit their own nationals and it expects that commitment to be upheld', but at the same time claimed that 'the Compact does not in any case create legal obligations for any states' (UN 2018c).

Moving to Raustiala's (2000) rationalist, norm-driven and liberalism theories on state's compliance there could be derived the following features. In view of rationalists'

perspective implying that states would cooperate and comply when they are better-off while cooperating than without it, at first glance, it may seem a classic prisoner's dilemma, where states would choose deviate/deviate option with a lesser pay-offs than in comply/comply option. However, in terms of migration governance the issue seems too complex to define the exact pay-offs. There are certain drivers for migration that require long-term solutions at the minimum and indicate that migration will not disappear, as well as previous practice and changes in the nature of migration that indicate to its inability to self-regulate with a positive outcome if everyone deviates and does not cooperate. Migration is deeply interconnected with many other issues (e.g. when poverty and unemployment lead to internal conflicts which later become external, therefore, unilaterally closing the border to stop migration will just result in other challenges which changes the pay-offs). From states' positions on the Compact in the adoption session, many developing countries drove attention to underdevelopment as the main root cause of migration, as well as to internal conflicts, poverty, environmental conditions as the main reasons why people migrate. It can be suggested that states understand that they are better-off taking certain measures in cooperation to address the challenges related to migration. As it is pointed out in the Compact "safe, orderly and regular migration works for all when it takes place in a well-informed, planned and consensual manner" (UNGA 2018). Dealing with smuggling, which appears where there are no regular paths for migration, can be done through cooperative increasing of regular pathways (recognition of skills etc.) and decrease the need of migrants to turn to smugglers (IOM 2019c). Regarding data collection and sharing, as it is also emphasized in IOM World Migration Report (2019c), data gathering approaches are so different and fragmented, that it is impossible to compare and draw conclusion from it for development of evidence-based policies that could better address challenges related to migration. Thus, a more unified approach developed in cooperation could also contribute to reaching the objectives of the Compact.

The structure of the Compact makes it complicated to deviate since it has clauses which benefit more destination states (objective 4 on ensuring that all migrants have proof of legal identity and adequate documentation; objective 11 on managing borders in an integrated, secure and coordinated manner; objective 21 on readmission) and those of more importance to states of origin (objective 15 on provision of access to basic services for migrants; objective 20 on financial aspects of migration). Thus, compliance of one side is, to certain extent, conditioned by compliance from the other side (a reciprocity example of compliance provided by Guzman and Meyer 2010, 193).

Analysis of states' positions on the Compact shows that the idea that migration (with a special emphasis on well-managed/well-governed/orderly/legal/regular migration) is beneficial is supported by many states: e.g. Azerbaijan, Canada, Bahamas, Belarus, Brazil, Canada, China, Comoros, Guinea Equatorial; Eritrea; Finland; France; Germany; Honduras; India; Ireland; Pakistan; Paraguay; Portugal and Singapore; St. Kitts and Nevis; Suriname; Tuvalu; UK (UN 2018c). Almost all of the countries admit that they need to cooperate to address the challenges related to migration (or to manage migration effectively according to some destination states). The problem here is the divergence of interests in a more specific issues, which is mentioned above in relation to constructivists' perspective on compliance and which makes it difficult to define the pay-offs from compliance.

In that regard, it is also important to mention that some countries did not share the opinion that governing migration by means of the Compact makes them better-off. Poland voted against the Compact, because 'it did not seem to be the right instrument to manage migration and to serve the best interests of the country and its people' (UN 2018a). Chile abstained from endorsing the Compact, stating that 'some elements of the Compact are not entirely in line with country's immigration policy, and that it also promotes the entry of vulnerable migrants that it is not fully in the country's interests' (UN 2018a). Australia did not adopt the Compact and abstained from votimg, pointing out that 'the Compact puts unnecessary constraints on State control of borders and implies risks fostering irregular and unlawful migration' (UN 2018a).

In the context of a norm-driven theory of Raustiala (2000), it should be noted that the Compact includes norms establishing a mechanism for provision and sharing of information on implementation, progress and challenges related thereof, which can induce compliance, but at the same very limited financial support for implementation of the Compact which is among the biggest challenges. In terms of capabilities of states, compliance with all its provisions implies first of all financial resources, which varies a lot considering the wide range of participating countries (comparing GDP of Malawi and Niger, which is in the low bottom and GDP of Norway or Luxembourg which are in the top). In the Compact (UNGA 2018) financial assistance is only covered by means of establishment of a start-up fund (with seed-funding and voluntary financial contributions (paragraph 43 (b)), and a commitment to "develop technical cooperation agreements that enable States to request and offer assets, equipment and other technical assistance to strengthen border management, particularly in the area of search and rescue as well as other emergency situations" (paragraph 27 (d)). However, there are provisions that require substantial funding, like, for instance, 'provide

access to justice for all migrants in countries of transit and destination that are or may be subject to detention' (paragraph 29 (d)) or 'provide inclusive and equitable quality education to migrant children and youth, as well as facilitate access to lifelong learning opportunities' (paragraph 31 (f)). Thus, it is expected, that compliance with thereof may be lower than compliance with other less costly commitments.

According to liberal theories cited by Raustiala (2000, 410) that if states submit to the rule of law at the domestic level, they are more likely to submit to similar regimes at the international level, and, thus, domestic structures should be studied to make assumptions, or Charney's (2003) theory that the nature of domestic legal systems reflects on compliance, it can be noted that it is not feasible to assess domestic structures of all the 164 signatory states. Indeed, the Compact, embraces countries with different levels of the rule of law, corruption, freedoms etc., and countries which are now experiencing internal protracted conflicts. In that regard, it can be concluded that there cannot be experienced the same level of compliance from all the countries. From the analysis of states' positions there can be made a general observation, that most of the states scoring higher in Rule of Law Index (The Global Economy 2020) – e.g. the one within top 20 like Finland, Norway, Switzerland, Sweden, Netherlands, Canada, Germany and the UK made their commitments under the Compact very precise by providing specific comments and their interpretation of certain norms. While other states within this range like Austria, New Zealand, Singapore, Australia and Liechtenstein participated in the elaboration of the Compact, but did not endorse it. Therefore, countries with a commitment to the rule of law principle at domestic level probably realize that joining the Compact implies compliance and estimate their compliance capabilities from the beginning.

Lastly, analysis of the Compact and states' positions on it, through the theoretical framework developed by Charney (2003, 118) in terms of the factors that impact compliance, helps to establish the following features important for the compliance. Norms of the Compact are linked to international law instruments in general, and, in particular, to the core international human rights treaties, multilateral binding international treaties related to transnational organized crime, smuggling, human trafficking, environmental issues, slavery and other issues (paragraph 2 of the Preamble), which enhances the probability of compliance with the Compact. This, in fact, was a particular issue of concern for states that did not sign the Compact, as the analysis of their positions shows. As paragraph 15 of the Compact established (UNGA 2018) – "within their sovereign jurisdiction, States may distinguish between regular and irregular migration status, including as they determine their legislative

and policy measures for the implementation of the Global Compact, taking into account different national realities, policies, priorities and requirements for entry, residence and work, in accordance with international law". And in case of Australia the link with international law (i.e. 'hard law') was a potential sticking point, since there was a concern that this reference could hinder implementation of key border protection policies, such as Operation Sovereign Borders, which could contradict to Objective 13 of the Compact regarding detention of migrants and some binding international treaties (Sherrell 2019).

Norms of the Compact are also connected to the other 'soft' norms such as 2030 Agenda for Sustainable Development, which also includes norms aimed at addressing international migration issues (e.g. migrant workers; on economic growth and decent work; trafficking in persons; on peaceful societies). From the statements of Marrakesh conference on the final text, it can be seen that most states also link migration with development and implementation of activities from the Compact considering Sustainable Development Goals.

Norms of the Compact also take account of the past practices. Migration is not a new phenomenon and up until now states have been exploring migration governance through different avenues of a bottom-up approach, individually and collectively, generating a multilevel international migration regime with different initiatives (Betts 2011; Martin and Weerasinghe, 2017). In Marrakesh conference on adoption of the Compact a lot of states (particularly from Latin and Central America and Africa) reported on the actions they are already taking in regard of the norms included in the Compact. Ecuador, El Salvador, Guatemala, Honduras and Peru explained certain policies, plans, roadmaps or projects addressing issues regulated in the Compact they have already in place UN 2018c). Within African countries, *inter alia*, Kenya is involved in regional initiatives and has national policies related to visa liberalization for citizens from other African countries, to provision of legal documentation, to diaspora issues, remittances and drivers of migration; Niger implements projects aimed at mitigating drivers of migration as well as reducing irregular Immigration; Senegal is working on creation of jobs to reduce migration; Uganda has projects addressing the root causes of migration and allowing free movement of people, goods and services within East African Community; Zambia is working to improve the collection, analysis and disaggregation of data to support evidence-based policies (UN 2018c). Some initiatives are also carried out in Cabo Verde, Ghana, Malawi, Mali and South Africa (UN 2018c).

The holistic 'whole-of-government' and 'whole-of-society' approach used in the process of elaboration allowed to include perspectives from NGOs or other national

stakeholders (civil society organizations, academic institutions, parliaments, diasporas, migrants, migrant organizations and the private sector) concerned with particular practical issues arising in migration, as it can be seen from the proposals at consultation and stocktaking phases (UN 2017c; OHCHR 2020). The contribution of civil society was particularly important as noted by Rother and Steinhilper (2019). Thus, these two above-mentioned factors increase the potential for compliance under Charney's (2003) theory.

Regarding the transparency of the norm, and its implementation (the clarity of the obligation; the ability of others to determine whether the target of the norm is in compliance or not, and the presence and nature of verification systems (Charney 2003), there can be observed the following. In a recent report on migration (IOM 2019c) Newland, Mcauliffe and Bauloz suggested that the Compact's 23 objectives can be divided into three "baskets": 1) specific and relatively straightforward measures (e.g. improving migration data and research; saving lives and coordinating efforts on missing migrants); 2) specific but contested issues (e.g. opening wider legal pathways for migrants; managing borders in an integrated, secure and coordinated manner; and 3) very broad and aspirational goals (e.g. reducing the negative drivers of migration; eliminating all forms of discrimination). It can be argued, however, that this distinction of norms should be made at the level of actions of each objective, not objectives in general, to establish the precision of the actions that need to be carried out to comply with the norm. Compliance, supposedly, will be more observable in such activities as 'develop targeted support programmes and financial products that facilitate migrant and diaspora investments and entrepreneurship' (paragraph 35 (e)) or 'provide accessible information on remittance transfer costs by provider and channel' (paragraph 36 (f)), than in more aspirational ones mentioned before. However, from the analysis of the actions established in the Compact, it may be suggested that in all of them there can be observed results on compliance, even though there are no precise indicators if the norm is fully complied with or not. Another challenge related to evaluation of compliance may be linked to inclusion of short-term, mid-term and long-term objectives in the same act.

Analyzing Zero Draft of the Compact (UN 2018b) with the final text also gives some ideas about the norms of the Compact. First, developers of the Compact were trying to be precise with their obligations. In some clauses, for instance, states went to limit the commitments by adding specifications to the norms. In other clauses states made commitments less clear and more ambiguous trying to decrease the level of responsibility. For instance, in Objective 4 the framing was modified from "***we commit to equip migrants*** with proof of legal identity and other relevant documentation" to ***"we commit to fulfil the***

right of all individuals to a legal identity by providing all our nationals with proof of nationality and relevant documentation"; in objective 5 – from "***facilitate family reunification*** for migrants at all skills levels ***by integrating provisions in migration laws and policies***" to "***facilitate access to procedures for family reunification*** for migrants at all skills levels **through appropriate measures**". Other similar modifications reducing the level of commitment and (or) making the norm less straightforward can be found throughout the whole Compact in paragraphs 22(a); 22(g); 23; 23(g); 24; 25 (a); 26; 26 (a); 31; 31 (a); 32 (b); 34(b).

There are also commitments that states were aware of not being able to comply with, and that were either modified or removed in the final text as compared to Zero Draft. Thus, in paragraph 31 (f) the commitment was changed from "grant equal access for all migrant children and youth to quality education and ensure that they can regularly attend…" (UN 2018b) to "provide inclusive and equitable quality education to migrant children and youth…" (UNGA 2018). In the same paragraph 31 commitment was changed from "develop, reinforce and maintain necessary capacities and resources to deliver basic social services to all migrants, regardless of their migration status, and ensure safe access to these services…" to "incorporate the health needs of migrants in national and local health care policies and plans…". For the same reason in the elaboration process there were excluded clauses like "facilitate access to regularization options as a means to promote migrants' integration into society…"; "consolidate a digital database to register migrants abroad…"; "institute an identification card for all persons residing in a particular country or city, regardless of their nationality, ethnicity, immigration status or any other characteristic, to access services, conduct business and participate in community life…". As Raustiala (2000, 424 – 425) concludes in his research "If governments care about compliance, they will resist creating standards that are too challenging for fear they will not be in compliance".

It should not be disregarded that in the process of elaboration there were also added some clauses that implied more commitment. These are, among others, in objective 5 regarding expansion of available options for academic mobility; cooperation to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin due to environmental matters; in objective 7 regarding building on existing practices to facilitate access for migrants in an irregular status to an individual assessment that may lead to regular status…; in objective 8 regarding cooperation to recover, identify and repatriate the remains of deceased migrants to their countries of origin; in objective 11 regarding review and revision of laws and regulations to determine whether sanctions are appropriate to address

irregular entry or stay; in objective 18 regarding enhancing the ability of migrant workers to transition from a job or employer to another; in objective 20 regarding enabling migrant women with special assistance to foster their active participation in the economy.

As to verification system, it was previously mentioned above. Remarkably, some states pointed in their positions in the adoption of the Compact to the necessity of good efficient follow-up and review mechanism (e.g. with a strong emphasis – Honduras; Kenya; China) (UN 2018c).

In terms of degree of political support of the Compact's norms (Charney 2003), the process of elaboration and adoption also demonstrates three approaches. The first group of countries that participated in all the phases of elaboration and adopted the Compact. The second group of countries participated in negotiations, but referred to internal discord within the state and abstained from vote (e.g. Latvia, Switzerland and Italy) or just abstained from vote without any explanations. The third group did not participate in elaboration of the Compact and\or did not vote for the Compact because of the absence of political support for it (e.g. Hungary which defined migration as a dangerous phenomenon and claimed that the Compact was prompting new migratory movements putting countries at risk; Poland which did not see it to be the right instrument to manage migration; Czech Republic (UN 2018a)). The US claimed that 'the Compact contained goals and objectives incompatible with its law and policy about how to secure its borders, and whom to admit for legal residency or to grant citizenship' (UN 2018a). The limitations of this factor can be related to sustainability of political support. It may be the case for some states, that with the change of the political leader, administration and the government, the Compact may lose political support and compliance will decrease. Although, this risk can be attributed also to 'hard law' instruments which also allow for withdrawal.

The Compact does not include norms with foreseeable consequences of non-compliance like sanctions or dispute settlement procedure, just as strong institutional mechanisms for monitoring and supervising compliance with 'soft law' obligations, which are crucial according to Charney (2003). Due to its soft nature, legal mechanisms used for 'hard law' instruments like referring to dispute settling bodies, to 1969 Vienna Convention on the Law of Treaties are also not applicable in this case. At the same time, the Compact can be considered politically binding since it is a promise on cooperation given by a state at the highest level. Thus, states can use it as a leverage to refer to other more flexible instruments of pressure to make the other states comply. Even though the US is not a party to the Compact, its practice may provide a good example of such a pressure. For instance, in 2019

the US was experiencing resistance from Guatemala and Mexico to sign agreements designating them as "safe third countries", but after pressing them with possible increase on tariffs, fees on remittances or tariffs escalation for Mexico, the two countries had to sign the US agreements and comply with them (Mixed Migration Centre 2019). This point may be supported by the theory of Lupu (2016) that 'compliance may depend on economic interests (in particular trade issues), where states may choose to comply when their economic interests are at stake'. States may also tie their development aid or other financial assistance provided for particular states with the implementation and compliance with the Compact's provisions. However, as the case of "EU-Turkey Joint Action Plan" on migration management from 2015 (European Commission 2015), among the others, shows, forcing compliance by sanctions or financial conditionality may be not the most sustainable option in terms of compliance.

The Compact also leaves room for control from the side of the supporters of the Compact that would be able to participate in revision of follow-up reports on the platform of International Migration Review Forum (paragraph 48), and through the UN Migration Network. As specified by Mixed Migration Centre (2019), 'some signatory states are already conducting mapping exercises and consultations with civil society, laying the groundwork for the structure of possible national reviews (e.g. Portugal, the Philippines and Morocco) in what may become lessons learned for other countries to build upon'.

5. Conclusion and implications

This research has analyzed how the 'soft law' nature of the Compact may impact states' compliance and which are the implications that can be drawn from the process of elaboration of the Compact (states' positions on it, norms included in the Compact) to assess the potential compliance. It can be suggested that the Compact managed to embrace almost all the advantages established through previous studies of the use of 'soft law' instruments in global governance. It managed to achieve widespread participation in a multilateral instrument for governing migration, united very complex and diverse aspects of migration and incorporated ambitious norms (states were prudent in making commitments, but still ready to find compromises and include more burdensome commitments). Compact's 'soft' nature enabled shorter negotiation procedure and less impediments to start implementation, as well as accommodating the sovereignty issue which is within primary obstacles in migration governance, and cooperation and participation of diverse stakeholders which have been able to push for inclusion in the Compact of some relevant provisions. Among the other beneficial features of the Compact are that its norms rather promote than restrict behavior, and that its follow-up mechanism to share information on the progress on implementation may help to push states to comply with the majority views as compliance increases. Besides, implementation of the Compact (even partial) may give rise to further agreements in this sphere if there are positive results in particular issues. Thus, overall, this research suggests that even though the Compact is not a 'hard law' instrument, its 'soft law' nature, all else equal, should have a positive impact on further implementation and compliance with the Compact, just as on multilateral cooperation of states in global governance of migration.

Regarding the implications that can be drawn from the process of elaboration, states' positions on the Compact and the norms included in it, to assess the potential compliance there has been established the following. The analysis carried out in this thesis leads to an assumption that the sphere of global governance of migration lacks a powerful dominant state able to exercise pressure on the states to comply with the Compact. On the other note, due to a voluntarily basis of the agreement, overall consensus on the commitments and withdrawal of disagreeing states from endorsement the Compact, compliance is supposed to be higher as it is proved by previous case studies. One possible hurdle for compliance may also be the absence of a powerful institution in charge of global governance of migration, that might induce compliance through monitoring, verification and capacity-building mechanisms. Although, the Compact includes such mechanisms, it is suggested that there is no strong

central governing institution that could effectively manage and coordinate all these structures and detect non-compliance and deter it on a global level, and pro-active stakeholders will be needed to maintain that mechanisms.

From the analysis of states' positions there can be observed a common shared idea on how to act to make migration work for all, which supposedly is beneficial in terms of compliance. However, there can be found differences in ideas on a more specific issues, where each state would emphasize one objective, while disregarding the other, especially when states are predominantly of destination or origin. What should be noted also is that countries which are both of origin and destination expressed concern and willingness to cooperate on all objectives and did not tend to emphasize any priorities in particular. What is also striking in the analysis of state's positions is that many destination countries point to the obligations of states of origin under the Compact, but claim that the Compact does not create obligations for them.

The fact that the Compact deals with migration matters that are deeply embedded in other global and domestic challenges, makes it difficult for states to define the exact pay-offs when they decide if they are better-off complying or deviating. On a larger scale, however, states hold the same opinion that well-managed migration makes them better-off. Those states that did not share this opinion did not sign the Compact, which is also beneficial for further compliance. Consolidation of norms that may be more or less relevant for particular states, may have an effect where compliance of one side is conditioned by compliance of the other side, which supposedly enhance compliance.

It can be suggested from this research that the norms of the Compact are perceived as legitimate by states since they voluntarily committed to them and developed them based on a consensus, thus, those norms have higher chances to be complied with. While it incorporates mechanisms for provision and sharing of information on implementation, progress and challenges related thereof, which can induce compliance, financial support for implementation of the Compact is very limited and this is within the biggest challenges. Considering the wide range and economic capabilities of participating states, it is expected that compliance will vary according to the costs of implementation. Voluntary contributions for particular objectives and countries which will be detected in follow-up reviews could partially address this challenge.

In terms of the factors that impact compliance, the Compact possesses features that according to the previous researches on compliance with soft law instruments increase the potential for compliance. Norms of the Compact are linked to international law instruments

and the other 'soft law' norms. They also take account of the past practices and include perspectives from various stakeholders. There can be witnessed high degree of political support of the Compact's norms, since states actively participated in its elaboration and 152 states voted for its endorsement in UNGA, while those who did not support or did not reach an agreement within national political environments were in minority. The fact that states removed in the final Compact commitments they were aware of not being able to comply with, shows that states actually cared about further compliance.

As to transparency and precision of the norms, conclusions are not straightforward. On the one hand, states were trying to be precise in the commitments they were making, agreed to include norms that implied more commitments suggested by other stakeholders and also pointed to the importance of a verification mechanism elaborated in the Compact. From the other side, compared to the Zero Draft, in the final Compact the degree of commitment in some actions under many objectives has been reduced and sometimes blurred in the process of elaboration. Among the possible hurdles to monitor compliance is that there are no precise indicators if the norm is fully complied with or not and the inclusion of short-term, mid-term and long-term objectives in the same act, which should be taken into account in evaluation. The Compact also does not include provisions with consequences of non-compliance or strong institutional mechanisms for monitoring and supervising compliance, so inducing compliance may require soft power measures.

Based on these conclusions, it is expected that there is a significant potential for compliance with the norms of the Compact. The main obstacles that can encountered in compliance may be related to substantial observable changes in pay-offs so that deviation from compliance becomes a clearly preferable option; the lack of capacities, especially financial; loss of political support at the domestic level and finding the remedy to address non-compliance given the ambiguity of verification and monitoring mechanisms established by the Compact.

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Appendix

Thesis report

Central European University (CEU)/Institut Barcelona d'Estudis Internacionals (IBEI)

THE GLOBAL COMPACT FOR SAFE, ORDERLY AND REGULAR MIGRATION: A CASE STUDY OF A 'SOFT LAW' INSTRUMENT AIMED AT ESTABLISHING INTERNATIONAL COOPERATION IN THE DEVELOPMENT OF GLOBAL MIGRATION POLICY

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Thesis structure

1. Introduction: research question, preliminary hypotheses, literature review, concepts;
general theoretical framework (soft law and 'hard law' (compliance, advantages/disadvantages)).

2. A case of the Global Compact for Safe, Orderly and Regular Migration (GCM) as an example of a 'soft law' instrument regulating international migration.

3. Conclusion – implications for compliance of the states with and implementation of GCM (establishment through the theory and GCM analysis: are there conditions for compliance of states with GCM; as a consequence, is implementation feasible given the nature of compliance in the realm of global governance of migration, international law and international relations; what is more appropriate e for global governance of migration – 'hard' or 'soft' law; is there place for further binding commitments in the sphere of global governance of migration).

Thesis title

The Global Compact for Safe, Orderly and Regular Migration: a case study of a 'soft law' instrument aimed at establishing international cooperation in the development of global migration policy

Introduction (topic introduction, literature review, research question)

International migration has existed for centuries. However, according to the United Nations (UN) data the number of international migrants worldwide has continued to grow in recent years, reaching 258 million in 2017 (3,4% of the world's population), up from 173 million in 2000 (2,8% of the world's population) (United Nations 2017, IOM 2018). Notwithstanding the fact that the need for global governance of migration is debated within academic and political environment, the fact that migration can be managed better in cooperation has been recognized by most of the states, international organizations and academic scholars. States repeatedly underline migration as a relevant global phenomenon requiring coherent and comprehensive global approaches and global solutions (2016 New York Declaration for Refugees and Migrants, 2030 Agenda for Sustainable Development) and call for greater international cooperation to assist host countries and communities (UNGA 2016). Most of the academic literature identifies migration as a global issue as well. Opinions on global governance of migration are presented from different perspectives. Some scholars

stand for having global migration governance and support the idea that migration is a matter of common interest which cannot be managed on a unilateral basis (Koser 2010; Betts 2011; Martin 2011; Crepeau, Idil 2016; Chetail, Bauloz 2014; Goodwin-Gill 2016; Chetail 2019), while there are some critical views on the possibility of governing and managing migration on global level (Geiger, Pecoud 2010, 2012). Another group of scholars argue whether global governance of migration should develop in the form of creating an international organisation that will govern migration or expanding the mandates of existing ones (Newland 2010; Crepeau, Atak 2016; Jubilut, Lopes 2017) or in the form of a single legal framework governing migration (Betts 2010; Jubilut, Lopes 2017).

At present moment there is no universal legal framework regulating international migration. There can be seen a fragmentation of international migration law with different international treaties related to human rights, human trafficking, organized crimes and other similar issues, or to specific categories of migrants like refugees or migrant-workers (Chetail 2019).

One of the recent attempts to enhance international cooperation in this field was the GCM, which was adopted by the Resolution of the UN General Assembly on 19 December 2018. The GCM is a non-binding document, which is not considered as an international treaty but as a 'soft law' instrument addressing international migration. Despite the fact that it is non-binding, only 152 states voted in favor of its adoption, while the United States, Hungary, Israel, Czech Republic and Poland voted against it and 12 states abstained from the vote.

Since GCM is quite a recent document there have not been many academic studies of it and most of them are of general character, with some expressing skeptical attitude towards the possibility of its implementation and states' compliance with it and governing of international migration on global level overall (Crépeau 2018; Guild 2018; Newland 2019; Klein Solomon, Sheldon 2019). The question of compliance with and implementation of binding international treaties ('hard law') and non-binding international agreements ('soft law') have been discussed in academic literature on the whole and in relation to a particular issue. There may be found opinions on advantages and disadvantages of 'soft law' instruments in comparison to 'hard law' instruments (Shelton 2010; Guzman, Meyer 2010; Guzman 2004; Abbott, Snidal 2000; Shaffer, Pollack 2011; Pauwelyn, Ramses, Wouters 2012; Raustiala 2000; Demin 2018). What concerns the use of 'soft law' in interstate cooperation and how it reflects on compliance and implementation, in particular, it has been reviewed in areas of environmental cooperation (Redgwell 2006; Shelton 2010; Ciplet 2015), trade (Shelton 2010), human rights (Lagoutte, Gammeltoft-Hansen, Cerone 2017; Shelton

2010; Cole 2009), security (Shaffer, Pollack 2011). Some basic issues related to international migration governance by means of 'soft law' and 'hard law' have been investigated in the works of Chetail (2014, 2019) and Betts (2010). However, it has not been looked into before in relation to the case of GCM.

This thesis relies on the above works to assess the feasibility of compliance and implementation of 'soft law' instrument in the sphere of global governance of migration and draw implications for a future cooperation in the sphere of global governance of migration. Therefore, the main research question is on what are the implications for compliance and implementation of such a 'soft law' instrument as GCM in the sphere of global migration governance and what is more appropriate for effective global governance of migration in terms of compliance and further implementation – 'hard' or 'soft' law. It is supposed that the conclusions of the thesis could be used in future research on effective global governance of migration concerning development of legal frameworks and instruments that regulate international migration and are implementable and complied with. As it can be concluded from the relevant scholarship the notion of compliance and implementation of 'soft law' instruments can be investigated in relation to a particular sphere, but overall the patterns are similar. Thus, certain findings from this thesis may also contribute to the existing researches on compliance with 'soft law' in general terms. The findings may be also used to answer the question of the ongoing debate on the possibility to govern migration on a global level.

Based on existing and relevant academic works revised at this thesis at this stage of research there can be developed the following preliminary hypotheses.

The first hypothesis concerns the choice of 'soft law' over 'hard law'. GCM was supposed to embrace all of the UN member-states. From a game theory perspective, it's extremely hard to balance the pay-offs of all the states in such situation, thus the probability of defection and lower level of compliance and implementation is higher, when the commitments are non-binding and do not provide for a structured enforcement mechanism. Reputation costs are high in GCM and reciprocity is difficult to achieve. Therefore, hypothesis 1 is that states choose 'soft law' to avoid high losses and increase the pay-off from cooperation, but given the nature of GCM commitments the probability of defection and, thus, proper compliance and implementation will be quite high in such an agreement.

Hypothesis 2 is that the flexibility of GCM increases participation, provides for more ambitious norms, lower transaction costs and is better in terms of uncertainty and sovereignty concerns, but cannot ensure the same sustainability as 'hard law' would do.

Hypothesis 3 is that the level of compliance and implementation 'potential' will depend on certain features that GCM possesses.

Methodology

Regarding the case selection, GCM is chosen as the latest 'soft law' instrument for a global governance of migration. Moreover, the distinctive feature of this document is that it's the first inter-governmentally negotiated agreement, prepared under the auspices of the UN, covering all dimensions of international migration in a holistic and comprehensive manner (IOM 2018a). This thesis will follow a qualitative approach. The research will combine interdisciplinary perspectives, drawing on international law, international relations and global governance. It involves content analysis of the documents related to elaboration and adoption of GCM from consultation phase (April – November 2017), stocktaking phase (December 2017 – January 2018) where all relevant input received during the consultations phase was pulled together and analyzed resulting in a first draft ("zero draft") of GCM and intergovernmental negotiations phase (February 2018 – July 2018). In parts, for deriving the features of GCM the research will also involve content analysis of GCM itself.

Analysis of GCM elaboration process with an emphasis on states' positions (proposals, objections and rejected proposals) and key challenges that have appeared in the course of drafting thereof, will serve for the assessment of the further compliance with and implementation of the document and, thus, help to answer to the research question. In particular, from the perspective of the research question and theories applied in the thesis, there can be traced states' intentions and expectations towards GCM, reasoning for choosing 'soft' or 'hard' form of regulation, presence or absence of specific factors that may be influential for further compliance and implementation. Necessary data will be obtained from open sources of International Organization for Migration (IOM) and the UN as the main coordinators thereof. In parts where there is no information, IOM inquiry /interviews about the process of development of GCM may be used.

Key concepts

The notion of ***global governance of migration*** has been widely discussed in academic literature. A commonly referenced definition of this concept that can be seen in many relevant academic researches is that of Betts (2011), who defines it as "norms, rules, principles and decision-making procedures that regulate the behaviour of states (and other transnational actors)". The definition of IOM is more elaborated, but still very similar – "combined

frameworks of legal norms, laws and regulations, policies and traditions as well as organizational structures (subnational, national, regional and international) and the relevant processes that shape and regulate States' approaches with regard to migration in all its forms, addressing rights and responsibilities and promoting international cooperation" (IOM 2019). Noteworthy, IOM distinguishes migration governance and migration management, pointing out that the latter means implementation of the migration governance framework within the State (IOM 2019). For the purposes of this research global governance of migration will be considered as it is defined above, but more in the context of regulatory framework (as it is defined by Betts), than institutional.

In the context of global migration governance it's also important to define what is understood under the concept of ***migration***. Until now, there has not been established an official definition of a migrant under international law. The GCM does not provide any particular definition thereof either or distinguish different types of migration. Scholars researching international migration differ in their approaches towards division of different types of migrants/migration, while recognizing it as a challenge. Koslowski (2011) divides global migration governance into three 'global mobility regimes', focusing on the refugee, travel, and labour migration regimes. Betts (2011) takes a slightly different approach and divides international migration into a range of policy categories: low-skilled labour migration, high-skilled labour migration, irregular migration, international travel, lifestyle migration, environmental migration, human trafficking and smuggling, asylum and refugee protection, internally displaced people, diaspora, remittances, and root causes. Since GCM operates in general terms in regard to migration, this thesis will also address migration in general without specification of categories, using the IOM definition of ***international migration*** as movement of persons away from their place of usual residence and across an international border to a country of which they are not nationals (IOM 2019). While IOM (2019) defines international migrant as "any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence", the definition of the UN Department of Economic and Social Affairs (ibid) as "any person who changes his or her country of usual residence" with exclusion of movements that are due to "recreation, holiday, visits to friends and relatives, business, medical treatment or religious pilgrimages" seems more appropriate.

In academic literature there can be found different opinions on and definitions of the concept of ***'soft law'*** (Cerone 2016) including those which deny the term in general saying that law is 'hard' in its nature (Blutman 2010; Hasanat 2007). However, the term is widely

used in international law and the majority of scholars agree that it can be simply defined as non-binding rules or instruments (Guzman, Meyer 2010). The definition of ***'hard law'*** can also be found with greater or less elaboration. Abbott and Snidal (2000) define it as "binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law". Public International Law scholars usually distinguish these concepts in an easier way. Evans (2003), for instance, defines 'soft law' as international acts that may assume the form of international agreements but which were never intended to create legal obligations, implying therefore that international agreements which are intended to create legal obligations can be considered as 'hard law'. From the analysis of existing definitions and for the purpose of the thesis there 'non-binding rules or instruments which create expectations about future conduct, but are not intended to create legal obligations' will be understood as 'soft law'. 'Hard law' will be seen as 'binding rules or instruments intended to create legal obligations'.

Theoretical framework that can be used for further empirical analysis of GCM

In regard to the use of 'soft law' or 'hard law' for governing transboundary issues there may arise certain questions regardless of the sphere. Pertaining to the research question the prime interest is: when would states choose 'hard law' or soft law to regulate their cooperation; what are the advantages of 'hard law' and 'soft law'; and, finally, how these former factors can affect further implementation and compliance with those commitments. All of these questions have been discussed by a number of scholars and so far there have been proposed different theories. Analyzing the relevant literature there may be made a conclusion that the most cited works in this field are those of Abbott and Snidal (2000), Shelton (2000) and Guzman and Meyer (2010).

To start with it is important to underline the notion of compliance and implementation. In that regard when it comes to international legal norms some scholars use these concepts without distinctions, while there are opinions, like those of Raustiala (2000), that the concepts of compliance, implementation and effectiveness should be distinguished. In particular, the author defines implementation as 'a process of putting international commitments into practice (working with domestic legislation, creation of institutions)', effectiveness as 'the degree to which a given rule induces changes in behavior' and compliance as 'conformity between behavior and a legal rule or standard' (Raustiala 2000, p.392). It is believed, though, that implementation and compliance are interconnected, as actions related to implementation

phase also reflect the conformity between state actions with the given rules. This view is generally observed in academic literature regarding compliance with international obligations. Thus, for the purposes of the thesis compliance and implementation will be seen as one process.

The question of when states would choose 'hard law' or 'soft law' has been investigated by several scholars as well. Guzman and Meyer (2010) in their work provide a set of theories of distinct reasons why states might opt for 'soft law' over 'hard law'.

The first reason can be considered from the perspective of game theory in which states choose 'soft law' trying to solve a straightforward coordination problem where once a given set of rules is chosen, there is a high degree of certainty that those same rules will remain self-enforcing in future (Guzman and Meyer 2010). On the other hand, states might opt for 'hard law' when they are concerned that the nature of the game will change over time and cooperation becomes more difficult; or when they are not certain about the structure of the game (e.g. they cannot observe the payoffs of their counterparts); or when it may be a prisoner's dilemma (Guzman and Meyer 2010).

The second theory is related to loss avoidance. The idea presented by Guzman and Meyer (2010) here is that rational states seek to maximize the joint value of their agreements – violation of binding legal commitments imposes greater costs on the violating state than that of non-binding, therefore, choosing 'soft law' can maximize value for states. Furthermore, Guzman (2008) uses his theory of '3 Rs' developed in regard to compliance with international law and explain how it can reflect on 'soft law' choice. These costs may be related to reciprocity, reputation and retaliation (Guzman, Meyer 2010).

More precisely, states might choose 'soft law' when they are sure in a reciprocal behavior implying that compliance of each party is secured by the continued compliance of the other party and there is no need for enforcement mechanisms (Guzman, Meyer 2010). However, the authors note that reciprocity is problematic as an enforcement device if one of the parties subsequently conclude that it is better off violating, if a threat to withdraw one's own compliance lacks credibility or is of no consequence to the other side and if it is a multilateral agreement (Guzman, Meyer 2010). Threats to terminate cooperation in response to a violation by one party will often lack credibility and, thus, reciprocity will be often unable to overcome the free rider problem in multilateral agreements (Guzman, Meyer 2010). An example provided by them is that states will not stop complying with human rights or environmental commitments just because one of the many parties stopped to do that (Guzman, Meyer 2010).

As Guzman (2008) further notes, reputational factor also may be a reason why 'soft law' agreements will sometimes be appealing since a loss of reputation is costly to states. When states enter into an agreement, they promise to comply and if they fail to do so, their future promises will be less credible, and this will make it more difficult or more costly for them to enter into future promises (Guzman 2008). On the contrary, a treaty is the most solemn promise a state can make, so if that promise is violated, it will suffer a larger reputational loss (Guzman, Meyer 2010). When compliance benefits outweigh the impact of costly sanctions, the parties will opt for a formal treaty, and when the cost of the sanctions will be too large, they will prefer a 'soft law' agreement (Guzman, Meyer 2010). This is particularly typical for human rights commitments, where the sanctions for violation are usually harsher than in other fields of multilateral agreements (Cole 2009). That can explain why states are not willing to commit to any kind of obligations related to and dealing with the protection of migrants' rights.

Finally, a retaliatory sanction from violation of international law is costly to both the violating party and the retaliating party, and although a credible threat of retaliation can increase the rate of compliance, retaliatory sanctions impose costs on both parties when they are actually used (Guzman, Meyer 2010).

Another theory proposed by Guzman and Meyer (2010) concerns delegation, according to which, 'soft law' is an attempt to improve the value created by international rules over time through a more efficient system of amendment. The delegation theory suggests that 'soft law' will be used when the expected benefits from the violations with the latter motivation to unilaterally amend suboptimal legal rules – are greater than the expected costs from both the violations with the former motivation and opportunistic efforts at unilateral amendment (Guzman, Meyer 2010).

The answer to the question on the advantages and disadvantages of 'hard law' and 'soft law' depends, of course, on the objective of the given set of norms. It is presumed, though, that the intention of any agreement is to reach its stated objectives that can be seen through compliance, implementation and effectiveness. Thus, the advantages and disadvantages of 'soft law' and 'hard law' instruments will be revised applicable to these criteria in synthesis.

Among the common major advantages of 'soft law' frequently mentioned in academic literature is its flexibility. 'Soft law' instruments usually are flexible and therefore can adapt to a fast changing and technology driven environment that is characteristic of globalization (Reincke, Witte 2003). Empirical research on environmental issues confirm that 'soft law'

achieves widespread participation fairly quickly (Stein 2008), and ambitious norms are more easily achieved in 'soft law' than in 'hard law' due to the greater flexibility offered by 'soft law' instruments with respect to the states that are included and the sectors of government that participate (Skjærseth, Schram Stokke, Wettestad 2006). Most importantly, the more burdensome is 'hard law' the less likelihood there is that the state will commit to it at all (Stein 2008). However, the flexibility of 'soft law' can also be seen as a disadvantage as according to Guzman and Meyer (2010, p.184) "although 'soft law' creates flexibility in one's own commitments, 'soft law' also creates flexibility in other parties' commitments, and therefore, this flexibility increases the likelihood that all states party to an agreement will deviate from their commitments". Such situation, in its turn, may lead to policy inconsistency (Cini 2001). In other words that means that with all the advantages of 'soft law' flexibility, the sustainability of it is under question and has to be considered within the specific context of the agreement.

'Soft law' in general exact lower transaction costs for the parties involved, e.g. costs related to negotiation, ratification, monitoring, enforcement, modification and exit (Abbott, Snidal 2000; Reincke, Witte 2003; Pauwelyn, Wessel, Wouters 2012). As Abbott and Snidal (2000, p.434) explain in their research, "hard legalization reduces the post-agreement costs of managing and enforcing commitments, but adoption of a highly legalized agreement entails significant contracting costs. Therefore, softer forms of legalization will be more attractive to states as contracting costs increase".

'Soft law' is preferable when sovereignty is concerned (Abbott, Snidal 2000). The potential for inferior outcomes, loss of authority and diminution of sovereignty makes states reluctant to accept hard legalization, especially when it includes significant levels of delegation (Abbott, Snidal 2000). Abbott and Snidal (2000) also refer to an example that tax policy, which is more of an internal sovereign matter of the state, but increasingly requires international coordination, is characterized by many bilateral treaties and displays little overall institutionalization. The implication for migration governance here is that it, indeed touches upon state sovereignty, but bilateral agreements are still questionable taking into account the object of cooperation. At the same time, another implication is that that migration matters could be disaggregated into fields, where there would be issues that do not endanger state sovereignty so much and ones that do.

'Soft law' instruments are open to all interested parties (including transnational private actors that could not participate in the making, implementation, and enforcement of 'hard law') and inability to comply is not a critical barrier to entry in contrast with the rigid in-or-

out mechanism of most legally binding agreements (Reincke, Witte 2003). Another opinion is that 'soft law' is more effective where the issue at stake requires promotion of certain behavior, but when there is a need for restriction or prohibition, 'soft law' would not be that useful (Langille 2016).

From analysis of the use of a set of 'soft law' instruments in human rights field, Shelton (2000) drives a conclusion that 'soft law' is useful and preferable in enunciating broad principles in new areas of lawmaking, where details of obligation remain to be elaborated. It can express standards and broad international consensus when unanimity is lacking in state practice and there is no will to establish hard law (Shelton 2000). Ultimately, as compliance increases 'soft law' may serve to pressure the few non-consenting states to comply with the majority views (Shelton 2000). These conclusions are particularly relevant for global governance of migration and can be counted in favor of using 'soft law' in governing international migration.

As various scholars note, 'soft law' may be preferable when states are uncertain about particular aspects of commitments. Abbott and Snidal (2000) specify that many international issues are new and complex and the underlying problems may not be well understood, so states cannot anticipate all possible consequences of a legalized arrangement, and here precise but not legally binding arrangements can be a solution. The same theory can also be applied to 'hard law' instruments. Cole (2009) provides an example of International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, which envisaged quite hard binding commitments and elaborated enforcement, and gained ratifications with the time when uncertainty was overpassed. Uncertainty factor can be present in migration governance, since there is no previous experience in implementation of a universal instrument and states cannot be sure about the course of action of other states. Besides, when it comes to GCM it includes absolutely different aspects of migration and actors, and, thus, creates even bigger uncertainty. Once implementation starts, states may realize what results brings the cooperation in migration governance and adjust their compliance and approaches towards further binding commitments. However, for a priori 'hard law' instrument uncertainty may just not be overpassed and binding international agreement will be ineffective in the end.

When it comes to the question of compliance, it should be mentioned that most academic scholars agree that 'hard law' has more probabilities to be complied with than 'soft law' (Abbott, Snidal 2000, Guzman, Meyer 2010) and that it is the primer means of global governance (Shelton 2000). Thus, this can be considered as the most important advantage.

Binding international agreements which create legal obligations usually require states to amend (modify, develop) legislation in order to implement the given treaty. The legislation of many states requires national authorities to take measures in accordance with the binding treaty within established timeframe. Thus, once the state commit to a binding international treaty, the matter of compliance becomes even more controlled within the state, than on international dimension. As Abbott and Snidal (2000, p.428) note "states care not only about their reputation on international level, but also at domestic – law observance is even more highly valued in most domestic societies; efforts to justify international violations thus create cognitive dissonance and increase domestic audience costs. International legal norms become a part of national legislation and that expands the possibilities of enforcement which is often the problem on international level".

One of the biggest challenges related to 'soft law' is that it is not recognized as a source of international law and, thus, cannot be enforced. Enforcement of international legal norms is a topic for a separate debate since cases of states' responsibility from breaching their international legal commitments show that enforceability on international level is complicated (Chetail 2019), but at least for 'hard law' the capacity for enforcement is bigger and the law of state responsibility (e.g. authorized countermeasures) can be applied to fix the consequences for legal violations (Abbott, Snidal 2000), whereas for 'soft law' agreements the matter of compliance falls more under the discretion of the states parties.

Altogether, scholars agree that 'soft law' can be a pathway to further 'hard law'. It facilitates compromise between weak and powerful states (Abbott, Snidal 2000). As Reincke and Witte (2003, p. 97) note, "global public policy and the application of 'soft law' should not be seen as substitutes for hard law and more traditional forms of intergovernmental cooperation, but as supplements responding to a changing global environment". Non-binding agreements can be a helpful tool to initiate global public policy and a process of transnational law-making (Reincke, Witte 2003), to decrease levels of uncertainty within the system of law (Demin 2018) and to facilitate transition of specific concepts from 'soft law' to 'hard law' (Lagoutte, Gammeltoft-Hansen, Cerone 2016). Among the examples Abbott and Snidal (2000) provide is the case of FAO "code of conduct" on the distribution and use of pesticides elaborated in 1985 and UNEP "guidelines" on the exchange of information on internationally traded chemicals elaborated in 1987. Both organizations sponsored extensive consultations with expert groups from government and industry and provided technical assistance, and in 1992 tried to adopt a binding treaty, but this effort failed (ibid). The FAO and UNEP continued to administer the existing system, however, and a few years later the member states

of both organizations authorized formal treaty negotiations resulting in a binding treaty (ibid). In fact, it must be noted that in the field of international human rights law a lot of agreements that are now binding where preceded by non-binding declarations (regarding discrimination, women's and children's rights, torture, disability issues, etc.).

Another interesting opinion in regard to 'soft law' use is that it can become binding through the general principle of estoppel (principle of international law according to which a state may be bound by a recommendation when its conduct gives rise to reasonable expectation of compliance on the part of other state that have acted upon these expectations) (Chetail 2019; Pauwelyn, Wessel, Wouters 2012).

The notion of compliance of states with international agreements (be it binding or non-binding) can be explored from different perspectives. In the realm of international relations Haas and Bilder (2003) propose to consider it through the theories of realism, institutionalism and social-constructivism.

According to classical Realists, states seek to protect territorial integrity above all other goals and, thus, compliance patterns should vary based upon the extent to which such integrity is potentially at risk and upon the availability of a powerful state to enforce compliance or deter non-compliance (Haas, Bilder 2003). As Haas and Bilder (2003, p.52) interpret realists further: "Compliance will only occur if there's a powerful dominant country that exercises some degree of pressure on a country to comply, either through rewards for compliance or threatened sanctions for breach". They also mention that due to the need of constant vigilance compliance would be spotty in case if the matter of the agreement is contentious and has been agreed upon through the exercise of power by a dominant state, but if it is a voluntary agreement then the impediments to compliance might be less (Haas, Bilder 2003).

From the perspective of institutionalism theories state's choices can be influenced by international institutions, defined as 'persistent and connected sets of rules (formal and informal) that prescribe behavioral roles, constrain activity and shape expectations' (Keohane 1989). In developing this idea Haas and Bilder (2003) suggest that powerful international organizations (institutions) may perform functions inducing states to comply, in particular, through monitoring, verification and capacity-building. Institutional monitoring, in their opinion, is essential since reports on compliance submitted by the states parties are most likely to be accurate and command political attention when they are collected, disseminated and verified by impartial third parties (Haas, Bilder 2003). Verification (e.g. prompt information about other states' actions) reduces the fear of free riding, increases the likelihood

of detection, and, thus, deters non-compliance and increases compliance (Haas, Bilder 2003). The authors also suggest that the provision of various capacity-building resources (technology, training, financing, and more general resource transfers) accruing as a consequence of compliance, or the anticipation of such resources, or fear that such resources may be withheld for non-complying, may induce compliance (Haas and Bilder 2003). Lastly, Haas and Bilder (2003, p.58) point out that "institutional profile may also influence national compliance choices. High level institutions, if domestic conditions are satisfied, provide an opportunity for politically opportunistic entrepreneurial civil servants to encourage compliance if they anticipate domestic rewards for public commitments".

From a constructivist's perspective compliance is more likely if there exist relevant widely shared causal beliefs about the operation of the issue to be controlled, and the degree to which the actual rules promote valued ends (Haas and Bilder 2003). Those ideas are developed and disseminated by transnational networks of policy professionals who share common values and causal understandings and who seek to introduce national measures consistent with their beliefs, and utilize the enforcement mechanisms of the bureaucratic units in which they operate (Haas, Bilder 2003).

Raustiala (2000) provides three theories in his research: rationalist theory, norm-driven and liberalism theory. From the rationalist perspective states should cooperate and comply when they are better-off while cooperating than without it, and do not comply when they are better off deviating from it (e.g. prisoner's dilemma) (Raustiala 2000). Well-elaborated enforcement mechanism and punitive measures can change the pay-offs in coordination game and, thus, induce compliance (Raustiala 2000). The core thesis of a norm-driven theory claims that compliance will happen when the rule is perceived as legitimate by those to whom it is addressed, while non-compliance will typically happen due to the lack of administrative or financial capacity, ambiguity in treaty terms, or unforeseen changes in conditions (Raustiala 2000). Therefore, to induce compliance there should be used not punitive measures, but rather provision of information, technical and financial assistance, or interpretive dialogue aimed at resolving interpretive disputes (Raustiala 2000). In a liberal theory states that are willing to submit to the rule of law at the domestic level are more likely to submit to their analogues at the international level, and, thus, such aspects of domestic structure as constitutional design, political tradition, and so forth may directly influence compliance levels (Raustiala 2000).

In a more detailed form in regard to 'soft law' compliance, Charney (2003, p.118) delimits factors that appear to be relevant to the rates of compliance with 'soft' norms in particular:

1. the linkage between the norm and hard law established by the international legal system or by domestic legal systems ('soft law' instruments linked to a binding obligation were more likely to be complied with than were those not so affiliated. Even where a 'soft law' instrument is not directly linked to a binding instrument, its placement within the context of a complex international regime may enhance compliance);

2. the linkage of the norm to other 'soft' norms;

3. the relationship of the norm to past practices;

4. the linkage of the norm to established international institutions;

5. the transparency of the norm, and its implementation, including:

a. the clarity of the obligation (be it is fixed or flexible),

b. the ability of others to determine whether the target of the norm is in compliance or not, and

c. the presence and nature of verification systems;

6. the degree of support for the norm among the affected members of the community (including how free rider problems and other disincentives created by non-supporters are addressed);

7. the degree of political, economic and/or military support for the norm;

8. the existence of epistemic communities, such as those of non-government organizations (including business organizations) and other interest groups;

9. the utilitarian interests of the targets of the norm;

10. the legitimacy of the process by which the norm was created;

11. the moral and ethical aspects of the norm and its perceived fairness among members of the relevant community;

12. the formality of acceptance by the affected members of the community;

13. the capability of the objects of the norm to conform to it, including their structural and economic capabilities and (if they are states) the nature of their domestic legal systems (*e.g.*, stability/war, liberal democracy/dictatorship);

14. the foreseeable consequences of non-compliance, including sanctions and dispute settlement procedures (institutional mechanisms for monitoring and supervising compliance with 'soft law' obligations are crucial; and

15. the control that the norm's supporters have over the objects being regulated (*e.g.*, nuclear material, technology, financial and natural resources).

In the context of compliance with 'soft law', Shelton (2003) also established the effect of the content of the 'soft law' instrument on compliance with it. The case studies confirmed that if it was costly to comply with 'soft law', either because of economic costs or the lack of technical, administrative, or other capacity, compliance was less likely (Shelton 2003). This did not mean, however, that bans (which require refraining from certain action) were necessarily complied with better than positive obligations requiring action (Shelton 2003). The significance of availability of resources and trained personnel for compliance was also proved by Abbott and Snidal (2000).

Haas and Bilder (2000) suggest that if leaders hold a tightly coupled view of international politics, then such high level beliefs will exercise a strong influence over state choice in lower-level conceptual areas. They further cite the work of Vinod Aggarwal who refers to the array of hierarchical influences on states' compliance with international obligations as 'nesting' (Haas and Bilder 2000).

Compliance with international obligations may depend on economic interests (in particular trade issues), where states may choose to comply when their economic interests are at stake (Lupu 2016).

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