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THE '2018 GLOBAL COMPACT FOR MIGRATION' AND THE POLITICAL AND ELECTORAL RIGHTS OF MIGRANTS. A MISSED OPPORTUNITY?

SUMMARY: 1. Introduction. – 2. A Short Summary of the Existing International Conventions Regulating the Political Rights of Migrants in the Hosting Country. - 3. The Existing International Regulations Concerning the Political Rights of Migrants in their Country of Origin. – 4. The Fragmented Application of International Norms at National Level. – 5. The Global Compact for Safe, Orderly and Regular Migration: a Brief Overview. – 6. The Legal *Status* of the Global Compact for Migration. – 7. The Rules on the Political Rights of Migrants Contained in the GCM. – 8. Concluding Remarks.

1. *Introduction*

As is well known, the term “political rights” refers to a number of rights including freedom of expression, freedom of assembly and association, freedom from discrimination, and the right to free elections. The exercise by migrants, and more generally, by aliens of these rights, has traditionally represented a sensitive issue owing to its political and social implications. Migrants might enjoy these rights on the occasion of elections or other political activities organized in their own State (internal dimension) or in relation to activities associated with the political situation in the host State (international dimension). These two aspects, although closely intertwined, need to be analysed separately as there are different normative reasons behind their enfranchisement. The *Global Compact for Migration* (GCM)¹ was perceived, in this frame, as a unique opportunity to shed some light and to provide some

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¹ The Global Compact for Safe, Orderly and Regular Migration is an intergovernmentally negotiated agreement, adopted under the auspices of the United Nations, that describes itself as covering “all dimensions of international migration in a holistic and comprehensive manner”. While not legally binding, it was endorsed by the UN General Assembly (UNGA) through the adoption on Resolution A/RES/73/195 on 19 December 2018. See *infra*, Sections 5 and 6. On the GMC and its role with respect to human rights protection, see A. LIGUORI, *Alcune riflessioni su diritti umani e "Global Compact for Safe, Orderly and Regular Migration"*, G. CATALDI (ed.), *I diritti umani a settant'anni dalla Dichiarazione Universale delle Nazioni Unite*, Napoli, 2019, p. 73 ff.

guidelines to interested States in order to have a more consistent and harmonized approach in this complex issue.

Arguments in favour of granting political rights to non-resident citizens or, as it is known in democratic theory, a “deterritorialised” perspective on the composition of the *demos*², have been developed by several scholars, often making reference to the principle of “inclusion”, which should enfranchise individuals beyond the boundaries of citizenship as well as beyond territorial boundaries³. Other scholars referred to the “all affected interests principle”⁴, which states that anyone whose interests are (significantly) affected by some political choice should be able to influence that choice, or to the “non-discrimination principle”, according to which restrictions to the right to vote of the diaspora would represent an unreasonable restriction and a violation of the principle of non-discrimination⁵. Other authors have underlined that the decision of a citizen to leave his/her country does not necessarily imply a lack of interest in participating in national elections⁶, nor that he/she will not be affected by the decisions taken by the elected bodies in the home country⁷.

However, according to another line of reasoning⁸, there are also many arguments that might justify restrictions on the political rights of non-resident citizens. The European Court of Human Rights (ECtHR) in the 2012 *Sitaropoulos and Giakoumopoulos* case, summarized these arguments as follows: «firstly, the presumption that non-resident citizens are less directly or less continually concerned with their country’s day-to-day problems and have less knowledge of them; secondly, the fact that non-resident citizens have less influence on the selection of candidates or on the formulation of their electoral programmes; thirdly, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and, fourthly, the legitimate concern the legislature may have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country»⁹.

At the same time, the question of granting political rights to non-citizens has raised mixed reactions among scholars (as well as among States). Waldrauch, for example, expressed his firm belief that should a foreigner have spent a long period in the host country, «not citizenship should be the relevant criterion for deciding who is granted electoral rights but residence in the respective territory». As a result, the criterion to adopt would be «the

² J. T. ARRIGHI, R. BAUBOCK, *A multilevel puzzle: Migrants’ voting rights in national and local elections*, in *European Journal of Political Research*, 2016, p. 619 ff.

³ M. A. PERÍCOLA, *El derecho de sufragio de los extranjero*, in *Revista Pensar en Derecho*, 2015, p. 167 ff.; P.T. LENARD, *Residence and the Right to Vote*, in *International Migration & Integration*, 2015, p. 119 ff.; S. SONG, *Democracy and noncitizen voting rights*, in *Journal of Citizenship Studies*, 2009, p. 607 ff.; L. BECKMAN, *Citizenship and Voting Rights: Should Resident Aliens Vote?*, in *Journal of Citizenship Studies*, 2006, p. 153 ff.; K. R. TUNG, *Voting Rights for Alien Residents-Who Wants It?*, in *The International Migration Review*, 1985, p. 451 ff.

⁴ R. E. GOODIN, *Enfranchising All Affected Interests, and Its Alternatives*, in *Philosophy & Public Affairs*, 2007, p. 40 ff. S. NÄSTRÖM, *The Challenge of the All-Affected Principle*, in *Political Studies*, 2011, p. 116 ff.

⁵ J. FRASER, *Inclusive Democracy: Franchise Limitations on Non-Resident Citizens as an Unjust Restriction of Rights under the European Convention on Human Rights*, in *Utrecht Journal of International and European Law*, 2017, p. 23 ff.

⁶ C. CARTER, *The right to Vote for Non-Resident Citizens considered Through the Example of East Timor*, in *Texas Int. Law Jour.*, 2011, p. 659 ff.

⁷ A. GRIFFITH, *What should Expatriates’ Voting Rights Be?*, available at <https://policyoptions.irpp.org/2016/06/07/canadians-living-abroad-voting-rights/>.

⁸ The so-called “insular” perspective, on which see J.T. ARRIGHI, R. BAUBOCK, *A multilevel puzzle*, cit. p. 620.

⁹ ECtHR, *Sitaropoulos and Giakoumopoulos v. Greece*, app. no 42202/07, Judgment of 15 March 2012, para. 69.

longer one stays, the stronger one's moral claims¹⁰. Such an approach may be labelled “post-national” and advocates for the inclusion of all long-time residents in the *demos*, whatever their nationality¹¹. Other arguments used in favor of the extension of the right to vote to non-citizens take into account different factors such as the contribution of non-citizens to a country's prosperity¹², or the urgent need to address the widening gap between popular and territorial sovereignty¹³. On the other hand, several arguments have been used to justify the denial of political rights to foreigners, notably of the right to vote in national or local elections in the host State. As observed by some experts embracing an “insular” perspective, staying in a foreign territory, especially if it is for a limited amount of time, does not allow a person to get sufficiently acquainted with the political pulse of the country, its main institutions, actors and problems. Furthermore, a temporary stay means that a foreigner, after casting his/her vote, might not be subject to the consequences of his/her choice¹⁴ and very often it appears that migrants are not really interested in exercising their political rights¹⁵.

Given the topic's sensitivity and how much it is influenced by the political landscape, opinions in the international community on the issue are obviously far from homogenous¹⁶. These tensions have already been the subject of extensive scholarly debate. The main conclusion reached is that both international factors (related to the timing of the national decisions) and domestic factors (related to the content of the decisions) influence these diverse and sometimes contradictory attitudes¹⁷. All this has had an impact on the legal framework which is not only fragmented, consisting of international rules codified in universal and regional human rights treaties and in *ad hoc* treaties devoted to the specific *status*

¹⁰ H. WALDRAUCH, *Electoral Rights for Foreign Nationals: A Comparative Overview of Regulations in 36 Countries*, available at <https://openresearch-repository.anu.edu.au/handle/1885/41780> and U. HAIDER QUERCIA, *I diritti politici dello straniero*, Ariccia, 2015.

¹¹ J.T. ARRIGHI AND R. BAUBOCK, *A multilevel puzzle*, cit. p. 620; F. ROSSOLILLO, *Nazione*, in N. BOBBIO, N. MATTEUCCI, G. PASQUINO (Eds.), *Il Dizionario di politica*, Torino, 2004, pp. 614-615; A. ALGOSTINO, *I diritti politici dello straniero*, Napoli, 2006 and A. EISENBERG, *Voting Rights for Non-citizens: Treasure or Fool's Gold?*, in *Int. Migration & Integration*, 2015, p.133 ff.

¹² Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Demography, Report by Mr. C. LUIS on *Participation of Immigrants and Foreign Residents in Political Life of the Council of Europe Member States*, Doc. 8916, 22 December 2000.

¹³ M.W. VARSANY, *The rise and fall (and rise?) of non-citizen voting: Immigration and the shifting scales of citizenship and suffrage in the United States*, in *Space and Polity*, 2019, p. 113 ff. and H.H. KIM, *In-Group and Out-Group Networks, Informal Social Activities, and Electoral Participation Among Immigrants in South Korea*, in *Int. Migration & Integration*, 2019, p. 1123 ff.

¹⁴ K. GROENENDIJK, *Local Voting Rights for Non-Nationals in Europe: What we Know and What we Need to Learn*, Washington, 2008.

¹⁵ G. MERELO, *Neither Here nor There, I Do Not Vote and I Do Not Care: The External Electoral Participation of Mexican Migrants in New Zealand*, in *Int. Migration & Integration*, 2017, p. 641 ff.

¹⁶ For comparative surveys of the different approaches adopted by States, see: R. BAUBOCK, *Stakeholder citizenship and transnational political participation: a normative evaluation of external voting*, in *Fordham Law Review*, 2016, pp. 2393 ff.; M. COLLYER, *A geography of extra-territorial citizenship: Explanations of external voting*, in *Migration Studies*, 2014, pp. 55 ff.; S. D. SCHMID, L. PICCOLI, J. T. ARRIGHI, *Non-universal suffrage: measuring electoral inclusion in contemporary democracies*, in *European Political Science*, 2019, pp. 695 ff.

¹⁷ D.C. EARNEST, *Expanding the Electorate: Comparing the Noncitizen Voting Practices of 25 Democracies*, in *International Migration and Integration*, 2015, p. 1 ff.; E. GROSSO, *La titolarità del diritto di voto: partecipazione e appartenenza alla comunità politica nel diritto costituzionale europeo*, Torino, 2001; L. D'ASCIA, *Diritto degli stranieri e immigrazione. Percorsi giurisprudenziali*, Milano, 2009 and M. LUCIANI, *La partecipazione politica e i migranti*, in L. RONCHETTI (ed.), *La Repubblica e le migrazioni*, Milano, 2014, p. 77 ff.

of migrants¹⁸, but also to some extent quite ambiguous.

In this controversial framework, the GCM represented the most significant attempt made by the international community to address jointly and comprehensively the many issues and problems connected to international migration. This explains, at least in part, the widespread hope, especially among migrant communities and networks¹⁹, civil society networks²⁰, within several global and regional organisations²¹ and among scholars²², that the issue of the political rights of migrants would receive more attention in the international debate in order to promote political and legislative reforms regarding the role of diaspora in countries of origin and host societies.

Against this background, this article aims to verify, mostly from a legal perspective, if and to which extent the adoption of the GCM can enhance a more uniform understanding of the internal and external dimensions of the political rights of migrants, thus bolstering their protection. These two dimensions of the political rights of migrants, although closely intertwined, will be analysed separately due to the fact that, as correctly observed by several authors, there are different normative reasons behind their enfranchisement which need to be taken into due account²³.

2. *A Short Summary of the Existing International Rules Regulating the Political Rights of Migrants in the Hosting Country*

The relevant articles of the *International Covenant on Civil and Political Rights* (ICCPR), namely Art. 19 (Right to hold opinions without interference), Art. 21 (Right of Peaceful Assembly) and Art. 22 (Freedom of association with others) do not allow any discrimination between citizens and non-citizens: in fact, all these rights are recognized to “everyone”. The same articles do however allow for the introduction of restrictions, but only if these are foreseen by law, and provided that they are in conformity with certain given criteria²⁴. The

¹⁸ J. FITZPATRICK, *The Human Rights of Migrants*, in A. ALEINIKOFF, V. CHÉTAIL (eds.), *Migration and International Legal Norms*, Geneva, 2003, p. 33 ff.

¹⁹ GLOBAL COALITION ON MIGRATION, *GCM Brings a Focus on Human Rights to UN Migration Week in Marrakech*, available at <http://gcmigration.org/2019/01/gcm-brings-a-focus-on-human-rights-to-un-migration-week-in-marrakech-december-4-11-2018/>.

²⁰ JOINT CIVIL SOCIETY, *Statement at the Conclusion of Negotiations on the Global Compact for Safe, Orderly, and Regular Migration*, available at <https://www.icmc.net/resource/joint-civil-society-statement-at-the-conclusion-of-negotiations-on-the-global-compact-for-safe-orderly-and-regular-migration/>.

²¹ OSCE/ODIHR, *Migrant political participation: a review of policies and integration results in the OSCE region*, Warsaw, 2017; UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Migration and human rights. Improving human rights-based governance of international migration*, Geneva, 2012; EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Together in the EU. Promoting the participation of migrants and their descendants*, Luxembourg, 2017; COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, *A parliamentary network on diaspora policies*, available at <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6753>.

²² R. HAYDUK, *Political Rights in the Age of Migration: Lessons from the United States*, in *Journal of International Migration and Integration*, 2015, p. 99 ff.; G. AITCHISON, *The next step for suffrage: give all immigrants the right to vote*, available at <http://www.ucd.ie/newsandopinion/news/2018/february/07/thenextstepforsuffragegiveallimmigrantshtovote/>.

²³ R.E. GOODIN, *Enfranchising All Affected Interests, and Its Alternatives*, cit., p. 56 and S. NÄSTRÖM, *The Challenge of the All-Affected Principle*, cit. p. 122.

²⁴ According to the ICCPR, the restrictions must be necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals (Art.

UN Human Rights Committee (HRC), in its *General Comment No. 15* (1986) devoted to *The Position of Aliens Under the Covenant*, confirms that «the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens»²⁵.

The only admissible forms of discrimination based on citizenship are those codified in Art. 25 (Right to vote and to be elected)²⁶ and those based on Art. 12 allowing States to restrict the liberty of movement and the freedom to choose the place of residence only to persons «lawfully within the territory». Obviously, in times of public emergency threatening the life of the nation, States can always resort to Art. 4 of the ICCPR to take measures derogating from their obligations under the Covenant²⁷. The main focus of the ICCPR is, therefore, on what we called the “international dimension” of the political rights of migrants, i.e. on the rights they may enjoy in the country hosting them. The HRC itself has not stretched the scope of Art. 25 too far with respect to foreign residents. In its *General Comment N. 25* (1996) concerning the provision, it invited State parties to «indicate whether any groups, such as permanent residents, enjoy these rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions»²⁸, without explicitly supporting such practice.

Regional Human Rights treaties offer a much more mixed picture with three different approaches to the issue of the political rights of non-citizens residents. While a few of them are drafted in a similar way to the ICCPR²⁹, many others contain specific rules. For instance, Art. 16 of the 1950 *European Convention of Human Rights* (ECHR), Art. XXXVIII of the 1948 *American Declaration Of The Rights And Duties Of Man*, and Art. 30 of the 1995 *Convention of the Commonwealth of Independent States (CIS) on Human Rights and Fundamental Freedoms* do all expressly allow State parties to restrict the political rights of foreigners in their territory. The 1990 *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (ICMW) also codifies important rules concerning migrant workers’ political rights in the country of employment. With respect to the right’s “international dimension” the treaty is also adopting a rather conservative attitude, as its Art. 42.3 states that «migrant workers may enjoy political rights in the State of employment if that State, in the exercise of

19) or if imposed in conformity with the law and are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others (Articles 21 and 22); see for instance S. JOSEPH and M. CASTAN, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*³, Oxford, 2013, p. 590 ff.

²⁵ General Comment N. 15 - The position of aliens under the Covenant, adopted at the twenty-seventh session of the Human Rights Committee, on 11 April 1986, para. 1, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6625&Lang=en.

²⁶ A. DE GUTTRY, *The Right of Aliens to Vote and to Carry out Political Activities: A Critical Analysis of the Relevant International Obligations Incumbent on the State of Origin and on the Host State*, in *ZaöRV*, 2018, p.1001 ff.

²⁷ E. SOMMARIO, *Stati d'emergenza e trattati a tutela dei diritti umani*, Torino, 2018.

²⁸ General Comment No. 25 - The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), UN Doc. CCPR/C/21/Rev.1/Add.7, 12 July 1996, para. 3.

²⁹ For example, the *Association of Southeast Asian States (ASEAN) Human Rights Declaration* adopted during the Phnom Penh meeting of the Association contains a provision (Art. 25) on the right to participation and on the right to vote, available at <https://asean.org/asean-human-rights-declaration/>.

its sovereignty, grants them such rights», thus leaving discretion to each State party on the issue³⁰.

Finally, there is a third approach characterized by a much more liberal attitude, which emerges from a few regional human rights treaties. Art. 3 of the 1992 *European Convention on the Participation of Foreigners in Public Life at Local Level*, for example, guarantees to foreign residents almost all “political” rights³¹. A similar approach has been taken by the member States of The Commonwealth of Independent States (CIS), which, in the 2012 *Commonwealth Charter* affirmed their commitment to «recognise the inalienable right of individuals to participate in democratic processes, in particular through free and fair elections in shaping the society in which they lives»³². The wording of the Charter makes clear that also foreign residents (and not only citizens) enjoy this right which refers to the elections taking place in the country in which they live (and not necessarily in the country of which they are citizens).

Art. 8 of the 2007 *African Charter on Democracy, Elections and Governance*³³ was drafted in similar terms, although with a more ambiguous phrasing (as it is not entirely clear if it refers only to the State’s obligation towards the non-citizens or even to those towards the non-residents). According to the provision, «State Parties shall adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, people with disabilities, refugees and displaced persons and other marginalized and vulnerable social groups»³⁴.

The EU must also be included among those regional organisations with a very progressive approach, at least as far as the rights of EU citizens residing in any EU Member State different from the one of their nationality are concerned: the current legislation allows the expansion and protection of the voting rights and, as an inevitable consequence, of the political rights of the European diaspora in the EU countries where they are residing, granting them the right to vote and to be elected in local elections and in those of the European Parliament³⁵.

3. *The Existing International Regulations Concerning the Political Rights of Migrants in their Country of Origin*

The question of the right of the diaspora to vote for elections in their country of origin has been specifically addressed in the 2002 *Convention on standards of democratic elections, the voting rights and freedoms in the State Parties of the CIS* (which partially contradicts the 1995 CIS

³⁰ Yet it should be noted that the ICMW guarantees to migrant workers certain rights that are functional to the exercise of political participation, such as the right to hold opinions without interference and the right to freedom of expression (Art. 13).

³¹ The Convention has been ratified, so far, by only nine States and many of them have appended interpretative declarations which significantly limit the applicability of the Convention, see more at www.coe.int/en/web/conventions/full-list/-/conventions/treaty/144/declarations?p_auth=AHMmusN2.

³² Emphasis added.

³³ The African Charter has not yet entered into force. So far, only 10 States have ratified it while 28 have signed but not yet ratified it. The text is available at <https://au.int/sites/default/files/treaties/36384-treaty-african-charter-on-democracy-and-governance.pdf>.

³⁴ Emphasis added.

³⁵ These two rights are enshrined in Articles 20 and 22 of the Treaty on the Functioning of the European Union, and they are also codified as fundamental rights in the EU Charter of Fundamental Rights, at articles 40 and 39 respectively. See also A. ETZIONI, *Immigration: Europe’s Normative Challenge*, in *Int. Migration & Integration*, 2019, p. 67 ff.

Convention on Human Rights, and Fundamental Freedoms). Art. 2 of the 2002 CIS Convention states that «every citizen living or staying in the period of conducting of the national elections beyond the boundaries of their state has the voting rights equal to those pertaining to other citizens of their state. Diplomatic representations and consulate facilities of the state, and their officials support citizens in execution of their voting rights and freedoms».

The rule is very clear and recognizes, at least on paper, that citizens of the countries belonging to the CIS have a right to vote in the national elections as well as to carry out related political activities even if they are abroad temporarily or for a long period.

Also the ICMW contains interesting provisions in this respect³⁶. Art. 41 para. 1 of the ICMW affirms that «[m]igrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation». Art. 41 para. 2 of the ICMW stipulates that «the States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights»³⁷. The innovation introduced by the ICMW is significant and noteworthy, although it only regulates the political rights of migrants in their home State³⁸.

4. *The Fragmented Application of International Norms at National Level*

Having briefly summarised the content of existing international obligations incumbent on States in relation to the political rights of foreigners in their territory and of their diaspora abroad, it is important to briefly explain how far these rules have been implemented at the domestic level. Considering the complex web of legal undertakings subscribed to by different States, it does not come as a surprise that domestic legislation reflects different degrees of protection with respect to the political rights of foreigners in their territory and those of their diaspora. While a few States have a liberal approach in granting political rights to non-citizens residents³⁹, many others are much more conservative and, in violation of the ICCPR, unreasonably restrict the right of foreigners/migrants to carry out political activities in their territories. An almost identical situation is characterising the States' attitude towards granting the right to vote and other political rights to their diaspora⁴⁰. The legal basis of these restrictive approaches has often been traced back to the specific clauses codified in regional treaties allowing such restrictions.

The jurisprudence of the international judicial fora tasked with solving the disputes arising from this fragmented and contradictory legal framework clearly reflects the existing

³⁶ A. PÉCOUD and P. DE GUCHTENEIRE, *Migration, Human Rights and the United Nations: an Investigation of the obstacles to the UN Convention on Migrant Workers Rights*, in *Global Migration Perspectives*, 2004, p. 1 ff.

³⁷ Emphasis added.

³⁸ It is interesting to note that art. 48 of the New York Declaration for Refugees and Migrants, calls upon States that have not done so «to consider ratifying, or acceding to, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families». See more in E. RUOZZI, *La Dichiarazione di New York sui rifugiati e sui migranti: verso un modello condiviso di gestione del fenomeno migratorio?*, in *Ordine internazionale e diritti umani*, 2020, p. 818 ff.

³⁹ See INTERNATIONAL IDEA, *Voting from Abroad, The International IDEA Handbook*, Stockholm, 2007 and M. HELBLING and I. MICHALOWSKI, *A New Agenda for Immigration and Citizenship Policy Research*, in *Comparative Political Studies*, 2017, p. 3 ff.

⁴⁰ L. PEDROZA and P. PALOP-GARCIA, *The grey area between nationality and citizenship: an analysis of external citizenship policies in Latin America and the Caribbean*, in *Citizenship Studies*, 2017, p. 1 ff.

uncertainties. Several international courts, when examining cases related to foreigners' political rights (including the right to vote), have demonstrated an unusually cautious approach. This emerges with regard to cases dealing with both the internal and the international dimensions of the political rights of the foreigners. The frequent references made by the judges to the doctrine of the "margin of appreciation"⁴¹, represent a strong signal of the willingness to guarantee States' discretionary power in this controversial sphere.

5. *The Global Compact for Safe, Orderly and Regular Migration: A Brief Overview*

Within the UN, the High-level Dialogues on International Migration and Development, which started already in 2006, prompted Heads of State and Government to meet within the UNGA to openly discuss all the issues related to migration and refugees in September 2016. The major outcome of that discussion was the adoption of the *New York Declaration for Refugees and Migrants*, in which the 193 UN Member States recognized the need for a comprehensive approach to human mobility and enhanced cooperation at the global level and endorsed a set of commitments that apply to both refugees and migrants, as well as separate sets of commitments for each of these categories⁴². In Annex II of this Declaration, the parties agreed to «launch a process of intergovernmental negotiations leading to the adoption of a global compact for safe, orderly and regular migration». This global compact «would set out a range of principles, commitments and understandings among Member States regarding international migration in all its dimensions. It would make an important contribution to global governance and enhance coordination on international migration».

The Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration took place in Marrakech, Morocco on 10 and 11 December 2018. On that occasion, despite the universal approval of the New York Declaration, only 164 States supported the adoption of the GCM. Finally, on 19 December 2018 the UNGA adopted a specific Resolution to endorse the document adopted in Marrakech⁴³. This time 152 States voted in favour, 5 against and 12 abstained. The arguments used by the States opposing the GCM⁴⁴ were based on the fear that «the Compact would force states to admit migrants, would be a pull-factor for migration, would contravene domestic migration policies, and violate the states' sovereignty»⁴⁵.

⁴¹ A. LEGG, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford, 2012; V. SCIARABBA, *Il ruolo delle Corti costituzionali nella giurisprudenza della Corte EDU: considerazioni sulla dottrina del margine di apprezzamento*, in R. BIN, G. BRUNELLI, A. PUGIOTTO, P. VERONESI (eds.), *All'incrocio tra Costituzione e Cedu. Il rango delle norme della Convenzione e l'efficacia interna delle sentenze di Strasburgo. Atti del Seminario, Ferrara, 9 marzo 2007*, Torino, 2007, p. 235 ff; Y. SHANY, *Towards a General Margin of Appreciation Doctrine in International Law*, in *Eur. Jur. Int. Law*, 2006, p. 907 ff.

⁴² UN General Assembly Resolution A/RES/71/L.1, 13 September 2016. On the content of this Resolution and for a description of the process leading up to the adoption of the GCM see C. CARLETTI, M. BORRACCETTI, *Il global compact sulla migrazione tra scenari internazionali e realtà europea*, in *Freedom, Security & Justice: European Legal Studies*, 2018, No. 2, p. 7 ff.

⁴³ UN A/RES/73/195, cit.

⁴⁴ The statements of the States intervening during session of the UNGA dedicated to the GCM, are available at UNGA, 60th and 61st plenary meetings, Wednesday, 19 December 2018, A/73/PV.60 and A/73/PV.61 respectively.

⁴⁵ A. PETERS, *The Global Compact for Migration: to sign or not to sign?* cit.

Significantly, within a short period, the number of States endorsing the GCM had decreased, whereas the same did not happen with the *Global Compact on Refugees*. The GCM, in fact, has proved to be the more controversial of the two compacts, most likely because a comprehensive (although not perfect) legal regime of protection for refugees already exists while the same is not true for migrants. Many important issues concerning international migration have not been duly addressed by the current international legal framework, and this holds true also with respect to the exercise and enjoyment of migrants' political rights. It will be interesting to observe the concrete efforts States will make to live up to their commitments under the GCM. In this respect, a first litmus test will be the establishment of the International Migration Review Forum (IMRF) in 2022, which shall serve as «the primary intergovernmental global platform for Member States to discuss and share progress on the implementation of all aspects of the Global Compact»⁴⁶.

6. *The Legal Status of the Global Compact for Migration*

Before moving to the actual contents of the GCM, it is worth spending a few lines on its legal *status*, as the issue has been the object of controversies⁴⁷. Paragraph 7 of the GCM states clearly that it is «a non-legally binding, cooperative framework» that builds on the commitments agreed upon by States in the *New York Declaration for Refugees and Migrants*, in the *UN Charter* and in several other international instruments regulating migration⁴⁸. The non-binding nature of the GCM is also strongly emphasised in letter (b) of the document's *guiding principles*⁴⁹. At the same time, however, the GCM restates the commitment of member States to abide by their obligations under international law⁵⁰, and to implement the document's contents in a manner that is consistent with their rights and duties⁵¹. This implies that there are parts of the GCM which correspond to existing treaty law or to customary international law. These parts, as such, are immediately binding on all States (as far as customary law is concerned) or on those States which have ratified the relevant conventions.

Having said this, there is still a question which remains unanswered, i.e. the extent to which the GCM contributes to the creation of new customary international law rules, which, once established, would *de facto* transform its content, or part of it, into new binding rules for any State. This is a sensitive issue and States, not only those who opposed the adoption of the UNGA Resolution endorsing the GCM, but also those voting in favour, proved to be very sensitive in this regard. The debate that occurred during the discussion of Resolution

⁴⁶ The establishment of the IMRF was already foreseen by para. 49 of resolution 73/195, while the timing and set-up of the event have been set through a subsequent GA resolution, see UN Doc. A/RES/73/326, 29 July 2019, p. 2.

⁴⁷ K. ALLINSON, P. ERDUNAST, E. GUILD and T. BASARAN, *Commentary: The Legal Status of the UN's Global Compact for Safe, Orderly and Regular Migration in International and UK Law*, in *Refugee Law Initiative Blog on Refugee Law and Forced Migration*, available at <https://rli.blogs.sas.ac.uk/2019/01/31/gcm-commentary-the-legal-status/>.

⁴⁸ In paragraph 2 of the Preamble of the GCM there is a long list of international treaties and relevant international documents, on which the agreement rests.

⁴⁹ Paragraph 15, letter (b) of the GCM reiterates that «the Global Compact is a non-legally binding cooperative framework that recognizes that no State can address migration on its own because of the inherently transnational nature of the phenomenon».

⁵⁰ GCM, para. 7.

⁵¹ *Ivi*, para. 41.

73/195 allows the identification of three main trends on this point. A group of States simply declared that the GCM is a non-legally binding document, which, therefore, does not create any new obligation or additional financial burden⁵². Another group added specifically that the GCM does not contribute to the creation of new customary international law rules⁵³, adding that it should not be seen as a source of soft law⁵⁴. A third group expressed a significantly different opinion emphasizing that the GCM is based on existing international law, including the Universal Declaration of Human Rights, and maintained that States were not discussing anything new but were rather «seeking to rationalize the international migration governance framework in order to make it safe, orderly and regular for everyone»⁵⁵. According to this line of reasoning, which considers the whole GCM as a mere restatement of existing international obligations, it is «reprehensible and shameful that some believe that human rights belong to everyone, without distinction [...] except in the case of those who are migrants»⁵⁶.

Summing up one may well conclude that, leaving aside the positions of a very limited number of States, the Global Compact is not creating, *per se*, new international obligations incumbent on States and, therefore, it has to be considered as a classical *soft law* instrument⁵⁷. However, a number of the rules contained in it merely reiterates existing international obligations incumbent on all States (as customary law rules) or on a few of them (as a consequence of their participation in specific treaties) and are, as such, binding. In addition to this it has been properly highlighted that «soft law texts such as the Migration Compact can serve as a guideline for the interpretation of hard law, can flesh out hard law commitments and make them more concrete (“law-plus function”»⁵⁸.

Other principles codified in the GCM represent an attempt to further develop existing international law. The real impact of the GCM on the creation of new future customary law rules will depend, inevitably, on the subsequent practice in the international community⁵⁹. The fact that the GCM has been endorsed by the UNGA with more than 150 votes in favour does not automatically contribute to the crystallisation of customary international law, considering the number of negative votes and of abstentions as well as the numerous statements reaffirming that the commitments in the GMC are not legally binding.

⁵² See the statements issued by the representatives of the following States during the debate in the UNGA preceding the vote on Resolution 73/195, published in UN Doc. A/73/PV.60: Ireland (p. 12), Russian Federation (p. 12 f.), China (p. 17), Lebanon (p. 18 f.), Belgium (p. 28), and in UN Doc. A/73/PV.61: Romania (p. 3 f.), Croatia (p. 4 f.), Georgia (p. 5), Jordan (p. 5 f.), Liechtenstein (p. 8 f.), France (p.7 f.), Albania (p. 12).

⁵³ See the declarations by Poland, Austria, in UN Doc. A/73/PV.60 at p. 16 and p. 18 respectively, and Estonia, New Zealand, Lithuania, in UN Doc. A/73/PV.61 at p. 2, p. 7 and p. 10 respectively.

⁵⁴ See the declarations by the USA and Poland, in UN Doc. A/73/PV.60 at p. 8 and p. 16 respectively.

⁵⁵ See the statement by the representative of El Salvador, *ivi*, p. 11.

⁵⁶ *Ivi*.

⁵⁷ P. GARGIULO, *Recenti tendenze della cooperazione internazionale in materia di migrazioni. Contenuto, potenzialità e limiti del Global Compact on Migration*, in *Ordine Internazionale e Diritti Umani*, Special Issue, 2020, p. 8. On the notion of *soft law* generally see T. GUZMAN and T.L. MEYER, *International Soft Law* in *The Journal of Legal Analysis*, 2010, p. 171 ff.; D. THÜRER, *Soft Law*, in R. BERNHARDT (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford, 2000, p. 452 ff.

⁵⁸ A. PETERS, *The Global Compact for Migration: to sign or not to sign?* cit. and A. BUFALINI, *The Global Compact for Safe, Orderly and Regular Migration: What is its contribution to International Migration Law?*, in *Quest. Int. Law*, 2019, p. 5.

⁵⁹ DEUTSCHER BUNDESTAG, *Eckpunkte und völkerrechtliche Bedeutung des Global Compact for Safe, Orderly and Regular Migration*, available at <https://www.bundestag.de/blob/586216/8eadaa8a3f8995f4a229224c21481736/wd-2-165-18-pdf-data.pdf>.

7. *The Rules on the Political Rights of Migrants Contained in the GCM*

As already anticipated, the GCM rests on a set of relevant international documents and treaties devoted to the protection of human rights, to the regulation of the migration phenomenon and to the definition of the specific rights of migrants. Paragraph 4 of the GCM restates that migrants are entitled to all the relevant universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times. Considering the difficult situation, they have to face in their countries of origin, the GCM «intends to reduce the risks and vulnerabilities migrants face at different stages of migration by respecting, protecting and fulfilling their human rights and providing them with care and assistance». In the GCM, there is only one specific rule devoted to the political rights of migrants: it is codified in Objective 19(g) in which States expressed their commitment to «[e]nable political participation and engagement of migrants in their countries of origin, including in peace and reconciliation processes, in elections and political reforms, such as by establishing voting registries for citizens abroad, and by parliamentary representation, in accordance with national legislation».

This objective is perfectly consistent with existing trends in the international community and seems also coherent with the new political discourse according to which all efforts have to be carried out not only to facilitate the return of migrants to their home countries but, also, to reinforce their capacity to contribute - even from abroad - to the peace process and development strategies in their home countries. As mentioned in the first part of this article there are also other arguments corroborating this approach (such as the “every citizen counts” principle⁶⁰, the “all affected interests” principle⁶¹, the consideration that those living abroad contribute in any case to the development of the home country and that this justifies their request to retain an active political involvement).

As Objective 19(g) is the only rule specifically regulating the political rights of migrants, it has to be concluded that the attention devoted in the GCM to these rights is limited and one-sided as it focuses only on the political rights that the migrants should be allowed to enjoy in their home country (internal dimension) while apparently neglecting the political rights of the migrants in the country of residence. Yet the provision deserves some additional comment. First of all, the question of the actual addressees of the rule needs to be clarified. The answer seems self-evident: the countries of origin of the migrants are those who are encouraged to ease the active political participation of their diaspora and to adapt and innovate their legal systems to this effect. These States are expected to take measures to allow the full political participation of their diaspora, specifically enabling them to actively take part in national (and local) elections, referenda and other consultations. This might imply, in accordance with the domestic framework in place, the introduction of voting registries for citizens abroad (a practice which already exists in several States) and/or the creation of dedicated seats in the national Parliaments for representatives elected abroad (as is foreseen, for instance, in the current Italian legislation).

However, a wider reading suggests that the provision is also addressed, at least to a certain extent, to the States where the migrants are (temporarily) settled: these States must

⁶⁰ K. HARRIS, *Supreme Court of Canada guarantees voting rights for expats*, available at <https://www.cbc.ca/news/politics/supreme-court-expat-voting-rights-ruling-1.4970305>.

⁶¹ R.E. GOODIN, *Enfranchising All Affected Interests, and Its Alternatives*, cit.

facilitate the exercise of the political rights of migrants on their territory by, for example, allowing them to carry out political activities and campaigns for the elections in their home country and to cooperate with the countries of origin in organising out-of-country elections.

Secondly, the GCM does not touch the sensitive issue of the political rights of migrants in the host States, which is regulated by the (limited) existing rules (both at international and at national level).

Thirdly, the wording of this Objective 19(g) reflects an extremely cautious approach: even though the GCM is not a legally binding act, States are invited to facilitate the exercise of the political rights of migrants “in accordance” with their national legislation. In other words, States continue to enjoy a wide discretionary power in implementing this recommendation and it is easy to forecast that there will be significant differences in the approaches taken, as has been the case so far.

The vague and cautious wording of Objective 19(g) of the GCM, coupled with the non-binding nature of the pact and the approach currently adopted by the vast majority of States, make it evident that this document does not expand the existing spectrum of political rights of migrants both in their home country and in the country of residence. These rights, in fact, remain very limited and to a significant extent, not properly implemented in national systems. This might be due, to a large extent, to the marginal political power of migrants, who have traditionally suffered from their volatile situation which often puts them in a weak position both vis-à-vis their home country and their hosting country⁶².

8. Concluding Remarks

Although different opinions have been expressed about the effective impact of diasporas on homeland politics⁶³, the existing literature suggests that «the role that diasporas can play is shaped by the type of government back home, the type of economic system (liberal or State-controlled), and the reasons why people within the diaspora left their country (to flee repression and conflict or to gain economic opportunities)⁶⁴. The analysis carried out in the previous paragraphs on the content of the various treaties on the political rights of migrants and the respective obligations incumbent on their countries of origin showed that the more conservative stances - the so called “insular” approach - seem to be still prevalent, with a few laudable exceptions⁶⁵.

As far as the political rights of migrants in their country of residence are concerned, what emerges from this overview is that many regional treaties allow for wideranging restrictions on the political rights of foreigners. This is in apparent contradiction with the relevant rules of the ICCPR: although Articles 4, 19, 21 and 22 of the ICCPR allow States to introduce restrictions to political rights if certain conditions are fulfilled, these conditions are

⁶² M. MOKRE, *We Demand Our Rights! Refugee Protest Camp Vienna*, in S. ROSENBERGER, V. STERN, N. MERHAUT (eds.), *Protest Movements in Asylum and Deportation*, Cham/Heidelberg/New York/Dordrecht/London, 2018, p. 205 ff.

⁶³ F. MÉGRET, R. GIRARD, *Diasporas, Extraterritorial Representation and the Right to Vote*, in *Can. YB. Int. Law*, 2011, p. 185 ff.; J. P. CASSARINO, *Theorising Return Migration: The Conceptual Approach to Return Migrants Revisited*, in *International Journal on Multicultural Societies*, 2002, pp. 253 ff.

⁶⁴ N. HIRT, *The Eritrean Diaspora and its Impact on Regime Stability: Responses to UN Sanctions*, in *African Affairs*, 2015, p. 115 ff.

⁶⁵ See for example the 2002 CIS convention and the 1990 ICMW.

rarely respected. International human rights monitoring bodies did not focus their attention on this trend so far, which is widespread among States and is likely to increase considering the recent success of anti-immigration movements gaining a foothold in several countries.

In this very fragmented and sometimes contradictory legal scenario, the GCM, as a soft-law instrument in the sphere of international relations, could have contributed to clarifying controversial issues and offered useful guidelines on the interpretation of existing treaties⁶⁶. Unfortunately, this did not happen. The GCM offers a very timid approach, both in the wording and in the definition of the political rights, and mostly limits itself to insisting on the (alleged) obligations of the States of origin. Compared to a few innovative regional conventions adopted in Europe and in the CIS or to the ICMW, the GCM does not really innovate in the matter. This is due, most probably, to the compelling need to find a compromise necessary to gather sufficient support among States. Considering the result of the voting on the UNGA Resolution 73/195, this latter goal has been achieved, although at the cost of not advancing the protection of migrants' political rights with all the consequences attached thereto.

If one considers the rules concerning the political rights of the migrants vis-à-vis the hosting State, the conclusions are even more disappointing: no specific and clear-cut objective has been drafted to harmonize the obligations incumbent on the hosting States with respect to the political rights of migrants residing in their jurisdictions. In other words, the GCM does not really contribute to the enhancement of migrants' political rights. This is unfortunate and confirms the limited political influence of migrants as such, due to their objective weak position both in the home and in the host country and their limited political power⁶⁷. This finds confirmation also in the inadequate attention devoted to these issues by human rights monitoring bodies which, with a very few exceptions⁶⁸, have almost never examined in detail how the political rights of foreigners are implemented by the hosting States. Interestingly, in the framework of the Universal Periodic Review, the number of recommendations concerning aliens were less than 0.05% of the total⁶⁹. Even more striking, amongst those recommendations almost none were specifically related to the political rights of aliens⁷⁰.

⁶⁶ A. PETERS, *The Global Compact for Migration: to sign or not to sign?*, cit.

⁶⁷ R. BRUBAKER, N. HALL, *Gaps in Global Advocacy for the Protection of Migrants' Rights*, available at <https://cpr.unu.edu/gaps-in-global-advocacy-for-the-protection-of-migrants-rights-open-democracy.html>.

⁶⁸ *Dutch NGOs' contribution to the second Universal Periodic Review of the Netherlands by the UN Human Rights Council*, available at https://njcm.nl/wp-content/uploads/2016/12/NJCM_Joint-UPR-Submission_The-Netherlands_June-2012_28-Nov-2011.pdf.

⁶⁹ In the framework of the UPR, 57,686 recommendations from sessions 1 to 26 have been made so far (two UPR cycles): of them about 100 were devoted to issues related to foreigners and 12 to those related to aliens. The statistics mentioned in the text are drawn from <https://www.upr-info.org/database/>.

⁷⁰ The very few exceptions are recommendations, drafted in a very generic manner, to a few States such as Luxemburg (remarks made by Tunisia, in Human Rights Council, *Report of the Working Group on the Universal Periodic Review on Luxembourg*, UN Doc. A/HRC/23/10, 25 March 2013, p. 7, para. 38), and Slovenia (recommendation made by Cote d'Ivoire, in Human Rights Council, *Report of the Working Group on the Universal Periodic Review on Slovenia*, UN Doc. A/HRC/28/15, 10 December 2014, p. 16), in which these States were merely invited to take the necessary measures to accelerate implementation of the law on the reception and the integration of foreigners. More relevant are a few reports of the Special Rapporteur on the Human Rights of Migrants in which the issue of the political rights of migrants is addressed: see for example the *Report of the Special Rapporteur on the Human Rights of Migrants: Mission to Albania*, A/HRC/20/24/Add.1, 10 April 2012, para 72. See also the conclusions contained in the *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, A/HRC/21/63, 16 July 2012, para 81.

The high number of migrants in many States requires new policies and new ideas to guarantee their full enjoyment of political rights. If migrants are (rightly) considered an asset for both the hosting State and their own State, it seems only sensible to guarantee that their rights, including the political rights as provided by the relevant international conventions, are fully respected. This is a necessary step to allow migrants to become better integrated in local societies and/or to prepare for a future voluntary return to their home countries. Bearing in mind that the political rights of migrants are already regulated, although very often in a contradictory manner, in several universal and regional conventions, the emphasis should now be placed on their harmonization and on the correct enforcement at the domestic level by the States parties. The adoption of the GCM represented a unique opportunity to move in this direction. Unfortunately, the analysis of the content of the GCM confirms that it represents another missed opportunity to make significant steps to enhance the political rights of migrants.