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The UN Global Compacts on Migration and Refugees

A Case for Experimentalist Governance?

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Abstract

As process-oriented, inclusive, legally nonbinding frameworks deemed to promote cooperation in the pursuit of agreed objectives, the Global Compacts for Migration and Refugees adopted in December 2018 introduce modes of experimentalist governance in fields where states have hitherto opposed (new) multilateral commitments. This article retraces the introduction of experimentalist elements in the compacts' architecture and critically discusses their potential and limits in such contested policy fields. It concludes that given the depth of normative and distributive conflicts, the compacts are unlikely to generate substantive innovation, as experimentalist theory would suggest. They may, however, help to counter the erosion of existing commitments.

Keywords

Global Compact on Migration – Global Compact on Refugees – experimentalist governance – polycentric governance – multilevel governance

1 Introduction

The Global Compacts on Migration and Refugees adopted in December 2018 have been heralded as “significant achievement,” “historic moment,” and “minor miracle” by UN architects.¹ Indeed, adopted at a time when more and more governments turn their back on existing humanitarian commitments and stick to a vision of migration policy as “last bastion of ... sovereignty,”² the compacts are an “unlikely achievement.”³ The political turmoil preceding the formal adoption of the Global Compact for Safe, Orderly and Regular Migration (GCM) substantiates the challenges underlining both initiatives. Australia’s then minister of immigration announced that his country was not going to “sign a document that surrenders our sovereignty”; and representatives of several Central European countries warned that the GCM would open the door to mass migration.⁴ A more sober assessment was given by *The Economist*. Recalling the fully voluntary and legally nonbinding nature of the two compacts, it concluded that in these controversies, “symbolism trumps toothlessness.”⁵

What from a legal perspective looks like a “toothless” agreement may have other qualities that are better adapted to cooperation in contested fields. As pointed out by UN Deputy Secretary-General Amina Mohammed, it may be premature to judge the GCM at this stage as, “implementation will be the ultimate proof of the Compact’s success.”⁶ This is particularly so because the compacts are not classic multilateral agreements establishing a common set of rules. They are best understood as setting up an “architecture”⁷ or “ecosystem”⁸ for encouraging international cooperation. Institutionally, they can be compared to the approach taken with the Sustainable Development Goals (SDGs) or the Paris Agreement on Climate Change. Embracing the notions of polycentric and multilevel governance, the compacts set up a process for working toward commonly agreed objectives on a voluntary basis and refrain from setting new international norms.

1 The quotes stem in this order from UN Secretary-General António Guterres 2018, President of the UN General Assembly Miroslav Lajčák 2018, and UNHCR Assistant High Commissioner Volker Türk 2018.

2 Dauvergne 2014, 92.

3 Newland 2018.

4 Remeikis and Doherty 2018.

5 “European Governments in Melt-Down over an Inoffensive Migration Compact” 2018.

6 Mohammed 2018.

7 Aleinikoff 2007.

8 Aleinikoff 2018.

In the light of the current “gridlock” facing the multilateralism system,⁹ this preference for process-oriented and non-legally binding instruments is not surprising. Also, with the exception of the international refugee regime set up after World War II, international migration has not been a stronghold of international cooperation.¹⁰ In this light, the fact that a vast majority of the international community has agreed on common objectives and a framework to promote their realization is a major step. The question, however, is whether this framework is likely to deliver on the agreed objectives and whether migration and refugee policies, with all their tensions and inconsistencies, provide a fertile ground for such process-oriented, polycentric governance.

In this article, I propose a first cut on this question by mobilizing the theoretical notion of global experimentalist governance (GXG)¹¹ and juxtaposing this with the concrete cooperation challenges in migration and refugee policy. The contribution is twofold. For our understanding of the compacts, the experimentalist approach offers a theoretically informed assessment that links up with wider debates on modes of governance in international relations. Conversely, the case of migration and refugee policy highlights particular challenges that may advance our theoretical understanding of the conditions for successful experimentalism.

I begin the article with a brief introduction of experimentalist governance before reviewing the main experimentalist features of the GCM and the Global Compact on Refugees (GCR). Then, I discuss the potential of these modes of governance in migration and refugee policy as well as their challenges. Linking up with T. Alexander Aleinikoff’s famous characterization of international migration governance as “substance without architecture,”¹² I critically review whether the global compacts do more than add an architecture to existing substance and whether this architecture is also likely to generate new substance that lives up to the agreed objectives. In the light of mounting nationalism and enduring migration pressure, I conclude that the compacts are unlikely to deliver on experimentalist expectations. If well orchestrated and inclusive, however, they may help preserve some of the normative substance that has been guiding liberal democracy after 1945.

9 Hale, Held, and Young 2013.

10 Betts 2001; Lahav and Lavenex 2013.

11 Sabel and Zeitlin 2014.

12 Aleinikoff 2007.

2 Experimentalist Governance

Global experimentalist governance has been defined as “an institutionalized transnational process of participatory and multilevel problem solving, in which particular problems (and the means of addressing them) are framed in an open-ended way, and subjected to periodic revision by various forms of peer review in light of locally generated knowledge.”¹³ Process-oriented arrangements fostering deliberation and mutual learning among participants have been heralded as a “promising approach to addressing contentious, uncertain transnational issues ... where conflicts of interest and values block multilateral agreement and there is no hegemon to impose global rules.”¹⁴ Such conflicts are particularly pronounced when uncertainty prevails and when “we may recognize problems yet not know how to deal with them.”¹⁵

Empirically, experimentalist approaches have proliferated in numerous sectors, including human rights, ozone, fishing, money laundering, financial regulation, forestry, climate change, and health governance.¹⁶ Various theoretical approaches have been proposed to conceptualize these new forms of legally nonbinding and voluntary cooperation, including the notions of “network,”¹⁷ “informal,” or “polycentric governance.”¹⁸ While sharing many aspects, including the inclusive multilevel and multiactor setup and the focus on progress through recursive learning and trust building, GXG proposes a more strongly “orchestrated”¹⁹ vision of governance. GXG thus goes beyond the observation of “regime complexity”²⁰ underlying the notion of polycentrism and proposes a certain integration of implementation efforts through feedback and joint evaluation mechanisms.

In an effort to delineate the notion of GXG, Grainne De Búrca, Robert Keohane, and Charles F. Sabel have identified five key elements that “must [all] be present to constitute a GXG system”:²¹

1. An inclusive, participatory, and nonhierarchical process is set up through which states and other participating units reflect and identify a broadly shared perception of a common problem.

13 De Búrca, Keohane, and Sabel 2014, 478.

14 Overdevest and Zeitlin 2018, 65.

15 De Búrca, Keohane, and Sabel 2014, 478.

16 A brief and recent review of this literature is provided in Goldstein and Ansell 2019.

17 Héritier and Rhodes 2011.

18 Ostrom 2010.

19 Abbott et al. 2015.

20 A *regime complex* is defined as an “array of partially overlapping and non-hierarchical institutions governing a particular issue area.” see Victor and Raustiala 2004, p. 279.

21 De Búrca, Keohane, and Sabel 2014, 478, 483.

2. A framework understanding is articulated with open-ended goals.
3. Implementation of these broadly framed goals is left to “lower-level” or contextually situated actors who have knowledge of local conditions and considerable discretion to adapt the framework norms to these different contexts.
4. Continuous feedback is provided from local contexts, allowing for reporting and monitoring across a range of contexts, with outcomes subject to nonhierarchical peer review.
5. Goals and practices are periodically and routinely reevaluated and, where appropriate, revised in light of the results of the peer review and the shared purposes.

Summing up, the central features of GXG are: process-oriented, voluntary cooperation; generally agreed but relatively openly formulated and revisable goals; a multilevel and polycentric yet orchestrated framework; and the involvement of states and international organizations alongside regional and local actors, as well as public and private stakeholders, who generate dynamics from below where actual problems arise. Implementation and enforcement follow very different patterns than hierarchical supervision through law. The key mechanisms for achieving change are horizontal, based on learning and the development of mutual trust.²² While emphasizing voluntary and horizontal mechanisms, the GXG framework acknowledges that such regimes “frequently operate in the shadow of a ‘penalty default’ that induces appreciation of the relative benefits of joint efforts by sanctioning non-co-operation, typically by substantially reducing the parties’ control over their fate through the imposition of an alternative, less attractive regime or outcome that none of them favors.”²³ In the absence of hierarchical sanction mechanisms, such a penalty default can be exercised by powerful states who incentivize others through making the delivery of aid conditional on the latter’s compliance, or by civil society organizing boycotts that put pressure on recalcitrant governments.²⁴

Theoretical proponents of GXG associate multiple advantages with such schemes. First, experimentalism may allow for cooperation in domains where command and control regulation would fail due to uncertainty or lack of convergence of interests and values. Second, they may accommodate diversity by tailoring shared goals to varied contexts instead of imposing one-size-fits-all solutions. Third, experimentalist governance should be more flexible and

²² Ostrom 2010.

²³ De Búrca, Keohane, and Sabel 2014, 478.

²⁴ De Búrca 2017, 282.

adaptable given its inbuilt revision mechanisms. Finally, the inclusive and horizontal setup is also seen to foster implementation by directly involving stakeholders in the deliberative process. It, thereby, also yields greater legitimacy than top-down intergovernmental arrangements.²⁵

International migration and refugee policies have hitherto not been studied from the perspective of experimentalism. With the exception of the international refugee regime set up after World War II, states have fiercely resisted efforts at international governance.²⁶ Yet initiatives to foster cooperation have proliferated since the turn of the millennium, and the global compacts are the preliminary apex in this development. The next section assesses the extent to which these compacts entail experimentalist features.

3 Assessment: Experimentalist Architecture

As indicated above, experimentalist governance is an institutional framework within which states and other actors progressively cooperate toward the definition of a shared problem and commonly agreed objectives. Implementation progresses in a decentralized and voluntary manner, is assessed and updated through periodic instances of peer review, and is encouraged through capacity building and recursive learning. International relations scholars working with this concept see it as a promising way to address contentious issues where other classic forms of multilateral cooperation are blocked due to conflicts of interests and values, and because no hegemonic power is capable or willing to impose common rules.²⁷ Certainly, the vast majority of states today acknowledge the need for better governance of international migration and concede that “no state can address migration alone” (para. 7 GCM Preamble). Yet migration and refugee issues are riddled with conflicts over interests and values. These conflicts are salient within states and among states. The most fundamental conflict is between the universalism of human rights applying to all human beings irrespective of their national origin and legal status, and the particularism of state sovereignty that imposes territorial and categorical boundaries to these rights. On top of this fundamental conflict, actors often pursue different interests and values as they balance human rights, foreign affairs, internal security, and economic prerogatives. Between states, (re)distributive conflicts over the responsibility for asylum seekers, migration control, or readmission

25 De Búrca 2017, 283.

26 Newland 2010.

27 Overdevest and Zeitlin 2018, 85.

have undermined responses to recent migration flows and have impeded solutions to protracted refugee situations. At the same time, identifying persons in need of international protection according to the 1951 Geneva Convention and establishing a basis on which to admit or reject other migrants remain major normative challenges in an era of mixed flows and multifaceted migrations.²⁸ Therefore, there is no doubt that conflicts of interest and values abound in these fields. With the exception of the refugee regime created after World War II, these conflicts have impeded classic forms of multilateral cooperation in the past. The 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was the last attempt at crafting an international treaty on the matter. The fact that no country of the Global North has been willing to ratify it substantiates well the conclusions drawn by the UN Global Commission on International Migration in 2005 that “most states have been unwilling to commit fully to the principle of international cooperation in the area of international migration, because migration policy is still mainly formulated at the national level.”²⁹

Given that binding multilateralism is not an option, experimentalist governance may help the international community address common problems in a more decentralized manner “from below.”

3.1 *Participatory Problem Definition and Open-Ended Goals*

The first two criteria for GXG establish that the problem definition, upon which cooperation is based, emerges out of an inclusive, participatory, and nonhierarchical process and that this shared problem definition is then translated into a framework understanding articulating open-ended goals. Both the overall notion of a compact and the way objectives have been framed speak to this notion, albeit more strongly for the GCM than for the GCR. The term *compact* is a newcomer in international law and the fact that no authoritative definition of this term exists can—somewhat ambiguously—be interpreted as a first sign of its malleable open-ended nature. The term entered the United Nations context with the UN Global Compact concluded in 2000 with multinational companies—a global public-private partnership designed to commit multinational companies to basic human and labor rights, environmental protection, and anticorruption.³⁰ Another source of inspiration stems from the European Union’s compacts concluded with Jordan and Lebanon during Europe’s asylum

²⁸ Lavenex 2018.

²⁹ Global Commission on International Migration 2005, 67.

³⁰ Ruggie 2004.

crisis in 2016.³¹ Compacts have hence been used in quite different contexts. What these initiatives have in common is that they privilege “political and practical cooperation as opposed to legal commitments,” emphasizing “more technical and procedural aspects” of governance.³² From a legal perspective, they represent “at best, the softest of soft law.”³³ Beyond these commonalities, the GCR and GCM differ regarding the extent to which existing international norms are embedded in them. Whereas the GCR draws on a relatively “robust” international regime based in the 1951 Geneva Convention,³⁴ the GCM is built on a fragmented and very partial set of international treaties across several areas that are frequently understood as a “last bastion of state sovereignty.”³⁵ Therefore, the fact that the GCR introduces a legally nonbinding framework in an area governed by a formal treaty has been interpreted as “a step back from international law as the otherwise preferred language of international relations” and less in terms of innovation.³⁶

Regarding their genesis, both compacts draw on a lengthy preparatory phase and processes of recursive learning, but the elaboration of the GCM was clearly more inclusive and participatory than the GCR. This can be explained by the existence of a prior refugee regime within which deliberation could be bundled under the leadership of the UN High Commissioner for Refugees (UNHCR). In contrast, leadership on migration was missing: the International Organization for Migration (IOM) is an intergovernmental organization without a normative mandate; it is new to the UN system, and its director general changed during the GCM preparations.

The genesis of the GCM goes back to diverse soft law initiatives from the 1990s onward to foster dialogue and consultations on international migration.³⁷ Among these are: the Berne Initiative; the Global Commission on International Migration; the 2006/2013 High Level Dialogues on Migration and Development in the UN General Assembly; and the Global Forum for Migration and Development, which has organized annual meetings between state representatives since 2007. Processes of learning and policy diffusion are particularly salient in connection with the 2015 Sustainable Development Goals whose Target 10.7 provides that states commit to “facilitate orderly, safe, reg-

31 Lavenex 2018.

32 Gammeltoft-Hansen 2017, 7.

33 Newland 2018.

34 Cantor 2018.

35 Dauvergne 2014, 92.

36 Gammeltoft-Hansen 2018, 609.

37 Newland 2010.

ular and responsible migration”—thereby largely anticipating the title of the GCM.³⁸ Language previously agreed in other settings thus provided a useful resource in gathering states’ support. The first draft of the GCM emerged out of a year of wide-ranging consultations led by Member States with interested parties, including nongovernmental organizations, local governments, regional organizations, and business representatives among others. Yet the phase of negotiations taking place in the first half of 2018 was less inclusive and followed a standard intergovernmental template. Leadership was assumed by two co-facilitators, the UN ambassadors from Mexico and Switzerland.³⁹ Approval of the final draft by 192 of 193 UN Member States (all but the United States) on 13 July 2018 documents a moment of broad intergovernmental consensus. This moment, however, soon waned under the pressure of anti-migration parties in national capitals. By the time of the formal adoption at the intergovernmental conference in Marrakech on 10 December 2018 and in the General Assembly on 19 December, only 152 countries gave their formal approval, 5 voted against (Czech Republic, Hungary, Israel, Poland, the United States), 12 countries abstained (Algeria, Austria, Australia, Bulgaria, Chile, Italy, Latvia, Libya, Liechtenstein, Romania, Switzerland, and Singapore), and others were absent from the vote. In sum, inclusive and participatory deliberation with stakeholders in the preparation of the intergovernmental negotiations was not enough. Critically, the media failed to report about the background to and the preparations for the GCM, and national politicians and members of parliament were not consulted. In the end, electoral politics took over the deliberative spirit and anti-immigrant parties elevated the “symbolism” of an allegedly pro-immigration deal subverting state sovereignty over the “toothlessness” of an “inoffensive compact.”⁴⁰

The GCR has faced less politicization and was formally adopted at the General Assembly on 17 December 2018 by 181 states. Only the United States and Hungary voted against it, while the Dominican Republic, Eritrea, and Libya abstained. The drafting of the GCR was less inclusive and bottom up because it was prepared by the UNHCR, as mandated by the UN General Assembly. The UNHCR engaged in a series of five thematic discussions with states, partners, civil society, and refugees culminating in a stocktaking exercise in 2017, as well as six formal consultations on the text of the compact in 2018.⁴¹ Also, reflecting

38 Klein-Solomon and Sheldon 2018.

39 All steps leading up to the GCM can be found at <https://refugeesmigrants.un.org/migration-compact>.

40 “European Governments in Melt-Down over an Inoffensive Migration Compact” 2018.

41 Türk 2018.

a narrower approach to problem definition, the GCR is less holistic and open than in the GCM. In the run-up to the 2016 New York summit, expectations were high that next to the issue of cooperation and burden sharing, the GCR would also tackle the limits of the refugee definition contained in the Geneva Convention. This question is of particular importance in the light of the high number of persons fleeing generalized violence, the emergence of new root causes such as climate change, and the reality of mixed flows.⁴² These claims found support in the fact that the UNHCR had already *de facto* widened its mandate to cover other populations of concern (e.g., fleeing generalized violence, or internally displaced persons), a process that has partly been backed by UN General Assembly resolutions, regional treaties and processes, and state practice. Thus, in the preparations of the GCR, the UNHCR proposed that “the need for international protection arises when persons are outside their own country and unable to return home because they would be at risk there, and their country is unable or unwilling to protect them” (para. 52 first draft). Yet the final version of the GCR leaves the decision to offer protection on wider grounds to the states: “Mechanisms for the fair and efficient determination of individual international protection claims provide an opportunity for States to duly determine the status of those on their territory in accordance with their applicable international and regional obligations ..., in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it” (para. 61 GCR). Avoiding any prescriptions, this wording eventually provides a “hook” for advocacy on behalf of “all those in need of international protection.”⁴³ In sum, however, the UNHCR preferred not to open up a Pandora’s box regarding the refugee definition, fearing that this would lead to a dismantling of the existing regime and choosing to focus on cooperation and burden sharing instead. These proposals were inspired by earlier attempts at creating norms relating to responsibility sharing, which affirmed the importance of learning and feedback loops. These experiences include the 1989 Indochinese Comprehensive Plan of Action (CPA) and the International Conference on Central American Refugees (CIREFCA) of the same year. Also relevant here was the UNHCR Executive Committee’s Convention Plus Initiative (2003–2005), which sought to create “generic agreements” on responsibility sharing to then apply in specific refugee situations.⁴⁴

The translation of consensual problem definition into open-ended goals rather than prescriptive regulations is the second element of GXG. The notion

42 Gammeltoft-Hansen 2018.

43 Aleinikoff 2018.

44 Betts 2013.

of goal-oriented governance is certainly very present in the two compacts. Given the absence of a comprehensive preexisting international migration regime and, in the light of the complexity of the phenomenon, the GCM is very open and aspires in its introductory statement to promote “enhanced cooperation on international migration *in all its dimensions*” (emphasis added). This omits a more specific and eventually constraining definition of the problem. According to Vincent Chetail, “When assessed as a whole, the Compact looks like a kaleidoscope; it is made up of a complex mix of multifaceted elements that are constantly changing and create different patterns depending on the angle of the relevant issue and the related objective.”⁴⁵ After referring to relevant international law, the GCM frames the common endeavor through nine general principles that underline the multifaceted nature of the phenomenon, namely: people centrism; international cooperation; national sovereignty; the rule of law and due process; sustainable development; human rights; gender responsiveness; child sensitivity; and a whole-of-government approach (para. 15 GCM). On this basis, the compact formulates twenty-three broad objectives that largely replicate the approach of various international migration fora since the 1990s.⁴⁶ They include relatively uncontroversial measures such as improving migration data and ensuring that migrants have proof of their legal identity (Objectives 1, 4). They also cover general human rights appeals deriving from existing human rights instruments⁴⁷ (i.e., to counter vulnerabilities in migration, save lives, give migrants access to basic services, and “limit” detention) (paras. 7, 8, 15, 13) and development aspects of migration such as root causes, remittances, and diasporas (paras. 2, 19, 20). Further, they extend to controversial issues such as cooperation on border management and readmission (paras. 11, 12, 21) and the call for more pathways for regular migration and decent work (paras. 5, 6). Assessing the GCM against the backdrop of international migration law, Chetail identifies a large number of areas where the GCM affirms existing international provisions, but he also points out some fields where references to international law are ambiguous and a few issues, such as labor migration, for which the compact encourages the elaboration of new international agreements.⁴⁸ In Kathleen Newland’s assessment, the negotiations yielded a broad consensus based on trade-offs and compromises so that in the end “all participating states got something they wanted; none got everything.”⁴⁹

45 Chetail forthcoming 2020, 2.

46 Pécoud 2015.

47 Newland 2019, 1.

48 Chetail forthcoming 2020.

49 Guild 2018.

By comparison, the GCR is less open-ended as it complements existing international refugee law and, as mentioned above, focuses on only one of the main shortcomings of the current regime, that of “predictable and equitable burden and responsibility sharing” (para. 3). According to Thomas Gammeltoft-Hansen, this goal is formulated as “an abstract principle with little, if any, normative specificity,”⁵⁰ which makes it “open-ended” in the sense of experimentalism. This goal is reflected in four objectives: cooperation to ease pressure on host countries; the expansion of access to third-country solutions; support for return in the country of origin; and the enhancement of refugee self-reliance, thereby activating the refugees’ own contribution to “burden reduction” (para. 7).

In terms of experimentalist governance, both compacts draw on a longer learning process; they are based on agreed objectives and avoid concrete prescriptions. In comparison, the preparations leading to the GCR have been less inclusive and its objectives are less open-ended.

3.2 *Multilevel and Polycentric Implementation*

The third criterion of GXG provides that implementation of the broadly framed goals is left to “lower-level” or contextually situated actors with knowledge of local conditions and considerable discretion to adapt the framework norms. In turn, the fourth criterion posits that continuous feedback should occur across a range of contexts, with outcomes subject to nonhierarchical peer review.

The GCM and GCR speak to these criteria by mobilizing activities in multiple settings such as regional economic communities and Regional Consultation Processes, as well as with city and local governments and a wide range of stakeholders, including civil society, employers, and migrants and refugees themselves.⁵¹ In addition, the compacts establish linkages with other international institutions active in the field such as relevant (human rights) treaties and respective treaty bodies, international organizations, and donors such as the World Bank and the International Monetary Fund. In bringing together different sectors, settings, and actors, the compacts thereby act “as a sort of hub for the coordination and association of myriad of activities and initiatives”—this “hub” or “linkage” function is also suggested by the etymology of the word “compact”: “the coming together of pacts.”⁵²

The virtue of experimentalism for implementation was pointed out by the Deputy Secretary-General Amina Mohammed when she underlined that “a

⁵⁰ Gammeltoft-Hansen 2018.

⁵¹ Thouez 2020.

⁵² Roele 2017, p. 15.

strong, fluid, multilayered follow up framework, supported by a solid evidence based and open, inclusive mechanisms, will ... be essential.”⁵³ The GCM foresees five operational measures sustaining implementation: a capacity-building mechanism, including funding and knowledge sharing; the UN Network on Migration, linking relevant UN institutions; global, regional, and subregional dialogues; voluntary national action plans; and, as a core mechanism, an inter-governmental review forum taking place every four years at the global level, to be supported by regional and subregional fora.

A look into the GCM's negotiation history indicates some of the challenges in institutionalizing inclusive implementation structures. Together with the addition of diverse actors, the centrality of state governments was also strengthened. The first article in the section on “Follow-up and Review” was reformulated from “We commit to track and monitor the progress made in implementing the Global Compact” (Art. 43 Zero Draft) to “We will review the progress made *at local, national, regional and global levels* in implementing the Global Compact ... through a *State-led approach* and with the participation of all relevant stakeholders” (Art. 48 GCM, emphasis added). The emphasis on state sovereignty and voluntarism also derive from a new article introduced with the June draft, according to which “We encourage all Member States to develop, as soon as practicable, ambitious national responses for the implementation of the Global Compact, and to conduct regular and inclusive reviews of progress at the national level, such as through the *voluntary* elaboration and use of a national implementation plan” (Art. 53 GCM, emphasis added). The central review forum, the International Migration Review Forum, is also respectful of state sovereignty. This forum will succeed the High-Level Dialogue on International Migration and Development and take place every fourth session of the General Assembly “to discuss and share progress on the implementation of all aspects of the Global Compact” (Art. 49 GCM). Pending concrete specification, it is not clear how far this crucial element of GXG, allowing learning and feedback loops from local actors dealing directly with migrants and refugees, will be realized.

Alongside the clearer emphasis on state sovereignty, the role of UN institutions has been specified, with the IOM obtaining the central coordinating role (Art. 45 GCM). In terms of GXG, the role of the UN Migration Network gathering relevant UN organizations will be key as it implements the connection hub (to facilitate agreements, provide trainings, and run projects), the start-up fund (to finance projects, technology, or databases), and the knowledge plat-

53 Mohammed 2018.

form (to collect evidence and best practices) (Art. 43 GCM). UN organizations will thereby support states and other actors in drafting and implementing (voluntary) national implementation plans.

Cross-references to related processes and institutions have also evolved over the negotiation rounds. The Agenda for Sustainable Development is referred to in a new article on international partnerships (Art. 42 GCM), and the SDGs' migration-related aspects will be included in the International Migration Review Forum (Art. 49 GCM). This forum "shall discuss the implementation of the Global Compact at the local, national, regional and global levels," and Article 50 provides that "considering that most international migration takes place within regions, we invite relevant subregional, regional and cross-regional processes, platforms and organization ... to review the implementation of the Global Compact." With this vague language, it is rather open as to which regional fora will concretely contribute and how far the compacts will fully implement the notion of multilevel governance.⁵⁴

Beyond regional actors, subnational entities (cities and municipalities) are consistently referred to in the implementation and review mechanisms, as is the role of private actors. The participation of stakeholders has become more precise and inclusive over the rounds of negotiation and includes "migrants, civil society, migrant and diaspora organizations, faith-based organizations, local authorities and communities, the private sector, trade unions, parliamentarians, national human rights institutions, the International Red Cross and Red Crescent Movement, academia, the media and other relevant stakeholders" (Art. 44 GCM). The review process is described as a "State-led approach with the participation of all relevant stakeholders" (Art. 48 GCM). But how stakeholders will concretely participate needs specification.

In sum, the implementation, review and follow-up mechanisms are clearly intergovernmental, with the inclusion of regional and subregional levels of governance and the involvement of stakeholders. The capacity-building elements and the mobilization of the different layers of governance (states, municipal and regional institutions, and greater coordination among UN organizations) have the potential to establish a "hub" structure typical of experimentalist arrangements. This architecture bears resemblance to that adopted for the SDGs or the 2015 Paris Agreement in climate policy. In contrast to the latter, however, there is no obligation to draft ambitious and progressive national action plans, and states' review of implementation will be only "voluntary" (Art. 53 GCM). States will thus have even more flexibility to "pick and choose"

54 Lavenex 2019.

the objectives they want to work on. Apart from the intergovernmental review taking place every four years, no time line or road map with specified deadlines is provided. Likewise, the modalities and organization of the International Review Forum have not been spelled out and are left for future negotiations (Art. 54 GCM).

The implementation structures of the GCR have many parallels with those of the GCM. The procedures encouraging burden and responsibility sharing across states provide the participation of other stakeholders including international organizations, local and regional governments, nongovernmental actors, and the private sector. As for the GCM, a Global Refugee Forum is to be held every four years; the first one took place in Geneva in December 2019. States meeting at the ministerial level as well as “partners” (including private actors and refugees) are invited to make pledges regarding, for example, assistance (whether financial, material, and technical); changes to national policies, laws, and practices; additional resettlement numbers; and “complementary pathways for admission” (para. 18). Pledges should be concrete and mutually reinforcing—this is an important element of GXG to ensure recursive learning and is also included in the Paris Agreement on Climate Change. The expectation is that governments will become “locked in” to their promises, holding them accountable toward the international community by participating in the process and thereby promoting not only the follow-up implementation but also processes of mutual learning, including a certain sense of competition driven by reputational concerns. With that said, the first forum did not reveal great ambition. One of its main outputs was the publication of the contributions made by states, international organizations, local governments, civil society, business, and refugees on a public platform.⁵⁵ But on inspection, not all of the pledges were made to go beyond existing measures—some pledges that were said to improve the situation of refugees may rather be restrictions (e.g., the announcement of streamlining asylum procedures), and indicators for measuring success are yet to be defined.⁵⁶

A second parallel with the GCM is the GCR’s emphasis on support and capacity building for states and other actors including refugees (Chapter III.B). A menu of options is proposed, including support for early warning, preparedness, and contingency planning; reception arrangements; safety and security; registration and documentation; addressing specific needs; identifying interna-

55 See the pledges and contributions made to the 2019 Global Refugee Forum at <https://globalcompactrefugees.org/channel/pledges-contributions>.

56 Crisp 2019; Yoon 2020.

tional protection needs; access to education; voluntary repatriation; and resettlement places and other pathways for admission to third countries.

The third type of implementation arrangements includes measures to improve the international response to specific refugee situations, in support of government-led arrangements. These arrangements include support platforms, solidarity conferences, and regional and subregional approaches (Chapter III.A.2). Such targeted initiatives have occurred in the past; for instance with the CPA and CIREFCA in the late 1980s (see above) and the Regional Refugee and Resilience Plan (3RP) launched in the context of the Syrian refugee emergency. According to Aleinikoff, these situation-specific initiatives have the potential to promote innovative solutions and “to experiment with other modalities, such as enhanced regional mobility for refugees seeking to move to locations where they can best pursue self-sufficiency.”⁵⁷ The most explicit experimentalist tools are pilot projects under the Comprehensive Refugee Response Framework (CRRF) to test the GCR’s approach in a number of African and Central American countries. The CRRF operates as a cycle consisting of consultations with relevant actors, practical implementation in selected countries, and a phase of evaluation and feedback allowing to improve the instrument.⁵⁸

In conclusion, the negotiation process and the implementation structure of the two compacts include features of GXG. While the GCM followed a more inclusive and participatory approach in the preparatory phase, the GCR provides for more experimentalist features at the implementation stage. This difference can be attributed mainly to the preexistence of an international regime for the latter that has helped to focus the objectives and leveraged support for concrete action. Both compacts aim to launch a dynamic that leads beyond what states have hitherto been willing to do and that, over time, will contribute to better, more cooperative, and humane migration and refugee governance.

4 Discussion: “Architecture without Substance”?

In experimentalist terms, the compacts design an “ecosystem” for international cooperation establishing structures of recurrent, inclusive, and participatory interaction along broadly shared objectives. These objectives are anchored in existing commitments, including refugee, human rights, and other interna-

⁵⁷ Aleinikoff 2018.

⁵⁸ Dare and Abede 2018.

tional treaties, and also include new ones such as those related to facilitating legal migration and countering irregular migration enshrined in the GCM. International norms relevant for migration thus no longer constitute mere “substance without architecture,”⁵⁹ but are assembled in a legally nonbinding framework between law and politics.⁶⁰

The question that follows is whether the experimentalist architecture will generate new substance, as the theory would suggest, or whether scope conditions point at a more cautious scenario. The risk with an experimentalist approach is that it will produce little more than “lots and lots of meetings to chat” and thus remain “all about process.”⁶¹ One should not forget that at the same time as governments were referencing human rights and refugee law in the compacts, they were concluding formal and informal deals among each other that preclude access to national asylum systems and put migrants’ lives at risk.⁶²

As a relatively new approach, scholars have only started to reflect on the preconditions for GXG to yield success. Existing studies and international relations theory point at a number of caveats. De Búrca, Keohane, and Sabel observe that GXG may fail when governments are “stymied by disagreement over basic principles” and when they perceive “the potential costs of unsatisfactory responses” as “high and irreversible.”⁶³ Indeed, one can ask whether migration is not such a case—the compacts’ rhetoric notwithstanding. Between July 2018, when the GCM’s final draft was near universally adopted, and the formal vote in the General Assembly on 19 December, numerous countries withdrew their support and one government—that of Belgium—collapsed over the issue. As pointed out above, the inclusive and participatory approach applied to societal actors and lower levels of government did not reach out to national politicians, the media, and the public at large. Anti-immigration forces succeeded in seizing the topic and, mobilizing social media and latent fears of uncontrolled migration, quickly dismantled the delicate consensus that had emerged out of a longer process of executive-led trust building and mutual understanding.

Thanks to the majority of states’ prior commitments under the Refugee Convention that normally also figure in domestic liberal democratic constitutions, the GCR has faced less open contestation. This is also due to its more moderate

59 Aleinikoff 2007.

60 Gammeltoft Hansen 2017.

61 Hathaway 2018.

62 Hathaway 2018; Lavenex 2018.

63 De Búrca, Keohane, and Sabel 2014, 484.

aim that leaves normative questions about who deserves protection untouched and focuses on cooperation instead. While minimizing conflicts over values, the GCR shares with the GCM distributive conflicts over burden and responsibility sharing. Institutional theory suggests that the unequal distributive effects of cooperation favor non-legally binding soft law arrangements,⁶⁴ but empirical analyses indicate that such conflicts impede experimentalism—unless there is some “shadow of hierarchy” or, in experimentalist terms, some “penalty default” capable of imposing agreements.⁶⁵ Thus, the GCR may appeal to states to grant protection, but there is no international organization empowered to sanction recalcitrant countries. The 1951 Refugee Convention does not even provide for a state reporting system and the UNHCR, with its precarious financial base, is extremely cautious not to alienate Member States. The IOM has even less authority. Elevated through the New York Declaration to a UN-related organization and granted the key role in the “orchestration”⁶⁶ of the GCM, the IOM is nearly completely dependent on (earmarked) funding from its members and does not even dispose of a charter or formal mandate from which it could derive normative authority.

In the absence of monitoring and sanctioning mechanisms from above, experimentalist theory points at the possibility of penalty default by other actors. These can be powerful states (who may exercise conditionality in foreign aid), or civil society actors (who may organize boycotts and social protest).⁶⁷ But strategies for the diffusion of norms that have been effective in other fields—such as human rights or, to a lesser extent, the environment—may not play out equally for migration policies. The current configuration of power and interests in the international system implies that those states that have the means to exert conditionality are those that seek to minimize their exposure to “unwanted” immigration. They may (and do) use their leverage to impose migration control and readmission by weaker countries,⁶⁸ but face few incentives to promote the rights-based agenda of the GCM or to enhance their share of responsibilities under the GCR. Social mechanisms promoting penalty default by civil society actors are equally weak. Once they have left their country of origin, migrants and refugees enjoy little “lobby” or leverage—neither from their country of origin nor from the host communities and transnational civil society. Although civil society organizations and business have engaged

64 Korenemos, Lipson, and Snidal 2001, 885.

65 De Búrca, Keohane, and Sabel 2014, 478.

66 Abbott et al. 2015.

67 De Búrca 2017, 282.

68 Lavenex 2006; Fitzgerald 2019.

with the compacts, the public at large is far from being generally supportive, let alone familiar with their objectives. For societal penalty default to work, popular support must reach beyond specialized actors and involve the public sphere including the media, electoral processes, and other forms of lobbying, protesting, and engaging in collective action.⁶⁹

These observations are relevant beyond the question of sanctioning mechanisms; they affect the prospects for experimentalist governance in a more essential way. In the field of migration, layers of governance above (regional agreements) or below the state (civil society, municipalities) play a key role given the structural limits states face. States' scope of action is circumscribed by the fundamental tension between the universalist claim of human rights and the particularist imperatives of state sovereignty. Research has shown that city governments are not exposed to the same pressures for demarcation of population and territory and, therefore, have been more flexible to find creative solutions addressing the presence and integration of undocumented migrants.⁷⁰ This resonates with GXG's emphasis on lower levels of governance as a source of innovation and change.⁷¹ Indeed, cities have organized in networks across borders to exchange best practices in migration policy and now count among the most dynamic places of experimentation.⁷² Universities and private companies too have taken up an active role and contribute, for instance, to opening up alternative legal pathways to refugees. And civil society plays a key role in assisting migrants and refugees all along the migratory route as well as in sustaining their integration into host societies. Yet electoral politics and resurgent nationalism show that society at large is deeply divided, pointing to the formation of new societal cleavages over migration.⁷³ In such a context, the scope for autonomous innovative action by subnational and private actors remains severely circumscribed. At the end of the day, it remains the states' exclusive sovereign prerogative to legalize or not a migrant's presence and stay in their territory. Even if the compacts' review mechanisms succeed in providing "continuous feed-back ... from local contexts" in the sense of experimentalist governance,⁷⁴ the central state remains, *qua* constitution, the decisive gatekeeper on immigration.

69 Kelley and Simmons 2019, 499f.

70 Thouez 2020.

71 De Búrca, Keohane, and Sabel 2014, 484.

72 Thouez 2020.

73 Hooghe and Marks 2018.

74 De Búrca, Keohane, and Sabel 2014, 478.

Against this background, it is not surprising that the compacts have been received as a “minor miracle” and an “unlikely achievement” (see above). The current political context characterized by anti-immigrant rhetoric and ever more obstructed access to national asylum systems is not propitious to experimentalist advances. The architecture set up with the compacts may, nevertheless, sustain cooperation in other ways. By assembling, for the first time, relevant human rights norms and other objectives in the GCM and acknowledging the need for burden sharing in the GCR, the international community reminds itself of existing liberal commitments. By empowering new actors and providing capacity building and support, the compacts may help preserve these liberal standards from erosion.

5 Conclusion

The global compacts adopted in 2018 acknowledge migration and refugee policy as key issues of international politics and propose an architecture for multi-level and polycentric cooperation based on procedural mechanisms and voluntary commitment. In the light of growing migration pressure, large-scale policy failure, normative erosion, and deepening societal cleavages, the compacts have been welcomed and questioned alike. The theory of global experimentalist governance offers a framework to make sense of these institutional developments in connection with a wider trend toward soft modes of governance in international relations. As particularly contested and value-loaded issues, migration and refugee policies also advance our understanding of the conditions under which experimentalist governance may actually deliver. Among these, I identified in this article several challenges, including deep disagreement about basic normative principles, which feeds into profound levels of politicization; the absence of international organizations, powerful states, or civil society actors capable of enforcing engagement by penalty default; and the gatekeeping function of the sovereign state vis-à-vis more innovative action by nonstate actors below and above the state.

In conclusion, only implementation will show whether the compacts work toward more equitable and humane migration and refugee governance. In a pessimistic scenario, the processes set up by them will merely add to a widening array of “meetings to chat”⁷⁵ paying lip service to alleged objectives that will remain far—and eventually move even further—away from actual state prac-

75 Hathaway 2018.

tices. In the meantime, perhaps the most likely scenario is that the global compacts' main contribution is the assertion of existing commitments regarding human rights and refugee law, and the recognition of the need for international and multilayered cooperation in this domain. Experimentalist governance, in this perspective, is not so much an architecture spurring substantive innovation, as the theory proposes, but may be more of an architecture designed to preserve normative substance in politically turbulent times.

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