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**GLOBAL COMPACT FOR SAFE, ORDERLY AND REGULAR MIGRATION AND ITS
PLACE IN INTERNATIONAL LAW**
Master's thesis

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INTRODUCTION

Migration is a distinctive characteristic for all living organisms; ranging from animal migration, which takes place on a seasonal basis mainly in search for food and a for more favorable climate conditions; to human migration, the topic of discussion in this thesis. People migrate for a variety of reasons: seeking better economic conditions, education, medical care, and security. As humanity evolved to modern times, societies, countries, and nation-states emerged. These establishments created cultures with attitudes and characteristics of particular groups alongside national identities manifested diversity of traditions. The complexity of today's societies made it difficult for governments to deal with migration distresses, utilize its opportunities, and to respond to the various challenges it generates that can threaten the stability of the state institutions and the harmony of the social fabric.

Hence, governments are required to take actions in the form of enacting public policies to overcome the challenges generated by human migration, and for the purpose of protecting migrants from exploitation and persecution in accordance with the values commensurate with modernity.¹ Therefore, the need for migration regulations arose as an important topic in the international sphere, urging policymakers to work out migration issues on a cooperative level. It is estimated that from the world population, there are about 258 million migrants globally, which amount to 3.4% of the worldwide population². Nevertheless, migrants are usually considered a vulnerable group since they are more prone to be victims of human trafficking, and typically work and live under worse living conditions than locals.³ People will continue to move in search of better and safer living conditions regardless of the barriers placed by governments. Accordingly, rational policymakers must embrace novelty in approaching

1 Report by the United Nations Department of Economic and Social affairs, The International migration report December 2017, N. 2017/5, p. 1. Accessible at:

“https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017_Highlights.pdf” (16.05.2019)

2 Ibid

3 Statement by the government of Denmark regarding adopting of the Global Compact Accessible at: <https://www.un.org/en/conf/migration/statement.shtml> (17.05.2019)

migration issues and formulate policies and laws in alignment with dynamic forms of migration.

With the rise of globalization and technologies, transnational mobility is facilitated, resulting in an increase in the numbers of migrants. Some factors including the growth of the economy, demographic pressure, security threats, conflicts, social differences, inequalities, environmental issues, and climate change, motivate people to migrate.⁴ That said, large numbers of migrants meet hostile public reactions and restricting state policy. This situation places migration on the top of the international political agenda. The international community, as its name indicates, ought to work together in order to find ways to strengthen international cooperation and governance, in order to handle better the influx of regular and irregular movements of migrants, instead of abstaining from entering as the only solution. The outcome anticipated of the multilateral collaboration, along with the unilateral regulations, is the betterment of the host societies.

The 2015 significant refugee crisis and large refugee movements were the conduit for the international community to address issues of refugees and migrants, comprehensively which resulted in the adoption of the New York Declaration on Refugees and Migrants.⁵ Then, during two years of negotiations, the General Assembly endorsed the Global Compact for Safe, Orderly and Regular Migration.⁶ Its adoption precedes extensive negotiations involving state policymakers in different regions of the world. It is the first-ever international cooperation framework for addressing issues that concern not only the current world's 258 million migrants, but future migrants, countries of origin, transit, and destination⁷. State representatives signed the agreement on December 10, 2018, at the international conference in Marrakech. Its primary purpose was to better regulate migration on a local, national, regional

⁴ Statement by the government of Sweden regarding Global Compact. Accessible at:

<http://www.un.org/en/conf/migration/assets/pdf/GCM-Statements/sweden.pdf> (17.05.2019)

⁵ New York Declaration for Refugees and Migrants, adopted 19.09.2016, UN GA Resolution 71/1.

⁶ UN GA Resolution to endorse the Outcome of the Intergovernmental Conference, 73/1, 14.12.2018.

⁷ Press release, General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants 19.12.2018. Accessible at:

<https://www.un.org/press/en/2018/ga12113.doc.htm> (15.06.2019)

and global level; and increase state cooperation, address cases that force people to move, raise protection and respect of rights of migrants, reduce risks for migrants, and provide them with care and assistance.

However, the adoption of the Compact did not get recognition among all UN Member States. The voting resulted in one hundred and fifty-two votes in favour, five against (Czech Republic, Hungary, Israel, Poland and the United States) and twelve abstentions. At the same time, states adopting GCM argued that it was an essential landmark in the history of migration, and anticipated that its strategic objectives would meet and address migration challenges.⁸ The majority emphasized that migration is a shared responsibility for the countries of origin and for destined ones, stressing on the necessity of international cooperation, and underlining benefits of migration for hosting countries. Besides, it was argued that migration is not a human right; GCM should uphold the principle of state sovereignty.⁹

The United Nations prepared the compact under its auspices. That said, and it does not represent a legally binding instrument, but it is based on the previous human rights instruments and commitments of states aiming at regulating all aspects of migration. It contains a range of principles that establish how states could address migration. Some examples of these principles comprise the respect of state sovereignty, responsibility-sharing, non-discrimination, protection of human rights, and others. Similarly, it provides 23 detailed objectives and detailed action plans for the management of migration at the local, national, regional, and global levels.

Global Compact is characterized by ambiguity in its legal status, relation to other existing instruments and its impact on international law. The compact is not legally binding in that it respects state sovereignty over the formulation of its national migration policies; hence, it

⁸ General Assembly Endorses First-Ever Global Compact on migration accessible at: <https://www.un.org/press/en/2018/dev3375.doc.htm> (20.09.2019).

⁹ Intergovernmental conference on the global Compact for Migration, 1st-4th plenary meetings, accessible at: <https://www.un.org/press/en/2018/dev3375.doc.htm>(20.09.2019).

does not enforce upon states the receipt of migrants¹⁰. However, it calls states to cooperate to “foster international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone.”¹¹ Non-signatories to the Compact claim that it contradicts with their national interests. Its adoption raised debates among different stakeholders, NGOs, civil society, and even led to demonstrations in some countries.

Global Compact belongs to the category of soft law instruments; those agreements that pave the road for political and moral commitments to the policymakers, not intending to create legal obligations for them. However, some scholars say that being non-legally binding, it can develop a politically binding impact on the field of migration.¹² Non-binding agreements such as GCM is not a traditional source of international law, can be categorized as soft law, which they are deprived of the legally binding force. However, they can be utilized as a forerunner of hard law with the potential of becoming a customary law. The role of the soft law instruments will be explained in detail later in this thesis.

This thesis consists of three chapters. The first chapter provides an overview of the Global Compact and the development process of its adoption, the meaning of the term compact under the international law, the possible reasons for this choice of this particular form of the international agreement, its main goals and objectives, and the reaction of the involved states, and the challenges facing its implementation.

The second chapter focuses on the establishment of its legal status with focus on determining the type of instrument the Global Compact through the analysis of customary international law and its elements such as state practice as an element of customary law, *opinio juris*, the role of the soft law in the UN practice, and the legal effect of UN General Assembly Resolutions. The main research question of this chapter is: Can political documents become an expression of customary international law? If yes, under what conditions?

¹⁰ ‘Historic moment’ for people on the move, as UN agrees first-ever Global Compact on migration, UN News 13 July 2018. Retrieved 18 January 2019.

¹¹ Global Compact for Safe, Orderly and Regular Migration, New York, 19.12.2018.

¹² Hansen G.T, Guild E, What is a compact? Migrants' Rights and State Responsibilities regarding the design of the UN Global Compact for Safe, Orderly and Regular Migration, Raoul Wallenberg Institute, p.8, 2017.

The third and last chapter aims at assessing the possible normative and political impact of Global Compact likely have on international migration law.

The research problem of this thesis is that GCM legal authority and its possible normative impact on the field of international law is unclear because it belongs to the category of soft law. Furthermore, the status of soft law instruments is debatable because of its possible implications and place among the sources of international law.

Furthermore, despite the global nature of migration, there is no formal institutional framework, and the governance of international migration law does not have a tradition of comprehensive international regulation.¹³ Instead, it is governed through a range of multilateral, regional, bilateral instruments. This situation provides for the states a high degree of autonomy. At international and regional levels it is traditionally regulated through non-binding, informal instruments. It is fragmented, and thus regulated as a cross-cutting field throughout various areas such as human rights law, trade law, humanitarian law, labour law, refugee law and maritime law because cooperation of the global level meets with some barriers and conflicting interests among the states. Many governments lack migration policies or the capacity to implement its current policies of relevance. Enacted policies usually focus on one aspect of migration.¹⁴ There is no comprehensive treaty governing all aspects of migration and adoption of formal treaties are rare; however, there are many agreements relating to migrants' status, and addressing human rights. Thus, adoption of the Global Compact can be considered as the first attempt that Heads of State and Government came together within the UN General Assembly on the global level with the active participation of civil society which is a quite innovative characteristic of the international instrument to address migration systematically and to establish a comprehensive approach to human mobility and enhanced cooperation at the global level¹⁵. However, its adoption brings forth many debates in regards to its impact on international migration law. States have treated it as

¹³ A. Betts, Introduction to migration governance, Oxford Scholarship Online, 2011, p. 1.

¹⁴ Report by the Secretary General, In safety and dignity: addressing large movement of refugees and migrants, 2016, para 14, accessible at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/59&=E%20

¹⁵ "Global Compact for Migration", International Organization for Migration. Accessible at: <https://www.iom.int/global-compact-migration>

a political agreement rather than a legal document, as its status and implications for the international migration law are not clear. It is treated as a soft law vehicle for cooperation; albeit carrying commitments that urge states to come up with national implementation plans that can be regularly reviewed and monitored. As a result of this ambiguous binding nature, some states decided not to join, deeming that it does not resonate with their national migration policies and the concept of state sovereignty, as of its ambiguous legal status in regards to accepting migrants. The behaviours of the said states make the situation around the Global Compact quite complicated.

To conduct the study, I formulated the following research questions:

- What type of instrument is the Global Compact for Migration? Is it one of the sources of international law? Is it soft law? What factors compel states to comply with soft law?
- Can it create new rules of customary international law in the future?
- What impact, legal or political, can it have on the development of international migration law?

The study hypothesizes that the Global Compact has the potential to have an impact on international law as a soft law instrument in several ways. Soft law can fill gaps in law in the absence of the binding force of the treaty. While regulators present the compact as non-legally binding instrument, it is believed that it is still politically binding, and consequential for signatory states. States have obligations under international migration law, which they must fulfil. UN Representative on migration, in his note, held that GCM could lead to the adoption of new specific treaties. Also, it can serve as a substitute for missing hard law and add some details to existing international instruments guidelines for the interpretation of hard law.

The objective of this thesis is to establish what is the legal status of the Global Compact and its potential impact on international law.

Regarding the methods used in this study, the author primarily used the analytical method to interpret the literature of pertinence to the Global Compact (including its text), its main

principles and values, the process of its development. Drafts of the Global Compact, discussions of states in relation to GCM were analysed. The author also analysed scholarly literature in particular on the theory of sources of international law which is concerned with soft and customary international law. The UN GA resolutions were analysed as sources in order to establish what is the legal status of GCM. In order to establish a possible normative impact, the author also relied on academic literature.

The importance of this work lies in the novelty subject of the research, as due to the recent adoption of the agreement and the lack of sufficient research conducted on the topic.

Keywords: migrants, migration policy, customary law, sources of law, human rights.

1. OVERVIEW OF THE GLOBAL COMPACT

1.1 The Development Process of the Global Compact for Migration

The President of the UN General Assembly emphasized in his speech that the Compact can guide us from “reactive to proactive mode. It can, also, help us draw benefits from migration, provide a new platform for cooperation, and find the right balance between the rights of people and state sovereignty that, theoretically speaking, in turn protects the right of their citizens.”¹⁶

This chapter focus on the genesis of the GCM, its content and barriers in its implementation.

People throughout history had various reasons to migrate. Hence, migration has always been a reality, but in today’s interconnected world, this reality needs more attention from the policymakers for its impact on the states. This interconnected world is characterized by more accessible and cheap transportation that helps in people’s mobility while searching for jobs, education, and by communication mediums as social networks, and other opportunities that contribute to human mobility.¹⁷

The number of migrants worldwide continued to grow rapidly, “reaching 258 million in 2017, up from 220 million in 2010 and 173 million in 2000, 102 million in 1980”¹⁸. The majority of migrants live in Asia – 80 million, Europe – 78 million, Northern America hosted 58 million migrants, Africa – 25 million, Latin America and the Caribbean – 10 million, Oceania – 8 million.¹⁹

¹⁶ S. Fella, The United Nations Global Compact for Migration. Vol. 8459, House of Commons, Briefing paper, 5.12.2018, p.10, accessible at: <https://www.parliament.uk/commons-library>

¹⁷ Report by the Secretary General, In safety and dignity: addressing large movement of refugees and migrants, accessible at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/59&=E%202016, para 22.

¹⁸ International migration report 2017, Highlights Key Facts. Accessible at: https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017_Highlights.pdf

¹⁹ United Nations, Department of Economic and Social Affairs, Population Division (2017). International Migration Report 2017: Highlights(ST/ESA/SER.A/404).

Migration provides positive impacts for the destination countries: economic growth and labour market. The General Assembly recognized that human mobility is a crucial factor for sustainable development.²⁰ In particular, it concerns the labour market. On that note, findings from a study conducted by the reputable McKinsey indicate that migrants make up about 3.4 per cent of the world population.

UN's special representative on migration held in his report that migration contributes positively to the development of societies by improving their labour market, as migrants create jobs, as well as entrepreneurs, do, pay taxes and bring to light new ideas.²¹ In addition to providing cultural diversity to host societies, migrants of science can contribute to the prosperity of the research and development realm.

Despite their positive contributions, migrants remain vulnerable to the challenges and barriers members of host societies lay before them. Such challenges can be realized in their sought for finding jobs, settlement in slum-kind-of-residences, confront of discrimination and in being victimized by human trafficking and abuse.

Discussions among representatives of different states on adopting the Global Compact highlighted the importance of multilateral cooperation on the level of the state, civil societies, regional organizations, to address root causes of mass movements, economic poverty, inequality, natural disasters and inhuman living conditions. Official representatives highlighted that fighting with misconceptions about migration is essential. For example, League of Arab States representatives said that the Arab World was one of the causal sources

Accessible at:

https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017_Highlights.pdf

²⁰ Report of the Secretary General, op.cit, p. 5.

²¹ Report of the Special Representative of the Secretary General on migration, accessible at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/71/728&=E%2003.02.2017, p.6.

of increasing migration. They highlighted that it is necessary to settle conflicts and to deal with xenophobia and human trafficking.²²

Discussions and adoption of instruments, governing migration issues are not new at the international level. However, international migration is one of the areas on the global agenda that lack a single comprehensive treaty. The international community attempted to regulate migration through international conventions and bilateral agreements. Rights of migrants can be found in international instruments such as the 1949 Migration for Employment Convention, 1975 Migrant Workers Convention, 1990 Migrant Workers Convention, and 2000 Palermo protocols on human trafficking and migrant smuggling.²³ They can be found, also, in the Convention against Transnational Organized Crime, international labour standards in relevant International Labour Organization conventions. The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, however, there are only 66 states which are parties to this convention, which are mainly Southern states. No country from western Europe, in particular, the European Union, ratified the Convention. There are mainly bilateral and regional treaties focusing on different aspects of migration.²⁴

The conflicting interests on migration issues preventing reach consensus among states.

For the last years, the international community witnessed massive displacement of people because of a variety of reasons: armed conflicts, natural disasters, and grave violations of human rights. Forced displacement caused large-scale spillover of migrants/refugees as in the case of the warring Syria, wherein 2015 millions of people seeking asylum in neighbouring countries such as Lebanon, Turkey, and Jordan. In the same year, more than one million

²² International conference on Global Compact for Migration, DEV/3377, Global Compact an Achievement in Multilateralism, 10.12.2018, accessible at: <https://www.un.org/press/en/2018/dev3377.doc.htm>

²³ Migration for employment convention 01.08.1949, e.i.f. 22.01.1952, Migrant Workers Convention 04.07.1975, e.i.f. 09.12.1978, International Convention on the Protection of the Rights of All Migrant Workers and members of their families. UN General Assembly. 18.12.1990, e.i.f 01.08.2003.

²⁴ M.K. Solomon, S. Sheldon, The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly and Regular Migration, *International Journal of Refugee Law*, Volume 30, Issue 4, December 2018, p.586.

refugees and migrants arrived in Europe²⁵, resulting in significant exposure to the phenomenon and more reactions of some powerful states on the international arena. During transit, such people faced arbitrary detentions, kidnapping and drowning in the sea. These ramifications diverted officials' worldwide priorities towards migrations related issues. It, also, led to recognizing that many of those risking their lives were not refugees by definition as in the Refugee Convention 1951, but migrants.²⁶ The death of people in the Mediterranean Sea called for action, requiring coastal states of proximity such Malta, Italy, and Greece to approve the entrance of large numbers of migrants into their lands. This situation urged the affected countries to call for action and to start negotiating migrants and refugees issues internationally.

Special Representative of the Secretary-General for International Migration, Peter Sutherland, came up with an idea to organize an international conference to provide more donor funding in order to deal with mechanisms related to migration and to accepting refugees.²⁷ On 19th of September, 2016, the General Assembly High-Level Meeting on Large Movements of Refugees and Migrants took place. It was attended by heads of states and governments, ministers UN leaders, and members of private sector, civil society, international organizations and academia, aiming at addressing the problem of migrants and refugees massive movement, and strengthening cooperation on migration and initiating a two year process for developing two global compacts on refugees and migration. The summit resulted in the General Assembly adoption of the resolution 71/1, "New York Declaration for Refugees and Migrants." It was a precursor to addressing the issue of large movements of refugees and migrants reflected in the GCM.

²⁵ Over one million sea arrivals reach Europe in 2015, accessible at:
<https://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>
(10.09.2019).

²⁶ M.K. Solomon, S. Shelton, The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly and Regular Migration, *International Journal of Refugee Law*, Volume 30, Issue 4, December 2018, p.585.

²⁷ Report of the Special Representative of the Secretary General on migration, 03.02.2017

The full text of the GCM was finalized by member states on July 13, 2018. Participants agreed to hold an intergovernmental conference on the Global Compact for Migration in Marrakech, Morocco, on 10th and 11th of December, 2018, where 164 UN Member States adopted it. Then it was endorsed by the UN General Assembly by the majority of 152 votes in favour, 5 against and 12 abstentions. 24 States did not take part in the voting process. Obviously, countries, voting in favour of the GA Resolution endorsing GCM, were less than those approving it in Marrakech.²⁸

The negotiation process of the adoption of the Global Compact consisted of several steps and involved different participants from a wide range of concerned players to build a better understanding. Its negotiations covered all regions such as Latin America and the Caribbean, Asia, Pacific, Europe and the Middle East, in order to highlight realities and migration trends in each region. They involved multiple hearings from different actors such as representatives of non-governmental organizations, civil society organizations, academic institutions, parliaments, diasporas, migrants, migrant organizations, private sector and civil society consultations.²⁹ The adoption of the compact was the result of a two-year negotiation process involving 193 countries.³⁰

Global Compact was not approved on a unanimous level due to its ambiguous binding evolutionary nature (it might become a customary law) in that disapproving states feared that approving it might hold them accountable in case they did not receive migrants, by which contravening their domestic migration policies; hence, their sovereignty.³¹

Five-member states voted against - the United States, Hungary, the Czech Republic, Poland and Israel, twelve abstained, and one did not vote. The main concerns are threats to national

²⁸ A. Bufalini, The Global Compact for Safe, Orderly and Regular Migration, What is its contribution to International migration law, *Questions of International Law*, 30.04.2019, p.7.

²⁹ Refugees and migrants. Accessible at: <https://refugeesmigrants.un.org/stakeholder-consultations> (10.09.2019).

³⁰ K. Newland, The Global Compact for Safe, Orderly and Regular Migration: An Unlikely Achievement, *International Journal of Refugee Law*, Volume 30, Issue 4, December 2018, p. 658.

³¹ A. Peters, The Global Compact on migration: to sign or not to sign, EJIL talk, Blog of the European Journal of International law, November 2018, available at: <https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/> (11.08.2019).

sovereignty, security, public policy and the governmental agenda, and encouragement of mass movements of migrants. The US did not participate in the negotiations. The United States adopted a national statement where it provides objections to signing the Global Compact on Migration. Some reasons for the emergence of this US behaviour can be concluded: firstly, the compact limits the national ability to make decisions regarding migration. Not for the US, but it might impose legal obligations in the future. Secondly, it does not draw a line in the sand between foreign nationals and those who entered the country unlawfully. It does not address large numbers of foreign nationals residing illegally in many states, which undermines the rule of law and limits the ability for states to consider new forms of legal immigration.

Moreover, apart from general objections, it does not agree with specific provisions as: “detention must be the last resort”, which will eliminate detention requirements with illegal migrants, “best interests of the child.” They claim that it cannot impose obligations on the US, which is not part of the Convention of the Rights of the Child, and that it has a sovereign right to define the detention of the minors. Also, it promotes, in the eyes of the US, unrealistic access to social services for migrants – it sets the expectation that states must provide higher services than they might provide for migrants, whom refugee status does not apply to them. It conflicts with international instruments such as Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of the Child as it refers to them, but many countries are not parties.³² And above all, the current US administration, headed by Donald Trump, is not an internationalist-directed government; hence, it would be highly unlikely to consolidate the work of international organizations.

The Australian government expressed a decisive stance, stating clearly that “Global Compact on Migration is inconsistent with well-established policies and not in Australia’s interest. The Australian government does not believe that it will add anything to manage a successful

³² National Statement of the United States of America on the Adoption of the Global Compact for Safe, Orderly, and Regular Migration, accessible at: <https://usun.state.gov/remarks/8841>, December 7, 2018 (02.08.2019).

immigration program; it fails to distinguish between legal and illegal migrants; it will encourage illegal entry into the country.”³³

Other countries such as Bulgaria, Croatia, the Czech Republic, Hungary, Israel, Poland, Slovakia, and Switzerland did not sign the Compact having comparable concerns.

Hungary’s case raises objections on national sovereignty and the threat of a wave of economic migrants. The Hungarian foreign minister, anxious about the security of the Hungarians stated that it “could lead to a fresh wave of migration, concerns the fact that migration is a positive process that must be encouraged, and accordingly new migration channels must be opened, and migrants cannot be differentiated based on their legal status.”³⁴ Also, he confirmed that the exchange of population among continents leads to the development of parallel societies, a situation that augments the threat of terrorism. Moreover, he claimed that migration is a dangerous phenomenon that should be stopped.³⁵

Indeed, cooperation in the field of migration had always been viewed by states as contradicting national policy. Among the other barriers are conflicting interests, asymmetrical power, disagreement of possible benefits of migration, sovereignty, national public opinion on migrants.

For example, regarding sovereignty, many states argue that migration governance is competence for the national governments and they prevent global institutions from establishing migration policy. For example, on the level of EU Poland, Czech Republic and Hungary refused to participate in the relocation plan on these concerns.

³³ National Statement by Australia 21.11.2018, accessible at: <https://www.pm.gov.au/media/global-compact-migration> (01.08.2019).

³⁴ Opposition to The Global Compact for Migration is Just Sound and Fury
Accessible at: <https://www.forbes.com/sites/freylindsay/2018/11/13/global-compact-for-migration-sound-and-fury/> (01.08.2019)

³⁵ The UN Global Compact for migration is endangering the security of the Hungarian people
Accessible at: <https://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/the-un-global-compact-for-migration-is-endangering-the-security-of-the-hungarian-people> (10.08.2019).

Another quite common barrier is negative public opinion on migrants in some countries. For example, in Europe, only 30% view migrants as positive contributions to their society, remains concern about public security and other similar issues.³⁶ Also among other reasons which prevent active cooperation are different interests between the North, which focus more on border controls, security screening, readmission agreements and the Global South focusing on labour rights of migrants, family reunification. So, it is proved by the fact that the 1990 Convention on the Rights of Migrants Workers was not ratified by any European States.³⁷

Concerns of non-signatory states might not be in place as the GCM contains a quite broad set of guidelines and menu of options for each objective to achieve. States have an attitude on deciding how to implement these elements. Still, migration circumstances vary widely in different regions, and traditional barriers such as conflicts between North and South prevent for states of and making it extremely difficult for such states to commit to a common binding agreement. Consequently, it is a beginning for the international community to address issues of migration, not the endpoint.

1.2 Meaning of the Compact under the international law and reasons why states choose this form of the agreement

The aim of this subchapter is to establish what is the meaning of the Compact and why states choose this particular form to address issues of migrants. The term compact means “coming together of pacts”, and it involves different actors together.³⁸ “Global Compact” is the English term; however, in other official UN languages, other terms are used. For example, in French, it is “Pacte Mondial” and “Pacto Mundial” in Spanish, while in the Russian language it is “Пакт” – pact”.

³⁶ N.R. Micinski, T. G. Weiss, *Global Migration Governance: Beyond Coordination and Crises*, The Global Community Yearbook of International Law and Jurisprudence 2017, p. 2.

³⁷ Ibid, p. 2.

³⁸ Hansen G.Tomas, Guild Elspeth. *What is a compact? Migrants' Rights and State Responsibilities regarding the design of the UN Global Compact for Safe, Orderly and Regular Migration*, 2017, p. 11.

The Usage and application of the instruments under the name “Pact” are more common, rather than “Compact”. The term Pact or Compact is used to refer to non-binding agreements between states. However, it is not new, and some international instruments were adopted under this name. For example, the Paris Pact Initiative was more political instrument rather than legal which is an essential framework to combat drugs trafficking and consumption in the Afghanistan Region.³⁹ Another example is the UN Nations Global Compact which is also non-binding to platform for business to adopt sustainable policies and report for their implementation. An additional example is the Jobs Pact which was adopted by the International Labour Organisation as a non-binding call for states to respect fundamental rights at work, social protection, and other related issues.

The common features of these agreements are that they are non-binding, quite flexible, and contain vague goals. They do not have adequate and enforcement provisions and emphasize networking and cooperation between different stakeholders like organisations. They can be characterized more as a platform for discussion and network. Using the word “Compact” instead of Pact might mean govern migration through public-private participants and their cooperation. The GCM include provisions that Global Forum on migration and development is a platform for partnerships, networking’ devices,⁴⁶ and primarily involve the sharing of best practices.⁴⁰

The next question following from the analysis of its name is to establish the legal nature of the GCM. There are following elements which should be taken into account when determining the legal nature of the instrument: the intention of the parties, its form, content.

Under international law, it is generally excepted that the intention of the parties is crucial in determining whether the particular instrument is non-binding. If parties of the instrument clearly stated that they don’t intend to create legal obligations, therefore it cannot be considered legally binding.⁴¹ Another essential element is the content and context of the document. The circumstances of its adoption, nature of provisions either they are precise or broad. It is accepted that precise commitments and adoption of the instrument in the context

³⁹ Paris Pact Initiative. 22.05. 2003

⁴⁰ Global Forum on Migration and Development, accessible at: <https://gfmd.org/pfp> (10.10.2019).

⁴¹ P. Gautier, Non-binding agreements, MaxPlanck Encyclopedias of International Law, 2006, p. 5

of negotiations lead to legally binding agreements.⁴² In relation to form, it is argued that form is not crucial in establishing legal nature. Political expression or will of the parties should be clearly stated; otherwise, court can not characterize as a non-binding agreement. Thus, applying these rules to GCM, it can be concluded that it is a non-binding instrument because of states clearly statements, it's quite vague wording, soft implementation.

Hence, there are several possible reasons why states choose this form in order to address critical issues for the international community. Firstly, the choice in favour of non-binding Compact is that migration policies and internal society attitude are various in all states. Furthermore, its quite complicated to adopt a binding treaty like already exist in international refugee law because of conflicting interests among the states.⁴³

Secondly, GCM being a soft law instrument provides a broad set of goals, principles and actions, which allow a state to choose how to implement and which steps to take. It has a quite uncertain legal status that could provide states with manoeuvre possibilities and different interpretations.⁴⁴

Thirdly, it allows states to avoid the implementation of the underlying objectives of the compact by applying a time-consuming process of analyzing, ratifying, and adapting it on the national level.

Moreover, GCM provides an opportunity for non-state actors, e.g. civil society and academic organisations to actively participate in migration governance by actively contributing throughout the negotiating process of GCM.

⁴² Ibid, p. 6.

⁴³ Solomon Michele Klein, Sheldon Suzanne. The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly, and Regular Migration. – Vol.30, International Journal of Refugee Law, 2018, p. 590.

⁴⁴ Bufalini Alessandro. The Global Compact for Safe, Orderly, and Regular Migration, What is its contribution to International migration law. – Vol. 1 Questions of International Law, 2019, p. 9.

Thus, the previous adoption of numerous bilateral and international instruments regulated only specific fields of migration law. Cooperation in the field of migration is quite complicated because of conflicting interests among states and difficulties in reaching a consensus that satisfies North and South interests. Therefore, the choice in favour of an informal instrument can be seen as the beginning where the international community sets out the direction for future actions. Indeed, GCM it is the first achievement on the global level where apart from states and civil society, other stakeholders play an active role. Such role can be viewed as a bridge between states and society because they might be able to exercise additional political pressure on states and provide sufficient support for migrants in terms of their integration, assistance, and rights protection. Therefore, GCM establishes a voluntary platform for states cooperation, exchange best practices among NGOs, and in facilitating and implementing existing commitments which comprise in international instruments.

1.3 The progressive provisions of the GCM

This subchapter analyzing the new provisions and elements included in GCM can constitute as a progressive because of their possible contribution to the development of international law. As it underlined in the Preamble of the GCM, it is based on the existing human rights instruments. Indeed, many of the existing provisions of GCM are flowing from migration Convention as well, but less detailed. Indeed, the Convention on Migrant rights was ratified by the deficient number of states, in comparison with other treaties which shows lack of the political will, unpopularity of regulating rights of migrants.⁴⁵ Furthermore, apart from this Convention, other treaties relating to migrants got disinterest among states such as No 97 and No 143.⁴⁶

The GCM included 23 objectives to better govern migration at the local, national, regional, and global level. Each objective sets out the following actions that can be drawn.⁴⁷

⁴⁵ A.Pecoud, P.Guchteneire, Migration, human rights and the United Nations: an investigation into the low ratification record of the UN Migrant Workers Convention, Global Migration Perspectives No. 3, 2004, p. 7.

⁴⁶ Migration for employment convention, op.cit., , Migrant Workers Convention, op.cit.

⁴⁷ GCM, op. cit.

The first, and one of the new, objective is about improving migration data: The objective encourages to “Collect and utilise accurate and disaggregated data as a basis for evidence-based policies”. Data on migration can help develop and better manage migration policies, and thus, bring benefits for countries. What is problematic is that data on transnational migration is quite limited and not sufficiently shared among states.⁴⁸ GCM provides an opportunity for states to improve the governance of data migration and data sharing. This objective includes 11 actions that aim at improving migration statistics, elaborating standards to measure migrants flow, supporting further development migration databases and producing countries migration profiles. One of the new recommendations posited in the document is a further development of Global Migration Data Portal, which collects migration data regarding migration governance in a number of countries and related to information about missing migrants, victims of human trafficking, irregular migrants' flows, and other relative information on different topics. Monitoring collection of data was assigned to utilizing Big Data as one of the methods recommended for data collection and analysis. Traditional sources of storing data migration such as population census and administrative sources are characterised by the gaps in quality and quantity; they are usually costly and conducted infrequently.⁴⁹ However, with the development of technologies, the vast majority of data are collected through digital devices, which provide the potential to contribute to migration data. New data sources include: mobile phone call detail records, internet activity such as google searches, IP addresses of websites login and send emails and online media content.⁵⁰ Facebook data can also be useful; for example, it could provide information about users claiming to settle in a country other than that they are settling in. Hence, new sources of information can be of utility in locating migrants, and that includes LinkedIn, which can provide data on the movements of highly skilled workers for further analysis. In 2018, the Big Data for Migration was launched to make progress in the area of data mining and analysis. Lastly, it is worth noting that the use of technology urges for the revision of the current laws and policies to introduce tech-friendly policies (digitization policies).

⁴⁸ IOM Global Migration Data Analysis Center, Data bulletin series, Informing the implementation of the Global Compact for Migration, 2018, p.13.

⁴⁹ Ibid, p. 25.

⁵⁰ Data bulletin series, Informing the implementation of the Global Compact for Migration, opt.cited, p.25.

Other new objectives are aiming in facilitating mobility; objective 5 paragraph 21 states “enhance availability and flexibility of pathways for regular migration”⁵¹. This objective means to provide easy access for migrants to travel documents such as visas and residence permits, or reducing it. It is also comprised in the 2030 Agenda for Sustainable Development stating “facilitate orderly, safe, regular migration and mobility of people..” Some scholars say that in order to facilitate mobility, it requires political leadership, which is missing in migration policy. However, these objectives do not sound very realistic because of nationalist policies in many countries.

Also, one of the innovative provisions is the inclusion objectives devoted to the recognition of climate migrants and states commitments to deal with climate changes.⁵² During negotiations, some state debated against inclusion this provision into GCM. Objective 2 underlines that “states commit to creating conditions that allow people to lead satisfactory lives in their countries and that desperation and deteriorating environments do not compel them to seek a livelihood elsewhere through irregular migration”⁵³ Particular actions include preparedness for such events such as evacuation planning, reception, assistance (para18(j)), ensure access to humanitarian assistance (18(k)) and address challenges of migration⁵⁴.

Some other progressive elements of the GCM is inclusion category of “migrant”. The previous instruments relating to migration mainly refer to “migrant worker”. For the states who are not parties the Convention on the Protection of Rights of All Migrant Workers inclusion “migrant” instead of “migrant worker”, replacement of “illegal” and “legal” to “irregular” and “regular” is called progressive because it goes beyond existing instruments and not used by most states.

⁵¹ GCM, objective 5.

⁵² W.Kälin. The Global Compact on Migration: A Ray of Hope for Disaster-Displaced Persons, *International Journal of Refugee Law*, vol. 30, issue 4, 2018, p. 665.

⁵³ GCM, objective 2.

⁵⁴ GCM, op.cit. para 18 (k), (j).

However, in spite of reference of the GCM to human rights treaties, the relationship between human rights law and migration is contested. International human rights instruments are designed to protect everyone, regardless of one's status. However, in practice, the level of protection is divergent; the set of rights is different for citizens and migrants. Among these rights are the protection of private and family life, right to liberty, and the protection against expulsion. Only vague references are made to these rights in the GCM. Detention is quite common practice for migration control, (for example, in the USA, there is a regulation to detain migrants' families who cross the border with their children illegally). Regarding the right to family life, it is not uncommon for states to apply different rules when it comes to the marriage of migrants when compared to their citizens⁵⁵. Article 1 (2) of the International Convention on the Elimination of All Forms of Racial Discrimination excludes differential treatment based on citizenship: "that the treaty 'shall not apply to distinctions, exclusions, restrictions or preferences made by a state party between citizens and non-citizens'". General Recommendation of the CERD Committee says that human rights should be enjoyed by every person. However, differential treatment is justified if it pursues a legitimate aim and proportionate.⁵⁶

Bottom-line is that GCM provides a new platform for states to uphold and improve the human rights of migrants.

1.4 Implementation of the Global Compact

The final part of the GCM includes provisions about how to achieve implementation, follow-up and review mechanisms. To achieve effective implementation, GCM presupposes numerous ways: establishing national and regional action plans, research and information centres, capacity building mechanism, UN network on migration and review forums. It emphasizes on the importance of international cooperation through bilateral, regional, multilateral cooperation considering national realities, capacities, level of development, and

⁵⁵ E. Guild, The UN Global Compact for Safe, Orderly and Regular Migration: What Place for human rights, *International Journal of Refugee Law*, Vol. 30, 2019, p. 662.

⁵⁶ CERD General Recommendation XXX on Discrimination Against Non Citizens, 1 October 2002.

respecting national priorities. Cooperation is linked to the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda.

Its implementation also assumes the creation of institutional mechanisms and active cooperation with the existing ones such as International Organization for Migration, Global Forum on Migration and Development, which is responsible for information exchange regarding GCM, share practices and policies; crucial newly created platform is the UN Network on Migration.

An innovative aspect of the implementation of GCM is found in paragraph 44, where states commit themselves to cooperate with migrants, civil society, migrant and diaspora organizations, local authorities, private sector, national human rights institutions, the media and other relevant organisations.⁵⁷ This provision is quite unusual for the international instrument as it actively and heavily engages with non-state actors. This acknowledges the multifaceted role of actors involved in the protection of migrants rights.

Para 40 states that “For the effective implementation of the Global Compact, we require concerted efforts at global, regional, national and local levels, including a coherent United Nations system.”⁵⁸

The primary way to execute all the principles and guidelines in the Compact is that member states resort to collective actions as the only states having the sovereign right to pass national legislation in regards to formulating migration policy. The GCM is clear, in that, states are the main actors to apply Global Compact; they can provide relevant data, evidence, best practices, innovative approaches and recommendations as they relate to the implementation of the Global Compact for Safe, Orderly and Regular Migration⁵⁹. Review mechanism at the national level presupposes the examination of national laws and policies, in order to ensure the effective integration of migrants.

⁵⁷ GCM, para 35.

⁵⁸ GCM, op. cit. para. 40.

⁵⁹ GCM, op. cit. para. 44.

In this case, Global Compact calls states to elaborate regional and national action plans for its implementation, and to conduct frequent reviews. Action plans are the key to the implementation because they are elaborated by the states.

Some states have already started working towards GCM implementation. For example, Morocco has adopted a draft of a national action plan for the GCM implementation. To each objective of the GCM, the government has envisaged specific actions:

Regarding migration data, the measures presuppose “Launch a centralized website for Moroccans residing abroad, for migrants residing in Morocco and future migrants in order to provide comprehensive and accessible information on migration issues”.⁶⁰ On objective 23 (strengthening cooperation), it offers to reinforce the South-South Cooperation over issues related to migration. On objective 19, actions envisaged are to support networks of migrants talents and to build databases.⁶¹

Some governments in Latin America also committed to working towards the revision of their current laws and legislation in light of GCM principles and values. On the other corner of the world, South Korea is working on analysing shortcomings of its national laws, and Bangladesh is developing a draft of a national strategy for implementation.⁶²

On a different note and apart from the national level, GCM calls regional relevant bodies to participate in its implementation. States should embark on this mission to encourage regional bodies to prepare implementation plans, and report every four years to the regional executive body.⁶³ For example, on the level of the European Union is Frontex – the EU Coast and Border Guard and the EU Fundamental Rights Agency - should provide annual reports regarding GCM implementation.⁶⁴

⁶⁰ Global Forum on Migration and Development, National Implementation of the Global Compact for safe, orderly and regular migration, 2019, accessible at: <https://www.gfmd.org/process/gfmd-and-gcm>, (12.11.2019).

⁶¹ Ibid

⁶² T. Domicelj, C. Gottardo, Implementing Global Compacts: the importance of a whole-of- society approach, accessible at: <https://www.fmreview.org/education-displacement/domicelj-gottardo> (05.11.2019)

⁶³ J. Monnet, E. Guild, GCM Indicators: Implementation, Follow-up and Review, RLI Blog on Refugee Law and Forced Migration, 2019. Available at: <https://rli.blogs.sas.ac.uk/2019/06/10/gcm-indicators-implementation-follow-up-and-review/> (15.09.2019).

⁶⁴ Ibid

One of the first attempts to discuss current progress on GCM implementation after the adoption of the GCM was the Thematic Workshop organised by the Global Forum on Migration and Development, where 89 UN Member States participated and discussed challenges in this field. IOM Deputy Director-General emphasised that “one size fits all” model cannot work for GCM implementation, meaning that every state will need to determine for itself what steps to take.⁶⁵ States should take a selective approach to match their national priorities and strategies to GCM objectives.

At the workshop, there were also highlighted existing challenges in the implementation of GCM:

- Difficulties in explaining laws, rules to new arriving migrants;
- Lack of migration data
- A false perception of GCM
- Anti-migrant sentiments in some countries
- Lack of financial sources⁶⁶
- Restrictive migration policies

The other implementation element included in the creation of specialised centres for research that call for experts and researchers papers and proposals for GCM implementation, information dissemination, crisis analysis to centralise collection migration data and monitoring a massive influx of migrants. Another type of research centres at the national level are special service points, which would provide support and counselling to people. The centres will include information regarding population movement, migrant’s deaths and trafficking. These centres will provide information to share best practices and for promoting better coordination.⁶⁷

⁶⁵ Global Forum on Migration and Development, Thematic Workshop “Implementation of the Global Compact for Migration at the National Level, 21-22 March 2019, Geneva, p. 2.

⁶⁶ Ibid, p. 4.

⁶⁷ N. R. Micinski, Implementing Global Compact for Migration, The Role of States, UN agencies, and civil society, June 2018, p.1.

The global knowledge platform aims at gathering best practices and evidence to share with countries on the existing networks such as the World Bank Global Knowledge Partnership on Migration and Development.

GCM also introduces the idea of creating United Nations network on migration to effectively second states GCM implementation; the furtherance of national implementation plans; promotion of information exchange; cooperation with civil society, NGOs and local authorities. The network has to report to the Secretary-General every two years about the progress of implementation. Participation in this network is voluntary for states.

The network seems propitious. However, being effective requires that it overcomes challenges related to securing fund, combating mistrust among UN agencies and cooperating with migrants and civil society.⁶⁸

Follow-up and review mechanisms establish international and regional forums. Every four years, starting from 2022, International Migration review forum shall take place, serving as an international platform, it is expected to address progress about the implementation of the Global Compact.⁶⁹ Each international migration forum will result in the adoption of the Progress Declaration. It aims at urging states to work out a voluntary national plan to review the implementation of the GP. Such limited frequency could jeopardize commitment implementation by states.

However, some scholars propose that in order GCM become more effective in terms of its implementation, it is necessary to take the following steps:⁷⁰

- Make provisions of the GCM more concrete for the stakeholders regarding what should be done in practice on all levels.
- Raise awareness about GCM among the civil society on the local level about their possibilities.
- Ensure the cooperation among civil society
- Raise awareness about the benefits of migration on social media

⁶⁸ T. Domicelj, C. Gottardo, Implementing the Global Compacts: the importance of a whole -of-society approach, 2018, available at: <https://www.fmreview.org/education-displacement/domicelj-gottardo>

⁶⁹ Global Compact for Safe, Orderly and Regular migration, 19.12.2018

⁷⁰ M.Jagon and others, Global Compact for Migration : a new outlook for the civil society on strengthening the global governance of migration, Regional Academy of the United Nations, p. 18.

- Create a platform for civil society to meet and exchange best practices.

Still, the implementation process of GCM does not go without criticism along with its workable approach. Firstly, its implementation did not have any visible positive results yet. In February 2019 there was an international expert symposium and conference on youth and migration organized by the IOM which were not focused on implementation.⁷¹ Also, it is critiqued because its provisions are general and lacking definite articles, which leaves room on the political arena for the states and their own interpretations in the ways of implementation. Furthermore, it is unclear how the implementation will be funded. Also, it is criticized with respect to coordination and the specificity of its timeline. Other challenges concern its monitoring process, which states that only the International Migration Review Forum will head this process.

2. LEGAL STATUS OF THE MIGRATION COMPACT

2.1 State Practice as an Element of Customary Law

Debates on the legal status and legal and political impact of the Global Compact have been intensive. It has its roots in the United Nations General Assembly Resolution – New York Declaration. The reason for such intensive debates is that the compact has a quite unclear legal nature, which does not constitute an international treaty or any other traditional source of international law. Some jurists claim that it may have legal force and become one of the sources of international law under article 38 of the ICJ.⁷² Therefore, it might be transformed into customary international law.⁷³ Despite the fact that it is not legally binding, it can

⁷¹ J. Wouters, E. Wauters, *The UN Global Compact For Safe, Orderly and Regular Migration: some reflections*, Leuven Centre For Global Governance Studies, working paper No.210, 2019, p.16.

⁷² K. Allinson, P. Erdunast, E. Guild, *GCM Commentary: The Legal Status of the UN's Global Compact for Safe, Orderly and Regular Migration in International and UK Law*, January 31, 2019, accessible at: <https://rli.blogs.sas.ac.uk/2019/01/31/gcm-commentary-the-legal-status/> (12.09.2019).

⁷³ A. Peters, *The Global Compact for Migration: to sign or not to sign*, Blog of the European Journal of International Law, 21.11.2018, available at: <https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/>

become politically binding. In this chapter, I will analyze custom as a source of international law, and the possibility of the global compact transfer to customary international law.

The following analysis will explain under what conditions and circumstances a particular rule may become customary law.

Many scholars and jurists have attempted to define what constitutes customary international law. Customary international law is an unwritten law deriving from practice and accepted as a law. It remains the most controversial source of public international law.⁷⁴ Customary international law, in comparison with other sources of international law, is not written and does not have an authoritative text. Karol Wolfke says that “customary international law comes into existence when State practice is sufficiently ripe to justify the presumption that states have accepted it as an expression of law.” For him, it is not man-created, hence, making it different from other sources of law.⁷⁵ The moment when customary norm comes into existence, it cannot be established as an intangible concept.⁷⁶ Formation of customary international law is a continuous process, but to identify a precise moment is impossible. International law lacks a determinate concept of customary international law.

Statute of ICJ and scholar literature express different formula regarding the identification of customary international law. The Statute of ICJ, draft conclusions on the identification of Customary International Law establishes a traditional two-element approach to custom.

The only source that comprises the official definition of custom is the Statute of the International Court of Justice. Its article 38 establishes sources of international law. It defines only elements of customary law, but it does not specify any guidance on the fulfilment of conditions generating it. The moment of custom creation is undetermined.

⁷⁴ Draft conclusions on the identification of customary international law, adopted by International Law Commission. International Law Commission, 2018, accessible at: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf

⁷⁵ K. Wolfke. Custom in present international law, Kluwer Academic Publishers, 1993, p. 60.

⁷⁶ Ibid, p. 60.

It includes the following sources: international conventions, international custom, general principles of law, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁷⁷

Article 38 of the Statute of the International Court of Justice contains a definition of customary international law:⁷⁸

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- b. International custom, as evidence of a general practice accepted as law;
- c. The general principles of law recognised by civilised nations;
- d. Subject to the provisions of Article 59, that only the parties bound by the decision in any particular case, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”.⁷⁹

It reflects that custom is generally considered to have two elements under which it creates valid norms of general international law: State practice, which refers to general practice by states; and *opinio juris*, which means states belief in certain obligations. They have equal value for the formation of customary international law, which is approved by academic literature and international tribunals.

Two elements supported by the orthodox view of customary law indicated the existence of customary norms. However, some theorists argue that one or another element is sufficient for the identification of CIL.⁸⁰ For example, Niels Peterson argues that customary international

⁷⁷ Statute of the International Court of Justice, San Francisco, 24 October 1945, art. 38.

⁷⁸ Ibid, art. 38.

⁷⁹ Statue of ICJ, opt. cit.

⁸⁰ S. Besson, J. Aspremont, The Oxford Handbook of the Sources of International Law. D.Lefkowitz, Sources in Legal- Positivist Theories: Law as Necessarily Posited and the Challenge of Customary Law Creation,

law can be formed even without general practice.⁸¹ Other authors argue that if a resolution was adopted by the UNGA, then state practice is not needed.⁸² Contrary to this view, is the opinion held by those espousing the legal positivist perspective. They, in turn, criticize the orthodox approach for the absence of norm creation. State belief about the existence of particular norms does not make it legal.⁸³ For them, belief is just facts about how the world is; hence, for them, it is difficult to derive an ought. Solution for identification of customary law can be found in judicial pronouncements, as an analogy to signing and ratification of treaties. Even broad consensus on the desirability of particular norms does not suffice to make it so; only the judge has the right to declare the existence of customary law.⁸⁴

International law incorporates two opposing approaches for the ascertainment of customary law. The first one is the traditional approach that assumes that custom comes from the general practice of states buttressed by a sense of legal obligation. The primary element is State practice, whereas *opinio juris* is of secondary consideration. Under this approach, the custom is identified applying the inductive reasoning premised on the examples of State practice.⁸⁵

At the same time, the modern approach to the identification of custom put under the primary consideration *opinio juris* because it relies on statements rather than actions. It results from multilateral treaties and declarations of UNGA which can generate new customs.⁸⁶ However, the Permanent Court of International Justice and the ICJ have said that customary law requires two elements. In the North Sea Continental Shelf Cases, the ICJ's two elements approach was affirmed⁸⁷.

Oxford's Handbooks online, p.330. But who is the author of the concrete article? You should refer to this within the book.

⁸¹ M. Geistlinger, Impacts of the Adoption of the Global Compact for Safe, Orderly and Regular Migration for Austria, University of Salzburg, 2018, p. 14.

⁸² Ibid, p. 14.

⁸³ S. Besson, J. Aspremont, op.cit.p. 330.

⁸⁴ S. Besson, J. Aspremont op.cit.p.331.

⁸⁵ A.E. Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, The American Journal of International Law, Vol. 95., No.4, 2001, p. 757.

⁸⁶ Ibid, p. 758.

⁸⁷ A.E. Roberts, op. cit, p. 760.

The International law Commission established that for identification of CIL, the existence of two elements is essential.⁸⁸ The first element of customary international law is State practice, which is not self-evident due to the absence of a consensual definition as we shall see later.

States, being primary subjects of international law, play an essential role in the formation of the practice, and in its examination in identifying customary law.⁸⁹ Particular state action or state omissions might determine such practice. There is no exact legal definition of what constitutes State practice. In 2016, the International Law Commission adopted a draft on the identification of customary international law, which contains provisions to identify the existence of customary international law.

State practice is expressed when a state exercises executive, legislative, or judicial power. State practice might include physical or verbal actions and inaction. Forms of State practice include diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organisation, or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct “on the ground”; legislative and administrative acts; and decisions of national courts.⁹⁰ Mark Villiger holds that “statements in the preparatory and plenary phases, the absence of “reservations” by States, and the voting records namely unanimous patterns may constitute first instances of State practice”.⁹¹

States votes on the UNGA Resolutions can present both State practice and *opinio juris* about the existence of the rule.⁹² The forms of State practice in the commentary to the International Law Commission draft articles are diverse. They include what states do and say, as verbal acts might also constitute a State practice. Examples of State practice, provided in the draft

⁸⁸ Draft conclusions on identification of customary international law, adopted by international law commission, 2018, accessible at: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf

⁸⁹ Ibid, conclusion 4, para 2.

⁹⁰ Ibid, conclusión 6, para 2.

⁹¹ Mark Villiger, Customary International Law and Treaties. The Hague, London, Boston 1997, p. 126.

⁹² M.P. Scharf, op.cit. p.313.

articles, are not exhausted and might include other acts, representing a list of possible examples. One example, it is under executive conduct “including executive orders, decrees and other measures; official statements on the international plane or before a legislature; and claims before national or international courts and tribunals.”⁹³ Under conduct in connection with resolutions, it included “acts by States related to the negotiation, adoption, and implementation of resolutions, decisions and other acts adopted within international organizations or at intergovernmental conferences, whatever their designation and whether or not they are legally binding.”⁹⁴

There are different concepts of State practice. One of them is when a state acts in the international arena, and there are no indications that particular behaviour becomes obligatory. Behavioural regularity can only be informed as custom when a subjective element is added. It means that State practice is a just fact, and only subjective element makes particular regular behaviour a norm.⁹⁵

Some scholars, like Niels Peterson, argue that customary international law is based on logical reasoning, and can come into being even without a general practice. Peterson maintains that the preparatory and plenary phases, the absence of “reservations” by states and the voting records may constitute first instances of state practice, which transitions towards a new customary rule by stating its substance and effects, and by revealing the *opinio juris* of member States.⁹⁶

After identifying the components of State practice, it is vital to determine what characterizes State practice, how to apply a particular norm in order to become practice, and how many states need to recognise it. It must be continuous and without interruption, but there are no

⁹³ Draft conclusions on identification of customary international law, op.cit, conclusion 6, para 5.

⁹⁴ Ibid, conclusion 6 para 5.

⁹⁵ J. Kammerhofer, Uncertainty in the Formal Sources of International Law, European Journal of International Law, 2004, p. 529.

⁹⁶ N. Petersen, The International Court of Justice and the Judicial Politics of Identifying Customary International Law, European Journal of International Law, Volume 28, Issue 2, May 2017, p. 360.

rules in international law about the times a practice must be repeated to become a State practice.

Elements determining the effectiveness of practice are reflected in its process of crystallization, consistency, repetition, and generality. Countries are aware of the time limit for recognizing a State practice. In regards to duration, in international law, there is no time limit, but historically it is a protracted process. It depends on the case circumstances, and sometimes it depends on the particular legal system. In the ordinary legal system, unlike “time-immemorial”, some specific statutes require a definite period to forty years at the continental legal system. Wolfke states that international law does not have to contain a requirement for a certain period of State practice.⁹⁷ The International Law Commission reckoned that a considerable time is required for the norm to emerge.⁹⁸ In the North Continental Shelf Cases, it was stated that passage of a short period of time does not hinder the formation of a new rule of customary international law.⁹⁹ Formation requirement would be that within the period in question, short though it might be, State practice, including those states whose interests are significantly affected, should be jointly substantial and consistent in the sense of the provision invoked.¹⁰⁰

The second important factor is that State practice should be general, and can be applied by the majority of states. Also, it should be widespread and consistent. In the North Continental Shelf cases, the ICJ stated that practice must be extensive, uniform and settled.¹⁰¹ There are no requirements that all states should participate in. The participating states should include those that had an opportunity or possibility of applying the alleged rule. States representation needs to be assessed in light of all circumstances, including the various interests at stake and the various geographical regions.¹⁰² In assessing the generality principle, an essential factor is

⁹⁷ Wolfke, op.cit. 45

⁹⁸ M.P. Scharf, Accelerated Formation of Customary International Law, 2014, p. 306.

⁹⁹ North Sea Continental Shelf Cases, 1969 I.C.J. Rep. 3, 43, para. 73

¹⁰⁰ North Sea Continental Shelf Cases, 1969 I.C.J. Rep. 3, 43, para. 74

¹⁰¹ Ibid, para 75.

¹⁰² Draft on conclusions on identification of customary international law, adopted by International Law Commission, op.cit. conclusion 7, para 2.

the participation of states in practice, especially those states affected by the rule. For example, to determine the existence of a rule linked to the law of the sea, it would be commonsensical to consider the interests of the coastal state. Some scholars claim that custom cannot come into existence without the resistance of the leading states.

The third element is twofold: repetition and consistency. Consistency means that there are no divergences in states behaviour. In the Fisheries case, the International Court of Justice stated that “although the ten-mile rule has been adopted by certain States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law”.

It was established in the case Asylum in 1950 by the International Court of Justice, where the court declared “that customary international law must be in accordance with a constant and uniform usage practised by states, State practices had been so uncertain and contradictory as not to amount to a ‘constant and uniform usage’ regarding the unilateral qualification of the offence in question.”¹⁰³

Customary international law can be formed more clearly when new cases of law are utilized and responded to quickly; thus, establishing customs. To explain the formation of customary international law, Visscher analogized using the making of a road across the vacant land. In the beginning, there is uncertainty and lack of direction; however, the majority of people begin to follow the same path that turns into a single road.¹⁰⁴

Hans Kelsen describes customary international law as “unconscious and unintentional lawmaking, which does not arise from the legislative process, but the effect of the conduct of states their international relations.”¹⁰⁵

¹⁰³ M.N. Shaw International Law, Cambridge University Press, 2014, p. 54

¹⁰⁴ M.P. Scharf, *opt. cit.*, p.316.

¹⁰⁵ P. B. Vianna Rigon, Formation and evidence of customary international law, Model United Nations Journal, 2013, p. 186

Some states are more powerful and influential, and their activities affect more formation of customary international law, as in the role of the UK in the development of the law of the sea and the impact of the Soviet Union and the US on the law of space. In conclusion, major powers play an essential role in the recognition of the custom; a small state can propose an idea, but its chances exist in the thought process of the major powers.¹⁰⁶

However, if the state fails to act or does not participate, it can be considered as evidence of action. It is maintained that even abstention from an action in a particular situation might lead to the formation of the legal rule as well as actions.¹⁰⁷

Custom is not just a product of amalgamating state practice with *opinio juris*. It is a normative characterization of state behaviour, interpretation of those issues as having specific importance in which members hold one another responsible.¹⁰⁸ The process of custom formation is an interpretive activity, which presupposes attribution of social meaning to the behaviour of the members of the community and convincing other members of the society that customary norms reflect the values of that particular community.¹⁰⁹ “Use of norms warrants belief in its existence, rather than belief in the norm existence warranting its use.”¹¹⁰

The creation of customary international law is quite uncertain, as there are no precise criteria for its determination. Its unwritten nature and formation make it unclear in terms of its duration, repetition and consistency. Approaches to customary law demonstrate weaknesses. Thus, the traditional approach to customary is criticized because it lacks procedural normativity. Formation of customary international law is based on state practice, but it is impossible to analyze the practice of all existing states. This inadequacy led to “democratic deficit”¹¹¹ because the compact is based on the practice of individual states and that customs

¹⁰⁶ M.P. Scharf. *op.cit.*, p.318

¹⁰⁷ A. E. Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, *The American Journal of International Law*, Vol. 95, No. 4, Oct. 2001, p. 759.

¹⁰⁸ S. Besson, J. Aspremont, *op.cit.*, p.340.

¹⁰⁹ *Ibid.*, p. 342.

¹¹⁰ *Ibid.*, p. 345.

¹¹¹ Anthea E. Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, *The American Journal of International Law*, Vol. 95, No. 4, Oct. 2001, p. 767.

are created by powerful, European and imperialist states, and that what makes a custom hegemonic, ideologically biased and legitimating force for the political and economic status quo.¹¹² For instance, new states are obliged to comply with customs even if they did not participate in the formation. Powerful states influence the content and application of the custom.¹¹³ This led to the problem of substantive normativity of traditional custom. Contemporary customs are democratically improved because they involve all states, and they are drawn from treaties and declarations.

2.2 *Opinio juris* as an Element of Customary International Law

Establishing that state practice is followed widely by many states is not sufficient for identification of customary law. Another crucial element of customary law is *opinio juris* that is considered as a psychological or subjective element, and which identifies that a particular rule is accepted by states.¹¹⁴ *Opinio juris* was formulated by the French writer, Francois Geny, who explains how to differentiate custom from common usage.¹¹⁵ However, in some cases, it is not necessary to determine the existence of the two elements as regards certain customary rules because of their importance for the co-existence and vital cooperation among states.¹¹⁶ In these cases, ICJ states that customary character of certain rules invokes moral imperatives, logical consequences of certain processes and the authority of certain conventions.¹¹⁷

The ILC adopted draft commentary states that “The requirement, as a constituent element of customary international law, that the general practice is accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.”¹¹⁸ States should feel that they are legally compelled by a rule of customary international law.

¹¹² Ibid., p.770.

¹¹³ Ibid., p. 769.

¹¹⁴ Draft conclusions on identification of customary international law with commentaries, op.cit., conclusion 4 para 1.

¹¹⁵ M. N. Shaw, International law, Cambridge University Press, 2017, p. 75.

¹¹⁶ T. Treves, Max Plank Encyclopedia of Public International Law, 2006, p. 7

¹¹⁷ Ibid, p. 7

¹¹⁸ Draft conclusions on identification of customary international law with commentaries, conclusion 2 para 1.

Also, in the commentary draft, it is stated that it is crucial to establish that states act in a certain way because they believe of their sense of entitlement by a rule of custom.

In the North Continental Shelf judgement, the ICJ established that “Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it¹¹⁹. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris* sive necessitates. The States concerned must, therefore, feel that they are conforming to what amounts to a legal obligation”.¹²⁰ In cases when states apply or act provisions of the treaty, they are not party with, can be evidence of acceptance of law – *opinio juris*. When “the members of the international community are profoundly divided” on the question of whether acceptance accompanies a particular practice as law (*opinio juris*), no such acceptance as the law could be said to exist.¹²¹

Opinio juris might have different forms, such as public statements made on behalf of States; official publications expressed in the name of state; government legal opinions by government legal advisers; diplomatic correspondence; decisions of national courts; treaty provisions and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.¹²² This list is not exhaustive and can include other forms. Other forms of *opinio juris* might include expression of public statement on behalf of the state that a permitted given practice indicates that the state has undertaken such practice. Issuing of public statements are necessary for “debates in multilateral settings;

Evidence of State practice also covers resolutions adopted by international organisations and intergovernmental conferences, national and international judicial decisions — their content and context are vital and need to be analysed.

¹¹⁹ T. Treves, Customary International Law, Max Plank Encyclopedia of Public International Law, 2006, p.7

¹²⁰ North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands, 1969, ICJ, para. 72.

¹²¹ Draft conclusions on identification of customary international law with commentaries, op.cit. p. 125

¹²² Ibid, conclusion 9 para 5.

Failure to react over time to practice may also serve as evidence of acceptance as a law (*opinio juris*), provided that states were in a position to react in circumstances that request some reaction.

In article 12, there are provisions associated with resolutions adopted at the international conference that states the following: “A resolution adopted by an international organisation or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law or contribute to its development.”¹²³

“A provision in a resolution adopted by an international organisation or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).”¹²⁴

As it follows, from commentary adopted by international commissions, the mere adoption of the resolution does not lay down a rule of the customary international law. Resolution should correspond to general practice, which has to be accepted as a law. A Custom does not directly arise from the resolutions.

Various scholars have emphasised that resolutions of the General Assembly are not legally binding. Nevertheless, they bear broad legal authority. For example, Wolfke states that GA resolutions “do not participate directly in the custom-formation as its elements, but do so often indirectly, as ready drafts of desirable rules, incentives for practice or other factors mobilizing world opinion.”¹²⁵ Many General Assembly Resolutions contain general principles of law, and the state believes that these principles are universally applicable, which make them evidence of *opinio juris*.¹²⁶ According to Brian Lepard, a professor of law at the Nebraska College of Law, General Assembly resolutions are not legally binding but serve

¹²³ Draft conclusions on identification of customary international law with commentaries, conclusion 12, para 2.

¹²⁴ Ibid, conclusion 12, para 3.

¹²⁵ Wolfke, op.cit. p.70.

¹²⁶ B. D. Lepard, Customary International Law, Role of the United Nations General Assembly Resolutions as evidence of *opinio juris*, Cambridge University Press, 2012, p. 211.

instead as recommendations with persuasive weight on the political arena.¹²⁷ General Assembly resolutions are a product of state negotiations and consultations. Discussions that take place among states are essential, “procedure that facilitates negotiation and reflection is desirable” and is a decisive factor enhancing the legal effect of a particular resolution.”¹²⁸ States’ votes of particular resolutions should be determined as they present states' views about desirability norm and acceptance as a legal norm. If a significant number of states oppose the adoption of the resolution, it should have less weight as evidence of *opinio juris*.¹²⁹

GA resolutions may provide evidence for determining customary international law. The International Court of Justice established that “even when they are not legally binding can in certain circumstances provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.”¹³⁰ *Opinio juris* may be deducted from the attitude of the states towards particular General Assembly Resolution.

It is necessary to assess different factors of whether the states have an intention to acknowledge the rule of customary international law. “It is necessary to look at the content and the conditions of its adoption, and the existence of opinion juris, also essential to assess negotiations, debates leading to the adoption of the document, statements after adoption, degree of support, explanation of vote, statements expressed by states after the adoption of the resolution. If there are differences of views expressed, then *opinio juris* does not exist, resolutions which got negative votes cannot reflect customary international law.”¹³¹ If there are abstentions, negative votes may serve as evidence for not accepting such resolutions as a law.

Moreover, the commentary states that in case a resolution lacks a legal force may play an essential role in the development of customary international law. When a resolution contains

¹²⁷ Ibid, p. 212.

¹²⁸ B. Sloan General Assembly Resolutions Revisited, British Yearbook of International Law, Volume 58, Issue 1, 1987, p. 57.

¹²⁹ B. D. Lepard, Customary International Law, Role of the United Nations General Assembly Resolutions as evidence of *opinio juris*, Cambridge University Press, 2012, p. 211.

¹³⁰ Ibid, p. 213.

¹³¹ Draft conclusions on identification of customary international law with commentaries, conclusion 12, para 5.

rules, which can serve as an inspiration for the growth of general practice, it is accepted as a law.¹³² Resolutions cannot be evidence of existing customary international law if the practice of states is absent, or inconsistent.

In case a state does not protest the behaviour of other states, then such behaviour is regarded as legitimate. Some scholars say that the absence of protest implies an approval; silence can be used as *opinio juris*. To apply this rule to the Global Compact, those states which do not intend to be obliged should abstain from joining the conference, because customary international law is binding on all states except those abstaining.

However, there is a disagreement among scholars regarding the importance of these elements. Positivists emphasize the vital meaning of the *opinio juris*, saying that if states believe that action is legal, then it follows that they agree with the particular rule. Other scholars say that *opinio juris* is impossible to prove.¹³³ Kelsen, in his works, argues that courts decide when certain norms become customary law.¹³⁴ For him, the central aspect of norm creation is an act of willing. *Opinio juris* is a collective act of will according to him, created by members of the community. A Custom is as a legislative act, mode of creating law; it is intentional, willed, and directed.

Two elements approach quite widely are supported by states in case law and scholarly writings. The commentary emphasized that the presence of only one element is not sufficient for the identification of customary international law. State practice, without opinion juris, is merely an aspiration.¹³⁵ Although some scholars argue that it suffices to have one element for the identification of a custom in certain circumstances, such theories are not supported by states or courts.¹³⁶ Two elements approach confirm the essential nature of custom and

¹³² Ibid, conclusion 2, para 4.

¹³³ M. N. Shaw, International law, Cambridge University Press, 2017, p. 67.

¹³⁴ M. N. Shaw, International law, Cambridge University Press, 2017, p. 70.

¹³⁵ Draft conclusions on identification of customary international law, conclusion 2, para 4, 2018.

¹³⁶ Draft conclusions on identification of customary international law, 2018, conclusion 2 para 4.

consistent with unity and coherence of international law.¹³⁷ Only a judge can declare the existence of a customary legal norm.¹³⁸

Thus, in relation GCM it is unlikely it will form the customary international law, because of provisions of the GCM and states declarations. Firstly, states declarations which hamper any development of CIL, for example, Denmark stated that: “the agreement (GCM) creates no new legal obligations for States nor does it further international customary law or treaty commitments”; the UK also stated that “GCM does not establish customary international law”; a representative from Norway: “The GCM is not legally binding nor does it seek to establish international customary law”¹³⁹. Thus, states clearly stated that their votes could not be considered as *opinio juris*. Secondly, commitments are quite broad, does not prescribe precise conduct which gives state discretion to determine a way of implementation. This is unlikely can be widely accepted as a rule of customary international law. Customary international law requires a particular legal practice and conviction by states that specific practice is accepted as a law. The GCM states that it is not legally binding. We cannot claim that the state has an intention to make it binding, not least that theorists of law are not in agreement. Some, proof states consent, believe that a state has to grant consent for the formation of the customary international law. And in the case of Denmark, the UK and Norway, if applying this view, CIL is not formed.

In the case of GCM, it is essential to take into account voting behaviour, how many states voted against, abstained in order in order to establish customary law. Also a number of non-participants, negative votes are of legal relevance. The formation of customary law is a complex issue because it cannot be governed by exact rules. It is difficult, for example, to establish the exact requirement of number states. “Furthermore, if we require a simple majority of states, we might not be able to take into account differences in the size and the political importance of a state.”¹⁴⁰

¹³⁷ Ibid

¹³⁸ Ibid

¹³⁹ Report by Norway at the Intergovernmental conference to adopt Global Compact for safe, orderly, and regular migration, Marrakech, 10-11 December 2018.

¹⁴⁰ B. Lepard, Customary International Law, N. Petersen, Role of consent and uncertainty in the formation of customary international law, Cambridge University Press, 2012, page 116.

2.3 Consent is an Integral Element of State Practice

Several aspects of customary international law remain unclear. One of them is the concept of consent. There are no rules in international law about how much consent is needed for the formation of customary international law.

There are two schools that dealt with the nature of *opinio juris* and in particular, the expressed consent for the particular norm. The first school is “Voluntarist”. It ascertained that states are sovereign, and cannot be bound by obligations without their consent either by treaty law or customary law. Under this approach, silence considered a form of consent. The other one is the “Belief” school. It states that custom is a binding force based on states' belief in the legal necessity of the practice.¹⁴¹

Court practice does not provide practice on this question either. In the academic literature, it is argued that customary international law can be formed without the consent of each state.¹⁴² That said, they can be bound if they were inactive during the period or if it is a new existing state. However, a state can opt-out if it does not seem to intend to be obliged by customary international law.

In contrast to treaty obligations where the state bears obligations in the only case if it explicitly consents to it, however in case of customary international law, all states are obliged unless they did not object to the formation of customary international law.¹⁴³ However, there is a principle in the international law, which was established by the Permanent Court of International Justice in the Lotus case, that says that states can only be bound by a norm if they consent to it.¹⁴⁴ This principle establishes the freedom of actions for states. States cannot be bound by legal norms unless they have explicitly consented to them.

¹⁴¹ M.P. Scharf, op. cit, 322.

¹⁴² B. Lepard, N. Petersen, op.cit., p. 127.

¹⁴³ B. Lepard, N. Petersen, op.cit., p. 120.

¹⁴⁴ Case of the S.S. “Lotus” (France v. Turkey), Judgment of 7 September 1927, PCIJ Series A, No. 10, 18.

International law does not specify to what degree a consent is required for the formation of customary international law. Whether the practice of all states is considered equally, the majority of scholars argue that higher weight should be given to the states more affected by the norm.¹⁴⁵ This idea was formulated in the North Sea Continental Shelf cases, where the International Court of Justice says that State practice, including that of states whose interests are primarily affected, should be both extensive and virtually uniform.¹⁴⁶ If we analyze the law of the sea, the practice of land-locked countries has less influence on the formation of customary international law, as their ownership of a fleet is less likely and the same goes for the inculcation of their interest in exploring the sea, fishing rights, and other related issues. Therefore, in the identification of customary international law, their practice has less weight.

2.4 Role of the United Nations General Assembly Resolutions as Evidence of *Opinio Juris*

The New York Declaration, which is a General Assembly Resolution, laid the basis for the adoption of the Global Compact. Global Compact was adopted at the international conference under the auspices of the United Nations via a UNGA resolution. Understanding the legal effect and effectiveness of the UN General Assembly Resolutions is assessed as essential to understanding the legal effect of the GCM. Resolutions of the General Assembly are not legally binding on member states but labelled as recommendations. According to article 25 of the United Nations Charter, states should accept and carry out decisions of the Security Council, but the status of General Assembly decisions bear only a recommendation character.¹⁴⁷ For example, it can establish a subsidiary organ, and make legally binding decisions by a majority vote deciding what an “important question”, which requires a two-

¹⁴⁵ Ibid, B. Lepard, p.130.

¹⁴⁶ North Sea Continental Shelf Cases Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, ICJ Rep. 3, 42, para. 74.

¹⁴⁷ Charter of the UN, 26.06.1945, art. 10.

thirds vote.¹⁴⁸ It does not possess law-making capacity; still, it plays an essential role in international law as a policymaker, treaty initiator, enforcer and codifier of customary law.¹⁴⁹

The legal status of GA resolutions is quite controversial. There are factors which should be taken into account in determining the impact GA resolutions have on the formation of customary international law. General Assembly resolutions have no legal authority, but have an indirect legal effect on states in the form of general principles of law; customary law as they constitute both elements such as state practice and *opinio juris*.¹⁵⁰ Scharf, Dean and Professor of Law and Director of the Frederick K. Cox International Law Center, argues that statements by states are state practice, and how states vote and explain their vote also constitute state practice, which can generate a customary law. Adoption of resolution can constitute a collective *opinio juris*, which crystallizes a rule.¹⁵¹ However, to determine if it constitutes a customary law, it is necessary to look at the content and conditions of its adoption, like provisions and language of obligations. Other forms of instruments of UN GA might have a form of Declarations, such as UDHR, which constitute customary international law.¹⁵²

According to the United Nations Charter Article 2, it requires states to “fulfil in good faith the obligations assumed by them”. General Assembly resolutions are not legally binding but serve as recommendations for states. In the case of the General Assembly resolutions, even though they are not legally binding, states are legally bound to consider them in good faith.¹⁵³ Obligations under the United Nations Charter presuppose the respect for the role of the General Assembly recommendations. In a separate opinion of Judge Hersch Lauterpacht, he

¹⁴⁸ Charter of the United Nations, art. 18, 22.

¹⁴⁹ L. Roslund, Reforming refugee protection: What role can compact play in the future development of International refugee law, Lund University, master thesis, 2018, p. 19.

¹⁵⁰ T. Gammeltoft-Hansen, E. Guild, V. Moreno-Lax, M. Panizzon, I. Roele, What is Compact? Migrants Rights and State Responsibilities Regarding the design of the UN Global Compact for safe, orderly and regular migration, Raoul Wallenberg Institute, 2017, p. 13.

¹⁵¹ M.P. Scharf, *op.cit.*, p. 327.

¹⁵² Universal Declaration of Human Rights 10.12.1948

¹⁵³ B. Lepard, Customary International Law, Role of the United Nations General Assembly Resolutions Resolutions as evidence of opinion juris, Cambridge University Press, 2012, p.210

wrote that “a legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly. Although there is no automatic obligation to accept a recommendation or series of recommendations fully, there is a legal obligation to act in good faith under the principles of the Charter.”¹⁵⁴

Many scholars recognise the persuasive legal authority of General Assembly resolutions. Wolfke says that resolutions by themselves “do not directly by themselves participate in the custom formation as its elements but do so indirectly as drafts of desirable results incentives for practice or other factors mobilizing world opinion.”¹⁵⁵ The resolution of the General Assembly can be used to reinforce norms of rules of customary international law. In particular, in the formation of *opinio juris*, resolutions contain provisions of general international law, and a large number of states believe that they should be universally applicable. ICJ has recognized the role of GA resolutions in the Nicaragua case, where it affirmed: *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the parties and the attitude of states towards specific General Assembly resolutions. The effect of consent to the text of such resolutions.¹⁵⁶

Furthermore, another vital element to consider is the electoral outcome. General Assembly Resolutions might possess significant evidence of *opinio juris*, especially those adopted by consensus, or by the vast majority since it can have a law generating effect. Usually, they are adopted as a result of a long consultation, and weight of *opinio juris* depends on the degree of consensus and degree of support among states. One such element that increases the weight of the resolution is the degree of support by the states. Some scholars say that resolutions that got support from the majority of states including major powers, then this resolution called “instantaneous customary law,” “quasi-legislation”. Resolutions adopted unanimously, bear

¹⁵⁴ B. Lepard, Role of the United Nations General Assembly Resolutions Resolutions as evidence of opinion juris, Brian Lepard, Customary International law, p.210

¹⁵⁴ Ibid, p. 211.

¹⁵⁵ K. Wolfke. Custom in present international law, Kluwer Academic Publishers, 1993, p. 85.

¹⁵⁶ Nicaragua Case, 1986 I.C.J. Rep. 14, 99–100, para. 188

the status of statements of law and quasi-judicial determinations.¹⁵⁷ Also, the degree of weight and evidentiary force depends on the number of affirmative votes. If Resolution was adopted unanimously, then it has the highest weight, because each UN state agreed. Particular attention should be exercised on actual views about the desirability of a norm as a legal norm. It is necessary to examine the representativeness of the governments that voted in favour or against.¹⁵⁸ Also, it is vital to consider the circumstances the adoption was within and the text about the desirability of states. Abstentions or numerous objections would prevent the norm from crystallization.¹⁵⁹ In the Nuclear Weapons Advisory Opinion the court stated: “Several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.”¹⁶⁰

Otherwise, UN GA resolutions cannot be viewed as an *opinio juris* in isolation, as they do not reflect the opinion of the highest representatives and other officials of the respective states of that state’s view of customary law or what the correct interpretation of a treaty is.¹⁶¹

Moreover, apart from voting results, scholars emphasize that it is essential to carefully consider the text of the Resolution, the legal and political context of adoption in order to establish whether states wish to implement the norm as the authoritative rule of law. One of these elements is the existence of a follow-up and implementation mechanism, “the existence of these measures implies that states view the resolution as recognising persuasive or binding obligations.”¹⁶² The court established the Nuclear Weapons Advisory Opinion: “General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence

¹⁵⁷ Ibid, para 188.

¹⁵⁸ B. Lepard, Role of the United Nations General Assembly Resolutions as evidence of opinion juris, Brian Lepard, Customary International law, p.212.

¹⁵⁹ M.P. Scharf, op.cit., p. 327.

¹⁶⁰ Nuclear Weapons Advisory Opinion, 1996 I.C.J. Rep. 226, 255, para. 71

¹⁶¹ L. Roslund, Reforming refugee protection: What role can compact play in the future development of International refugee law, master thesis, 2018, p.20.

¹⁶² B. Lepard, op.cit.p. 214.

of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Some resolutions may express just political views, other solutions to a particular conflict, or it can contain legal rules. Alternatively, a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule”.¹⁶³ One law scholar, Brian Lepard, concludes that although resolutions are not legally binding, they have persuasive authority. A similar opinion, from another scholar, holds that although a General Assembly Resolution is not legally binding, and possess ill-defined authority, which by states repetition can turn into *opinio juris*.¹⁶⁴

Other scholars possess different view about status of General Assembly Resolutions, thus MacGibbon, held lectureship on public law in Aberdeen University, says that “regardless of its wording, and regardless of the size of the favourable vote it attracted, a General Assembly resolution *per se* is intrinsically incapable of providing (or evidencing) either of the essential elements of custom; and it is certainly incapable of simultaneously providing (or evidencing) both”. Mark Villiger states that state voting behaviour any declarations at the preparatory phase for the UNGA is of legal relevance for Compact to become customary international law.

Thus, GA Resolutions can not be considered as an *opinio juris*. However, they constitute somewhat aspirational efforts.

2.5 Soft Law in the United Nations Practice

The Global Compact for Migration does not belong to one of the traditional sources of international law, which are defined in article 38 of the ICJ Statute. However, it can belong to the category of soft law because of its form and content, which can serve different functions.

¹⁶³ Nuclear Weapons Advisory Opinion, 1996 I.C.J. Rep. 226, 254–55, para. 70

¹⁶⁴ B. Lepard, Customary International Law, Cambridge University Press, 2012, p. 214.

An alternative to a binding agreement, such as treaties that states might conclude, are non-binding instruments. Non-binding agreements belong to the soft law category.¹⁶⁵ These instruments do not possess characteristics of hard law as in formality and enforceability and tend to be political statements.¹⁶⁶ Into this category, included not only acts of states, but instruments of the international organisations. This issue about soft law and its role in international law in the academic literature remains unclear. Its functions, relations, and interactions with hard law are heavily discussed among scholars. The line between law and non-law remains blurred.¹⁶⁷ The nature of soft law presents a challenging category within international law. Scholars assert that despite being non-binding, it has particular legal relevance. Shelton argues that soft law could not be viewed in isolation from hard law because it serves as a supplement and precursor to hard law.¹⁶⁸

Global Compact on Migration is intergovernmental agreement, prepared under the auspices of the United Nations, and it is non-legally binding asserted by all states. Interstate agreements, recommendations, declarations, resolutions of international organizations and resolutions of intergovernmental conferences belong to the category of soft law.¹⁶⁹ However, some scholars do not support that GCM is soft law, arguing that "GCM contains actionable commitments, which makes states under a duty to come up with national or regional implementation plans, which will be regularly monitored and reviewed".¹⁷⁰ Soft law used to cover instruments that deprived legally binding force despite being a non-binding character they have an impact on the national law of states, international law and in general development of international law and state behaviour. One of the famous examples of such instrument, adopted by the United

¹⁶⁵ P. Gautier, Non-Binding Agreements, Max Planck Encyclopaedia of Public International Law, 2006.

¹⁶⁶ I.A. Olsson, Four Competing Approaches to International soft law, Scandinavian studies in law, Vol. 58, p.184.

¹⁶⁷ D. Shelton, Commitment and compliance: The Role of non-binding norms in the international legal system, Law, Non-Law and the Problem of "Soft Law, Oxford Scholarship Online: January 2010, p.10.

¹⁶⁸ Ibid, p. 8.

¹⁶⁹ P. Gautier, opt. cit., p.2.

¹⁷⁰ M. Panizzon, D. Vitiello, UN Global Compact for Safe, Orderly and Regular Migration – Towards a Legal Regime Governing International Migration, European Journal of International Law, 11.04.2019, available at: <https://blog.nccr-onthemove.ch/un-global-compact-for-safe-orderly-and-regular-migration-gcm-towards-a-legal-regime-governing-international-migration-part-1/>

Nations General Assembly, is the Universal Declaration on Human Rights, which now constitutes customary international law. It was the first-ever instrument that incorporated fundamental human rights and freedoms. Few states abstained from joining. It was adopted as non-legally binding, nevertheless led to adoption of further binding specific human rights on the international and regional level such as the International Covenant on Civil and Political Rights adopted on 19 December 1966 and entered into force on 23 March 1976; International Covenant on Social, International Covenant on Economic; and Social and Cultural Rights adopted on 16 December 1966 and entered into force on 3 January 1976.¹⁷¹ Indeed, the Declaration is not a binding document; however, it became the most fundamental human rights reference point and aspirational instrument for the states. However, in contrast to any other non-binding instruments, it had strong potential to affect states' compliance: circumstances of its adoption and drafting, language and content and the existence of mechanisms that are capable of pressure and ensure state compliance. All these factors, in sum, determine the effectiveness and influential character of the Declaration.

Another example of a non-binding instrument that leads to further the development and adoption of human rights instruments is the Declaration of rights of the Indigenous people, which had a significant historical meaning for the rights of indigenous people. It was one of the most broadly negotiated documents in the history of the United Nations, starting in 1980 and lasting for twenty-two years. The drafting process of the Declaration demonstrates its legitimacy and authoritativeness and offers an overall value as their representatives from different areas and indigenous people themselves.

After the adoption of the Declaration, some states adopted national laws that reflected provisions of the document - Bolivia, Nepal, and Ecuador made changes on the constitutional level. Also, Canada and Japan initiated changes in their national legislation. For example, the Canadian "House of Commons adopted a motion calling the Parliament to implement

¹⁷¹ International Covenant on Economic, Social and Cultural Rights adopted 16 December 1966, e.i.f. 3 January 1976.

standards contained in the Declaration”¹⁷² Although it is not legally binding, there is an expectation among states that laws and policy will uphold principles contained in the Declaration. It can be enforced by interpretation of Indigenous people's rights of the provisions of the Declaration and states obligations under international law.

The above-mentioned examples of instruments are both non-legally binding documents created through General Assembly Resolutions. Norms of the UDHR provided a basis for developing other human rights treaties that demonstrate the process of evolving international law, the evolution of rules of customary international law for the protection of human rights.¹⁷³

“Declarations represent the dynamic development of international legal norms and reflect the commitment of states to move in certain directions, abiding by certain principles.”¹⁷⁴ Moreover, some scholars claim that provisions of the Declaration of Indigenous people reflect provisions of customary international law.

Although non-binding agreements do not enforce legal rights and obligations, they have legal implications for the states, which should be based on existing instruments.¹⁷⁵

Soft law might inspire the state for lawmaking as an intention. D. Thürer, a Swiss jurist and a professor emeritus of international, comparative constitutional and European law at the University of Zurich, asserts that resolutions adopted at the intergovernmental conference can lead to the adoption of the treaties. Also, he argues that between law and politics, soft law has legal relevance.¹⁷⁶ For example, the UN Conference on Environment and Development established the Rio Declaration on Environment and Development on 14 June 1992, United Nations Conference on Human Environment that adopted Stockholm Declaration, Vienna

¹⁷² Understanding and Implementing the UN Declaration on the rights of Indigenous people, an Introductory handbook, Indigenous Bar Association, 2011, accessible at: https://quakerservice.ca/wp-content/uploads/2011/10/UNDRIP_Handbook_IBA.pdf

¹⁷³ D. Thürer, Soft Law, Max Planck Encyclopedia of Public International Law, p. 4.

¹⁷⁴ Understanding and Implementing the UN Declaration on the rights of Indigenous people, an Introductory handbook, Indigenous Bar Association, 2011, accessible at: https://quakerservice.ca/wp-content/uploads/2011/10/UNDRIP_Handbook_IBA.pdf

¹⁷⁵ P. Gautier, Non-Binding Agreements, Max Planck Encyclopedias of International Law, 2006, p. 6.

¹⁷⁶ Ibid, p. 8.

World Conference on Human Rights, the Cairo Conference on Population and Development in 1994, the Copenhagen World Summit for Social Development in 1995, and the World Conference on Women held in Beijing in 1995. All these conferences aimed at substituting treaty law and led to the adoption of further detailed conventions and protocols.

Thürer claims that soft international law has particular relevance in different ways. The first way, it has an immediate legal effect in the field of good faith – *bona fide*, which protects legitimate expectations produced by soft law, requiring states not contradicting their behaviour.¹⁷⁷

The second way, soft law contributes to the shaping and development of international law. Moreover, it can serve as an indication of customary international law. In the case of *Nicaragua v. the United States of America*, the International Court of Justice relied on the definition of aggression contained in the Resolution of General Assembly 3314 of 14 December 1974.¹⁷⁸

Furthermore, soft law plays an essential role in the interpretation of international law. It can clarify legal existing treaties with certain legal principles when they lack specific provisions or not formulated.¹⁷⁹ It also can help in the interpretation of national law in decisions of courts in case of secretive clause provisions or unclear legal norms. “Soft law may thus intrude into the inner sphere of States and help to define the meaning of the principles and rules laid down in municipal law. Codes, memoranda, and similar soft law acts can thus become part of municipal legal orders.”¹⁸⁰ A similar view also holds other scholars saying that soft law serves to interpret ambiguity and gaps in treaty law.

Despite being non-legally binding, the compact is anticipated to be an essential phenomenon in international law since it is believed to be the first inter-governmentally negotiated agreement deemed to be so far covering all dimensions of international migration holistically

¹⁷⁷D. Thürer, *op.cit.*, p. 8.

¹⁷⁸ *Ibid.*, p. 9.

¹⁷⁹ *Ibid.*, p. 9.

¹⁸⁰ *Ibid.*, p. 10.

and comprehensively¹⁸¹. Despite lacking a legal force, it provides a legal effect on states. Soft law plays a crucial role in strengthening or complementing the international legal norms in case there is a gap, and it is difficult to reach a legal solution order. It also provides a guideline for elaboration on international and national law.

Thus, according to common understanding, soft law can create only moral and political obligations; however, it may serve an alternative to treaty law and can be used to complement it, strengthen norms of the treaty and serve as an authoritative interpretation for other norms. One of the most important features is that it can become the rule of customary international law.¹⁸²

Still, concluding non-binding agreements may have pros and cons. States increasingly prefer to conclude soft rather than hard law for the following reasons.

First motivation would be that soft law helps states to avoid legal obligations and commitments, and able to change; also, it allows for more flexibility in implementation and compliance, allowing more freedom of actions.¹⁸³ As Global Compact clearly shows, it provides quite a broad list of principles and guidelines for the states to allow the possibility of discretion, meaning to choose the method of implementation and compliance.¹⁸⁴ The adoption of soft law is more practical in that it takes less time, allowing states to express their views on specific topics and avoiding ratification.

Another crucial question flowing out from analyzing soft law is the issue of compliance with soft law, and what factors induce states to comply with soft law. D. Shelton provides a range of reasons about what drive states to comply: a process of instrument adoption, the content of the norm, institutional setting and follow up procedures. Other elements embody the instrument form and the parties conduct. He hypothesizes that states comply with norms in

¹⁸¹ International Organization for Migration, available at: <https://www.iom.int/global-compact-migration>

¹⁸² I.A. Olsson, *Four Competing Approaches to International Soft Law*, *Scandinavian studies in law*, Vol. 58, p.180.

¹⁸³ *Ibid*, p. 182.

¹⁸⁴ A. Bufalini, *The Global Compact for Safe, Orderly and regular migration: what is its contribution to International migration law*, *Questions of International Law*, Vol. 1, 2019 p. 9.

which they have self-interest. Parties intention is the key to tell if an instrument is non-binding. On GCM, all state parties expressed that it is not legally binding and does not carry obligations.

More with Shelton, the first factor, in his opinion, affecting compliance is in the context of the norm-creation. When determining the legal nature of the instrument, it is necessary to consider its adoption circumstances. Soft law can fill gaps of the hard law or might supplement the law with new norms, and hence the greater consensus there is in the community regarding particular norms, the more compliance transpires among states.

The second factor is the content of the norm. Shelton asserts that the harder the provisions of the norm there are, the better compliance is witnessed.¹⁸⁵ Ambiguity and openness of the norms can limit compliance because states are unaware of the expected behaviour and conduct, or it may evidence lack of the agreement when states expressed clear intentions to conclude the non-binding agreement; also, economic costs must be considered, in case of certain positive obligations, which call states to invest additional resources.

The third factor is an institutional setting, under which better and safer living conditions, Shelton emphasizes that institutions and unique mechanisms capable of giving authoritative interpretations can foster compliance. Supervisory mechanisms are crucial, especially in subject areas, where the norm is accompanied by strong incentives for non-compliance.¹⁸⁶

Thus, we conclude that the Global Compact is a soft law for its possession of many soft law characteristics like its form and content, albeit not a traditional soft law instrument. The compact is a hybrid document situated between hard law and soft law in the form of recommendations. It might have a function of norm filling norm by closing gaps in the existing international instruments since it contains some new provisions. For example, in relation to the sharing of migration data among different stakeholders. Also, it can serve a role in the interpretation of the hard law.

¹⁸⁵ D. Shelton, *The Role of Non-binding Norms in the International Legal System, Law, Non-law and the Problem of Soft Law*, Oxford Scholarship Online, 2010, p.14.

¹⁸⁶ *Ibid*, p.15.

Soft law in the human rights sphere tends to be decisive and more protective, which becomes binding to the state's compliance with norms in the future. Sometimes, soft law presents a preferable reference point for allowing states extra flexibility in interpretation and providing room for manoeuvre.

3. GLOBAL COMPACT AND INTERNATIONAL LAW

3.1 Normative Impact of the Global Compact

The adoption of the Global Compact generated debates among states, international lawyers, and academics about what the compact is, the functions it serves, and on its impact on international migration law and the kinds of challenges its implementation faces on the national and local levels. Global Compact on Migration never stated that it is a legally binding instrument, but a framework for states commitments.¹⁸⁷ Even if Global Compact does not transmute into the body of the binding instruments in the international law sphere, it might, nevertheless, make an impact on state behaviour. It serves as an umbrella of regulations, recommendations, principles, and values for states. Paragraph 7 of the text states out that it presents a non-legally binding framework, and in paragraph 15, it explicitly “reaffirms the sovereign right of states to determine their national migration policy and their prerogative to govern migration within the jurisdiction”.¹⁸⁸ However, many scholars see it as a precedent for future international agreements and instruments.

The international law scholar, Anne Peters, argued that the Global Compact would have an impact in several ways. Although it is a non-international treaty, and therefore cannot dictate migration policy, it can be characterized as a “pre-law”, meaning a forerunner of hard law and leading to the adoption of the treaty and in the future transferred to customary international law. However, it needs state practice and *opinio juris*. Also, according to her, it can substitute missing hard law. It can serve as an interpretation of hard law and make it more concrete. She asserts that it would add some extra details to already existing conventions, “In particular conventions on nationality (objective 4), and from the UN Convention on Transnational

¹⁸⁷T.G. Hansen, E. Guild, V. M. Lax, M. Panizzon, I. Roele, What is a compact? Migrants Rights and State Responsibilities regarding the design of the UN Global Compact for safe, Orderly and Regular Migration, Raoul Wallenberg Institute, 2017, p.8.

Organized Crime (objective 10).”¹⁸⁹ Also, courts can resort to it for the interpretation of their national law.

Special Representative on migration, Peter Sutherland, unsurprisingly holds a similar opinion by wishing that Global Compact may pave the way for the new international norms and treaties.¹⁹⁰ Nevertheless, the collective agreement among states holds that it is not legally binding. It can become a policy framework, which accommodates multilateral legal instruments. It could reach the status of positive international law in the form of customary law. When international law norms are more inspirational rather than positive, they form part of *lex ferenda*.

Moreover, it could lead to the development of norms at the domestic level, regional instruments and international that will contain binding norms. “The Compact thus acts as a sort of hub for the coordination and association of myriad activities and initiatives.”¹⁹¹

Anuscheh Farahat, a German scholar and author of the book “Progressive Inclusion Migrant citizenship and transnational migration in Germany”, asserts the techniques in order to deduct international legal norms from political documents. She adds that provisions of political documents that are not legally binding can, nevertheless, be binding concerning a particular state through reception by national courts. She makes an example from the case-law of ECHR in case *Maslov v. Austria*, where the court used non-binding documents of the Council of Europe, which then become binding for Austria.¹⁹² There are other opinions regarding Global

¹⁸⁹ A. Peters. The Global Compact for Migration: to sign or not to sign?, Blog of the European Journal of International Law, 2018, accessible at: <https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/> (14.09.2019)

¹⁹⁰ Report of the Special Representative of the Secretary General on Migration, 2017, accessible at: https://www.un.org/en/development/desa/population/migration/events/coordination/15/documents/Report%20of%20SRSG%20on%20Migration%20-%20A.71.728_ADVANCE.pdf

¹⁹¹ T. G.Hansen, *op.cit.*, p.15.

¹⁹² M. Geistlinger, *Impacts of the Adoption of the Global Compact for Safe, Orderly and Regular Migration for Austria*, University of Salzburg, p. 11.

Compact that explain that its provisions might become a source of a general principle of law.¹⁹³

Other scholars hold a similar position, stating that ECtHR uses non-binding instruments apart from international treaties in his judgments. For example, in its judgment 04.12.2007 the court referred to the 1957 UN Standard Minimum Rules for the Treatment of Prisoners;¹⁹⁴ In another case 27.09.1995 the ECtHR applied 1990 UN Basic Principles on the Enforcement and Enforcement Officials. In case *Hirst v. the United Kingdom* ECtHR used as a tool for the interpretation the Code of Good Practice in Electoral Matters of the Venice Commission in order to determine circumstances when the right to vote might be deprived.¹⁹⁵

Additionally, there are current views among scholars that GCM might be a source of general principles of law. “The authoritative interpretation approach” is a method of articulating and accepting general principles of law. The necessary requirement is acceptance and recognition by the states regarding its adoption through UNGA resolution and Marrakesh Conference.

Moreover, in some monist states, where international law applied directly, it is quite possible for national courts to invoke international standards, including soft law instruments. In the case of Belgium, which is monist state could apply international soft law.¹⁹⁶ Belgian national courts in their judgments refer to non-binding instruments such as UNHCR guide to procedures and criteria for determining refugee status for better clarifications. Also, they rely on reports of NGOs such as Human Rights Watch or UNHCR.¹⁹⁷ Thus, soft law instruments can play an important role to facilitate interpretation of hard law, add details to existing instruments.

¹⁹³ A. Farahat, Progressive inclusion: migrant citizenship and transitional migration, *European Law Journal*, Vol.15, No.6, 2009, p. 56

¹⁹⁴ *Dickson v. UK* App no44362/04, para 30.

¹⁹⁵ *McCann and others v. United Kingdom* App no 8984/91, para 138 and 140.

¹⁹⁶ J. Wouters, E. Wauters, The United Nations Global Compact for Safe, Orderly and Regular Migration: some reflections, working paper No. 210, 2019, p. 13.

¹⁹⁷ Wouters, E. Wauters, *opt.cit*, p. 13.

Some scholars say that the “compact” can be characterized more as being more political instrument rather than legal and binding. For instance, Isobel Roele, a lecturer in law and the co-director of Queen Mary University Centre for Law and Society in a Global Context, states that it is rather political than a legal instrument; however, it will serve to guarantee minimum standards and facilitate international cooperation on migration challenges.¹⁹⁸ The Global Compact could lead to bilateral treaties, regional agreements and facilitate legislation on a national level that contains binding norms. It is likely to extend future obligations towards migrants. As it follows from its name “compact” - “coming together of pacts.”¹⁹⁹

Despite being a soft law instrument, GCM can have a normative impact differently: firstly, standards and principles contained in a compact could affect and govern state behaviour and its internal migration policy. Secondly, it might become a norm-filling to set universal principles and standards for existing rules and facilitate state support.²⁰⁰ Thirdly, and the most crucial, Global Compact could set new rules to international migration that might evolve to become binding treaties in the future.

3.2 The Political Impact of the GCM

Many scholars debate what impact new agreement introduces on international migration law. GCM has quite limited normative power; however, it can have some sort of political effect. It can affect state behaviour and can “name and shame states” by isolating them for not sharing basic universal values.²⁰¹

Academic debates concerning the legal effect and impact of the Global Compact are still in its infancy. All states accord that the Global Compact is not legally binding. However, some

¹⁹⁸ I. Roele, What are the forms of United Nations international agreements, Understandings and what is their legal effect? 2017, p. 15.

¹⁹⁹ Ibid, p. 20.

²⁰⁰ T. G. Hansen, J. Cerone, S. Lagoutte, Tracing the Roles of Soft Law in Human Rights, Oxford University Press, 2016, p.20.

²⁰¹ A. Bufalini, op.cit., p.24.

scholars believe that it can be viewed as a politically binding instrument armed with interpretative force. It will serve as a framework to guarantee minimum standards for migrants and facilitate international cooperation.

The principal conclusions according to Roele, “is that the Global Compact for Safe, Orderly and Regular Migration is a political rather than a legal instrument, but that its purposes go beyond awareness-raising and virtue-casting and are likely to have indirect, and possibly deleterious effects.”²⁰²

This conclusion is drawn from the report of Special Representative on Migration. Mr Peter Sutherland. In his notes to Secretary-General, he highlighted that Global Compact might set up new norms in the area of migration and lead to binding international law in the form of a treaty. He stated that “The Global Compact on Migration could bundle the agreed norms and principles into a global framework agreement with both binding and non-binding elements and identify areas in which States may work together towards the conclusion of new international norms and treaties.” He also highlighted that states having the signatory status to the politically binding commitments of the United Nations High-Level Dialogue on International Migration and Development (2013) 7 and the 2030 Agenda (2015), as well as in the New York Declaration (2016), have obligations that must implement towards migrants under international law. The management of migration is a shared responsibility, and all states must work together. “These may in time develop into a global “soft law” framework, which in turn can serve as a basis for more formal and binding legal instruments at the global, regional and national levels.” He holds that GCM is based on state cooperation, state governance of migration and that migration is shared responsibility.

Several scholars speak in favour of these statements and highlights expressed by Mr Sutherland. For instance, Andrea Spagnolo, from the department of law in Turin University, highlighted that not legally binding agreements commit states on a political plane. It might affect national and international judges. The GCM language indicates that states accepted to

²⁰² I. Roele, What are the Forms of UN International Agreements/Understandings and What is Their Legal Effect? *op.cit.*, p. 11.

abide by some political commitments: the words “commit” employed in the text seem to support this view.²⁰³

Its binding political effect is based on the state’s intentions, commitments, and frameworks they agreed upon on the international level. It consists of principles and objectives that signatory states pledged to respect under national and regional implementation plans which will be regularly reviewed.²⁰⁴ Moreover, Article 41 states that “We will implement the Global Compact, within our own countries and at the regional and global levels, taking into account different national realities, capacities, levels of development, and by respecting national policies and priorities. We reaffirm our commitment to international law and emphasize that the Global Compact is to be implemented in a manner that is consistent with our rights and obligations under international law”²⁰⁵ The Special Representative of the Secretary also suggests, in the recommendations, to support soft law development in the area of migration, in cases when states show interest, the UN can help to conclude formal specific issue treaties. Global Compact can facilitate the work of the states towards the conclusion of new international norms and treaties stitched together with agreed norms and principles into a global framework agreement with both binding and non-binding elements.²⁰⁶

In the academic literature, it is generally accepted that non-binding agreements do not create legal rights and obligations, and there is no state responsibility. Nevertheless, in some cases, these agreements have legal implications, but the latter should be based on the existing sources and rules of international law.²⁰⁷

²⁰³ A. Spagnolo, *We are tidying up”: The Global Compact on Migration and its Interaction with International Human Rights Law*, Blog of the European Journal of International Law, 2019. Accessible at <https://www.ejiltalk.org/we-are-tidying-up-the-global-compact-on-migration-and-its-interaction-with-international-human-rights-law/>

²⁰⁴ K. Allinson, P. Erdunast, E. Guild, *GCM Commentary: The Legal Status of the UN’s Global Compact for Safe, Orderly and Regular Migration in International and UK Law*, 2019, accessible at <https://rli.blogs.sas.ac.uk/2019/01/31/gcm-commentary-the-legal-status/>

²⁰⁵ Global Compact for Safe, Orderly and Regular Migration, para 41.

²⁰⁶ Report of the Special Representative of the Secretary-General on Migration, 03.02.2017, para 87, p. 29/32.

²⁰⁷ P. Gautier, *op. cit.* p.6.

Allinson, from University of Bristol Law School, says that Global Compact can supplement international law in that it can influence interpretation and application of international law in the national courts, providing state intentions regarding the fulfilment of the obligations.²⁰⁸ Reinhard Merkel, a professor of criminal law, says it argues that it will have an impact on German national courts because they must consider Global Compact when interpreting domestic law.²⁰⁹

The political commitment of states includes Paragraph 15(f), which professes that: “The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect for and protection and fulfilment of the human rights of all migrants regardless of their migration status, across all stages of the migration cycle. We also reaffirm the commitment to eliminate all forms of discrimination, including racism, xenophobia, and intolerance, against migrants and their families.”²¹⁰

States, in their statements regarding the legal status of the Global Compact, completely excluded the legally binding nature of its objectives and actions. Iceland, Lithuania, Malta, the Netherlands, and Denmark stated that the Global Compact “confirms the sovereign right of states to determine their migration policy. The agreement creates no new legal obligations for States, nor does it further international customary law or treaty commitments.”

The representative from Norway emphasizes that Norwegian legislation functions well and there is no need to make any changes. It does not seek to establish customary international law.²¹¹

²⁰⁸ K. Allinson, op.cit.

²⁰⁹ H. Birkenkötter, S. Buszewski, Unpacking the controversy around the Global Compact for Migration, 2019, accessible at: <https://theglobal.blog/2019/03/20/unpacking-the-controversy-around-the-global-compact-for-migration/> (12.11.2019).

²¹⁰ GCM, op. cit. para 15.

²¹¹ Statement at Intergovernmental Conference to adopt Global Compact on Migration, 11.12.2018, accessible at: https://www.regjeringen.no/en/aktuelt/statement_marrakech/id2621949/ (25.09.2019)

Thus, the GCM being a non-legally binding instrument presents an important instrument in international relations, as it produces a legal effect. It might be helpful in further developing and interpreting international law.

CONCLUSION

The primary purpose of this thesis was dedicated to the establishing of the legal status of the Global Compact for Safe, Orderly and Regular Migration, and its possible impact on the international migration law. It can be concluded that cooperation on the international level on migration issues had always been a struggling point for the states, because of conflicting interests, issues of states sovereignty, financial obstacles, political challenges and anti-migrant trends in some countries. There is no coherent formal document regulating international migration. Furthermore, governance on migration issues was regulated by an increasing number of bilateral, regional non-binding instruments, as it is quite challenging to adopt common binding agreement in this field. As historical background demonstrates that a number of states ratified previous conventions related to migrant are extremely low in comparison with other human rights treaties and these states primarily countries of origin of migrant workers.

Hence, the choice by states in favour of the compact can be explained by the following reasons, GCM being a soft law instrument provides more flexibility for states, a broad set of principles that allow a state to choose how to implement and which steps to take. Its uncertain legal status can provide states with manoeuvre possibilities as well as a diversity of interpretations and understandings in its application. Also, it allows states to avoid the implementation of the underlying objectives of the compact by applying a time-consuming process of analyzing, ratifying, and adapting it on the national level.

Nevertheless, GCM is still considered an achievement in the political terms for its content, as it serves as a platform for cooperation among states. Although GCM does not contain new migrants' rights, but rather affirms the importance of existing obligations towards migrants and establishes the direction for future actions. On the other hand, GCM has sparked an ongoing controversy and opposition among states because of its ambitious objectives and

unclear consequences since GCM is regarded as a soft law instrument. Several states decided to withdraw from it such as - Czech Republic, Hungary, Israel, Poland, the United States, while twelve chose to abstain.

The first research question of the study discussed what type of international agreement GCM belongs to. The study found that the Global Compact on migration is not a traditional source of law which contains in the statute of ICJ. However, it belongs to the category of soft law such as non-binding agreements because of its form, content, and intentions presented by states during its adoption.

Firstly, the name of GCM is quite uncommon for usage under international law. There are no many instruments named under the term “Pact” or “Compact”, but the one which exists in the field of business and combat drugs of trafficking, characterized by quite flexible and contain vague goals. They do not have effective and enforcement provisions and focus more on networking and cooperation between different stakeholders like organisations, civil society. The Compacts serve as non-binding instruments. They can be characterized more as political instruments rather than legal with firm commitments.

Secondly, in determining the legal nature of particular instrument content and circumstances of the adoption of the document are crucial. As regards to the content of GCM, its provisions are quite broad and generic and do not prescribe precise conduct for the states. It does not possess characteristics of hard law as in formality and enforceability.

Thirdly, the intention of some parties in different ways tried to limit the impact of the document. It was deprived of legally binding force as non legally binding cooperative framework. Also, it has features of previous acts that can infer from, such as the 1972 Stockholm Declaration on Human Environment, the 1992 Rio Declaration on Environment and Development, and the Universal Declaration of Human Rights.

Soft law as a form of informal lawmaking fulfils a number of important functions. GCM despite being a non-legally binding, the agreement maintains a powerful position in the soft law realm, which might have an impact in various ways:

Firstly, it may serve a role for the interpretation of hard law instruments by the domestic and international courts such as ECtHR. Secondly, it may give rise to an international treaty on the international level. Thirdly, it can fill gaps and uncertainties in international migration law because it contains many principles and objectives.

Although GCM has an important political impact on the international community, its implementation is unlikely to succeed mainly because of its current form and vague provisions. Its objectives and principles are not well defined and unclear for the civil society, which has an important role but need clarifications on what do these objectives mean in practice.

Its provisions are not new in their entirety, but they are based on the existing international norms. The compact is just a stepping stone for international community engagement in addressing issues related to migration. It provides a broad set of principles and concrete actions rarely presented in the legally binding instruments, from which states can choose to realize.

The second research question denoted the possibility of the Global Compact on migration to rise to the status of customary international law. Its formation of the customary law could be qualified as a process that lacks precise normativity because there is no specified time limit for its formation or an agreement about its elements. Traditionally, customary international law consists of two elements: state practice and *opinio juris*. However, there are disagreements among scholars regarding if one or two elements are sufficient for establishing a custom. State practice is comprised of all state actions, and *opinio juris* is the belief of the states that specific behaviour is accepted as a law. It is unwritten and does not have an authoritative text, but it is an essential source of international law. In relation to Global Compact, some scholars argue that the adoption of a resolution by UNGA can constitute state practice.

Resorting to scholars, experts and literature, I concluded that the GCM could unlikely rise to customary international law, because of its provisions and states declarations. Language of its provisions are quite ambitious and does not prescribe detailed conduct which affirmed by some states such as Norway and Lithuania which clearly stated that they do not intend to

change national law or policies related to migration. In addition, it provides a menu of options with the ways of implementation and whether to implement it or not. As regards to states declarations, many states such as Denmark, Netherlands, Malta, and the UK pointed out that GCM does not contribute to the development of customary international law. By stating that states made it clear that their votes cannot be considered as an *opinio juris*. The Global Compact on Migration lacks one fundamental element for the creation of customary rules: the adoption by consensus.

Therefore, these statements hamper further development of customary law.

Thus, the Global Compact on Migration represents more a milestone rather than an instrument that could effectively deal with migration issues. Its significance for future international migration law(s) is quite unclear. Its vague provisions and non-committal character could establish a path for the future for more detailed instruments.

ABBREVIATIONS

ICJ: International Court of Justice

CIL: Customary international law

GCM: Global Compact for Safe, Orderly and Regular Migration

ECtHR: European Court on Human Rights

UNGA: United Nations General Assembly

ILC: International Law Commission

ICCPR: International Covenant on Civil and Political Rights

UN: United Nations

BIBLIOGRAPHY

BOOKS

- Alexander Betts. Introduction to migration governance, Oxford Scholarship Online, 2011.
- Besson Samantha, Aspremont Jean (eds). The Oxford Handbook of the Sources of International Law. Oxford Handbooks Online, 2017.
- Joost Pauwelyn, Ramses Wessel, Jan Wouters. Informal International Lawmaking, 2013.
- Lepard D. Brian. Customary International Law. Cambridge University Press, 2012.
- Mark Villiger. Customary International Law and Treaties. The Hague, London, Boston 1997.
- Shaw N. Malcolm. International Law. Cambridge University Press, 2014.
- Shelton Dinah. Commitment and Compliance: The Role of non-binding norms in the international legal system. Oxford Scholarship Online, 2010.
- Wolfke Karol. Custom in present international law. Kluwer Academic Publishers, 1993.

JOURNAL ARTICLES

- Allinson Kathryn, Erdunast Paul, Guild Elspeth. GCM Commentary: The Legal Status of the UN's Global Compact for Safe, Orderly and Regular Migration in International and UK Law. Blog on Refugee Law and Forced Migration, 2019, accessible at: <https://rli.blogs.sas.ac.uk/2019/01/31/gcm-commentary-the-legal-status/>
- Bufalini Alessandro. The Global Compact for Safe, Orderly, and Regular Migration, What is its contribution to International migration law. – Vol. 1 Questions of International Law, 2019.
- Elspeth Guild, The UN Global Compact for Safe, Orderly and Regular Migration: What Place for human rights. - International Journal of Refugee Law, Vol. 30, 2019, pp. 661-663.
- Gautier Philippe. Non-Binding Agreements, Max Planck Encyclopedia of Public International Law. - Oxford Public International Law, 2006. Pages? Where published?
- Geistlinger Michael. Impacts of the Adoption of the Global Compact for Safe, Orderly and Regular Migration for Austria, University of Salzburg, 2018.

Genina Victor. Proposals for the Negotiation Process on the United Nations Global Compact for Migration. – Vol. 5 Journal on Migration and Human Security, 2017.

Hansen G.Tomas, Guild Elspeth. What is a compact? Migrants' Rights and State Responsibilities regarding the design of the UN Global Compact for Safe, Orderly and Regular Migration. - Raoul Wallenberg Institute, 2017.

Jan Wouters, Evelien Wauters, The UN Global Compact For Safe, Orderly and Regular Migration: some reflections, working paper No.210, 2019.

Kammerhofer Jörg. Uncertainty in the formal sources of international law: customary international law and some of its problems. – Vol.15 European Journal of International Law, 2004.

Maria Jagon, Nikolett Takacs and others. Global Compact for Migration : a new outlook for the civil society on strengthening the global governance of migration.

Micinski R. Nicholas. Implementing Global Compact for Migration, The Role of States, UN agencies, and civil society, Friedrich Ebert Stiftung, 2018.

Newland Kathleen. The Global Compact for Safe, Orderly, and Regular Migration: An Unlikely Achievement, International Journal of Refugee Law. – Vol. 30, 2018.

Nicholas Micinski, Tomas Weiss. Global Migration Governance: Beyond Coordination and Crises. - The Global Community Yearbook of International Law and Jurisprudence, 2017.

Olsson I. Alkan. Four Competing Approaches to International soft law. – Vol. 58. Scandinavian studies in law, 2013.

Peters Anne. The Global Compact on migration: to sign or not to sign, EJIL talk, Blog of the European Journal of International law, November 21, 2018, Available at: <https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/>

Petersen Niels. The International Court of Justice and the Judicial Politics of Identifying Customary International Law. Vol. 28, issue 2 European Journal of International Law, 2017.

Rigon P.B. Vianna, Carvalho Cristieli. Formation and evidence of customary international law. - Model United Nations Journal, 2013.

Roberts A. Elizabeth. Traditional and Modern Approaches to Customary International Law: A Reconciliation. – Vol.95, The American Journal of International Law, 2001.

Scharf P. Michael. Accelerated Formation of Customary International Law. Vol. 20, ILSA Journal of International and Comparative Law, 2014.

Sloan Blaine. General Assembly Resolutions Revisited. Vol. 58, British Yearbook of International Law, 1987.

Solomon Michele Klein, Sheldon Suzanne. The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly, and Regular Migration. – Vol.30, International Journal of Refugee Law, 2018.

Spagnolo Andrea. We are tidying up: The Global Compact on Migration and its Interaction with International Human Rights Law, Blog of the European Journal of International Law, 2019, available at: <https://www.ejiltalk.org/we-are-tidying-up-the-global-compact-on-migration-and-its-interaction-with-international-human-rights-law/>

Tamara Domicelj, Carolina Gottardo. Implementing Global Compacts: the importance of a whole-of- society approach, available at: <https://www.fmreview.org/education-displacement/domicelj-gottardo> (05.11.2019).

Thürer Daniel. Soft Law, Max Planck Encyclopaedia of Public International law, March 2009.

Treves Tullio. Customary International Law. Max Plank Encyclopedia of Public International Law, 2006.

LEGAL ACTS

Global Compact for Safe, Orderly, and Regular Migration, Marrakech, 19.12.2018.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, New York, 18.12.1990 e.i.f. 01.07.2003.

New York Declaration on Refugees and Migrants 19.09. 2016.

The Universal Declaration of Human Rights, Paris, 10.12.1948

United Nations General Assembly, International Covenant on Civil and Political Rights, United Nations, New York, 16.12.1966, e.i.f. 23.05.1976.

United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, New York, 16.12.1966, e.i.f. 03.01. 1976. □

United Nations, Charter of the United Nations, San Francisco, 26.06.1945, e.i.f. 24.10.1945.

United Nations, International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21.12.1965, e.i.f. 04.01.1969.

United Nations, Statute of the International Court of Justice, San Francisco, April 18, 1946.

Zero Draft of the Global Compact for Safe, Orderly, and Regular Migration, 05.02.2018.

NEWSPAPER, ARTICLES, AND PRESS RELEASE:

Press release, “U.S. Ends Participation in the Global Compact on Migration”. Secretary of State, Washington, DC, December 3, 2017. <https://ar.usembassy.gov/u-s-ends-participation-global-compact-migration/>

Press release, General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants 19.12.2018. Accessible at: <https://www.un.org/press/en/2018/ga12113.doc.htm> (15.06.2019)

Refugees and migrants. Accessible at: <https://refugeesmigrants.un.org/migration-compact>

United Nations, “Global Compact an Achievement in Multilateralism”. Accessible at <https://www.un.org/press/en/2018/dev3377.doc.htm> accessible at: <https://doi.org/10.1093/ijrl/eeey065>

United Nations, Global Compact for Safe, Orderly and Regular Migration to be adopted at High-Level Conference in Marrakech, Morocco, Press Release, accessible at: <https://www.un.org/press/en/2018/dev3373.doc.htm> (24.07.2019)

OTHER RESOURCES:

Birkenkötter Hannah, Buszewski Sinthiou. Unpacking the controversy around the Global Compact for Migration, March 20, 2019, accessible at: <https://theglobal.blog/2019/03/20/unpacking-the-controversy-around-the-global-compact-for-migration/>

CERD General Recommendation XXX on Discrimination Against non-Citizens, 1 October 2002

Global Forum on Migration and Development, National Implementation of the Global Compact for safe, orderly and regular migration, 2019.

International Center for migration policy development, Input to the UNSG Report on the Global Compact for Safe, Orderly and Regular Migration.

International Organization for Migration. Accessible at: <https://www.iom.int/global-compact-migration>.

IOM Global Migration Data Analysis Center, Data bulletin series, Informing the implementation of the Global Compact for Migration, 2018.

Lindsay Frey, Opposition to The Global Compact for Migration is Just Sound and Fury. November 13, 2018. Accessible at: <https://www.forbes.com/sites/freylindsay/2018/11/13/global-compact-for-migration-sound-and-fury/>

McKinsey Global Institute. People on the move: Global Migration impact and opportunity, December 2016, accessible at: <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Employment%20and%20Growth/Global%20migrations%20impact%20and%20opportunity/MGI-People-on-the-Move-Executive-summary-December-2016.ashx>

Office of the High Commissioner for Human Rights. Understanding and Implementing the UN Declaration on the rights of Indigenous people, an Introductory handbook, Indigenous Bar Association, 2011.

Terms of Reference for the UN Network on Migration. Accessible at: https://www.un.org/en/conf/migration/assets/pdf/UN-Network-on-Migration_TOR.pdf

UNHCR. Over one million sea arrivals reach Europe in 2015, 30 December 2015, accessible at: <https://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html> (10.09.2019).

United Nations News. Historic moment for people on the move, as UN agrees on first-ever Global Compact on migration, 13 July 2018. Accessible at: <https://news.un.org/en/story/2018/07/1014632> (12.09.2019)

United Nations. International Conference on Global Compact for Migration. Global Compact an Achievement in Multilateralism. 10 December 2018. Accessible at: <https://www.un.org/press/en/2018/dev3377.doc.htm>

United Nations. World leaders adopt first-ever Global Compact on migration, outlining framework to protect millions of migrants, support countries accommodating them. Accessible at: <https://www.un.org/press/en/2018/dev3375.doc.htm> (20.09.2019).

REPORTS AND SURVEYS

International Law Commission. Draft conclusions on the identification of customary international law, 2018.

Ministry of Foreign Affairs and Trade. The UN Global Compact for migration is endangering the security of the Hungarian people. November 06, 2018. Accessible at: <https://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/the-un-global-compact-for-migration-is-endangering-the-security-of-the-hungarian-people>

Parliament of Lithuania, Resolution on the Global Compact for Safe, Orderly and Regular Migration, 04.12.2018. Accessible at: https://www.lrs.lt/sip/portal.show?p_r=119&p_k=2&p_t=263259 (20.09.2019).

Plenary statement by the government of Denmark regarding adopting of the Global Compact, Marrakesh, 10 December 2018, Accessible at: <https://www.un.org/en/conf/migration/statements.shtml>

Plenary statement by the government of Sweden regarding Global Compact, Marrakesh, 10 December 2018, Accessible at: <https://www.un.org/en/conf/migration/assets/pdf/GCM-Statements/sweden.pdf>

Prime Minister, Minister for foreign affairs. National Statement by Australia accessible at: <https://www.pm.gov.au/media/global-compact-migration>, 21 November 2018.

Report by Norway at the Intergovernmental Conference to adopt Global Compact for safe, orderly, and regular migration, Marrakech, 10-11 December 2018.

Report by the OHCHR accessible at: <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/FollowUpAndReview.pdf>

Report by the Special Representative of the Secretary-General on migration, 03 February 2017.

Report of the Secretary-General. In safety and dignity: addressing large movement of refugees and migrants, 21 April 2016.

The Department of Economic and Social Affairs of the United Nations . International migration report, New York, 2017.

United Nations Department of Economic and Social affairs. The International migration report, New York, December 2017, Accessible at: https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017_Highlights.pdf .

United States Mission to the United Nations. National Statement of the United States of America on the Adoption of the Global for Safe, Orderly and Regular Migration, 07 December 2018.

THESES

L. Roslund, Reforming refugee protection: What role can compact play in the future development of international refugee law, master thesis, 2018, Lund University, accessible at: <https://lup.lub.lu.se/student-papers/search/publication/8955277>

CASE LAW

Canada v. USA, Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, International Court of Justice, I.C.J., 12.10.1984

Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), North Sea Continental Shelf cases, International Court of Justice, Judgment of 20 February 1969.

France v. Turkey (The Case of the S.S. Lotus). Permanent Court of International Justice (P.C.I.J.) No.10. September 7, 1927.

Nuclear Weapons Advisory Opinion, 1996 I.C.J. Rep. 226, 255, para. 71

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