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Global Migration Law in Tunisia: The Potential of the Global Compact for Migration to Support the Ratification of the United Nations Convention on Migrant Workers Rights

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Abstract: While Tunisia endorsed the non-binding Global Compact for Migration (GCM), it has not yet ratified the binding International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). In view of the overlap and convergence between both instruments and the fact that soft and hard law interact through cross-fertilisation processes, with the result that the boundaries between both become blurred, this article examines the potential of the GCM to reinforce the legal standing of the ICRMW in Tunisia and to pave the way for the attenuation of the obstacles to its ratification. Based on policy documents, interviews and secondary sources, we first conclude that the Compact has a considerable potential to promote the Convention as it created a political dialogue in which the Convention gained attention and visibility. Crucially, the implementation of Objective 6(a) GCM, calling for ratification of international labour instruments, appears to be the first step towards ratification as it resulted in a governmental decision to re-consider the ratification of the ICRMW. Secondly, on the basis of comparative legal analysis, we conclude that reading the ICRMW's provisions through the lens of corresponding GCM Objectives attenuates the obstacles to ratification of the ICRMW. Our findings exemplify the well-established influential function of soft law as a catalyst supporting hard law by reinforcing its legal standing and by providing an impetus for its endorsement. Both analysis and conclusions are not only relevant for the Tunisian case but also for all other countries that endorsed the GCM but have yet to ratify the ICRMW.

Keywords: global migration law; soft law; hard law; GCM; ICRMW; cross-fertilisation; ratification; Tunisia



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1. Introduction

Over 20 years have passed since the entry into force of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Convention or ICRMW).¹ Despite being one of the United Nations' nine core human rights treaties², to date, only 59 states have ratified the Convention.³ In contrast, 152 states have endorsed the recently adopted Global Compact for Safe, Orderly and Regular Migration (Compact or GCM).⁴

¹ The ICRMW was adopted by the UN General Assembly on 18 December 1990, 2220 UNTS 3.

² OHCHR, The Core International Human Rights Instruments and their monitoring bodies, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last accessed on 25 July 2024).

³ United Nations Treaty Collection, Chapter IV, Human Rights, Section 13, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-13&src=TREATY, (status as at: 18 July 2024, 03:15:33 EDT).

⁴ UN General Assembly, GCM, 11 January 2019, UN Doc A/RES/73/195.

North African states' positions on both instruments display a spectrum of stances. Although these states (Morocco, Algeria, Tunisia, Libya and Egypt) converge in various aspects, in particular with regard to being countries of immigration, transit and emigration, they diverge in terms of adherence to the Compact and the Convention. Egypt and Morocco ratified the ICRMW and endorsed the GCM. Libya and Algeria have ratified the Convention but abstained during the GCM's voting. However, both Algeria and Libya have been engaging with the Compact's review mechanism by submitting national voluntary review reports⁵ to the first International Migration Review Forum (IMRF). In contrast, Tunisia endorsed the GCM but has not yet ratified the pre-existing Convention, which is the only core international human rights treaty that the country still has to ratify (*Mixed Migration Centre 2021*, p. 17).⁶ Tunisia's position stands out in comparison with that of the four other North African states that have ratified the Convention and engaged with the Compact.

Tunisia's stance reflects States common preference for non-binding soft law (GCM) instead of binding hard law (ICRMW) when it comes to migrants' rights protection (*Geiger and Pécoud 2010*, pp. 1–20; *Desmond 2017*; *Desmond 2022*, p. 84). In fact, the use of soft law in the field of international migration started just after the adoption of the ICRMW in 1990 (*Chetail 2019*, p. 293). This suggests that soft law, including the GCM, is used as an alternative framework to avoid and undermine binding rules of international law, in particular the ICRMW (*Chetail 2019*, pp. 292–94; *Chetail 2023*, p. 7; *Olsson 2013*, p. 188). States' attempt to avoid the ICRMW can also be inferred from the text of the GCM, which sidelines the ICRMW by mentioning it only in one footnote in its Preamble (GCM, para. 2). In addition, the considerable publicity that the GCM receives in public and academic debates, as well as the considerable material resources mobilised for its implementation and promotion, bear the risk of overshadowing the ICRMW because the debate becomes centred around and guided by the GCM (*Grange and Majcher 2020*, pp. 288, 293 and 300; *Chetail 2023*, p. 7). Relatedly, States may use soft law as an excuse for not adopting hard law (*Chetail 2019*, pp. 292–93; *Olsson 2013*, p. 194). The GCM, therefore, may function as an obstacle to the adoption of the ICRMW (*Chetail 2023*, p. 7).

That said, soft law is a double-edged sword (*Chetail 2019*, pp. 292–300; *Olsson 2013*, p. 194) as it also has the potential to support hard law. First, soft law can reinforce the legal standing and authority of pre-existing hard law (*Chetail 2019*, pp. 286–87; *Olsson 2013*, p. 196). This is the case, for example, when soft instruments provide an authoritative interpretation of treaty provisions, such as the recommendations of the International Labour Organisation (ILO) aiming to guide states when implementing ILO Conventions (*Chetail 2019*, pp. 287–88). Similarly, the General Comments of UN treaty bodies reinforce the authority of the relevant conventions by providing authoritative interpretations (*Chetail 2019*, p. 289; *Olsson 2013*, pp. 186–87). This state of affairs can also be witnessed in the upcoming CMW's General Comment No. 6 (GC 6) on the convergence of the Convention and the Compact.⁷ GC 6 aims to guide states in implementing the GCM in conformity with

⁵ Libyan Voluntary Review Report, https://migrationnetwork.un.org/sites/g/files/tmzbd416/files/docs/libya_gcm_report_eng.pdf (last accessed on 25 July 2024); see the Algerian submission to the first regional review of the Global Compact for Safe, Orderly and Regular Migration in the Arab World, https://migrationnetwork.un.org/sites/g/files/tmzbd416/files/resources_files/algeria_regional_review_en.pdf (last accessed on 25 July 2024).

⁶ Tunisia ratified the other eight core human rights instruments, namely, the International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; International Convention for the Protection of All Persons from Enforced Disappearance; and the Convention on the Rights of Persons with Disabilities. See OHCHR, Status for Tunisia—Tunisia, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=178&Lang=EN (last accessed on 25 July 2024).

⁷ See: 'Committee on Migrant Workers: Discusses Draft General Comment on the Convergence of the Convention and the Global Compact for Safe, Orderly and Regular Migration', <https://www.ohchr.org/en/press-releases/2022/09/committee-migrant-workers-discusses-draft-general-comment-convergence> (last accessed on 25 July 2024).

core international human rights instruments, including the Convention. By doing this, this GC restates the importance of the ICRMW and bears the potential to minimise the risk of the ICRMW being overshadowed by the GCM. Looking at the GCM's text, we see that the Compact rests on core international human rights instruments, including the Convention, and that it explicitly upholds the principle of non-regression (GCM, para. 15). This means that the protection offered by the Compact should not be less than the standards offered by core international human rights treaties, including the Convention. The GCM, therefore, supports the Convention by confirming and reinforcing its legal standing and authority.

Second, soft law can support hard law by forming the first step towards the negotiation or an impetus for the endorsement of a binding rule or treaty (Chetail 2019, p. 286; Olsson 2013, pp. 186 and 193). For example, the Universal Declaration of Human Rights (UDHR) was the first step to negotiating and subsequently adopting the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In particular, the right to leave any country, which was introduced in the UDHR, "was the starting point of a customary law process" and subsequently, "matured into a custom through an incremental and widespread process of endorsement and emulation in a vast number of subsequent treaties" (Chetail 2019, p. 186). Importantly, the 2016 New York Declaration for Refugees and Migrants, which paved the way for the adoption of the GCM, calls "upon States that have not done so to consider ratifying, or acceding to, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families."⁸ In the same vein, Objective 6(a) of the GCM calls on states to 'promote signature, ratification, accession and implementation of relevant international instruments related to international labour migration, labour rights, decent work and forced labour.' Ratifying the ICRMW is thus an important measure to implement Objective 6(a) of the GCM. This exemplifies the GCM's potential to pave the way for the ratification of the ICRMW.

Against this background, the present article sets out to examine the potential of the Compact to reinforce the legal authority of the Convention in Tunisia and to pave the way for the attenuation of the obstacles to its ratification. To this aim, we conducted two types of analysis. Both examinations contribute to our understanding of the multi-faceted relationship between international soft law and hard law which, generally speaking, interact through explicit and subtle cross-fertilisation processes, with the result that the boundaries between both norms become blurred (Chetail 2019, pp. 290–94).

We first examined the extent to which the Convention gained attention and visibility within the national debate on the Compact (Section 2). To this aim, we assessed the ways in which the government and civil society organisations⁹ received and have been engaging with the Compact. Our focus is on verbal and written statements of the government and civil society organisations as well as on their engagement with the GCM's process, rather than the implementation of the GCM in practice.¹⁰ We relied on policy documents that the

⁸ New York Declaration for Refugees and Migrants, UN A/RES/71/1. See in particular para. 48. "We call upon States that have not done so to consider ratifying, or acceding to, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families".

⁹ As illustrated in para. 2.2. below, civil society organisations participated in the GCM's negotiation process and they are encouraged to engage with the implementation and review process. Indeed, the GCM encourages the involvement of multi-stakeholders, including civil society, in the implementation and follow-up process (GCM, para. 15 under 'whole-of-society approach'): "The Global Compact promotes broad multi-stakeholder partnerships to address migration in all its dimensions by including migrants, diasporas, local communities, civil society, academia, the private sector, parliamentarians, trade unions, National Human Rights Institutions, the media and other relevant stakeholders in migration governance".

¹⁰ This means that we are not looking at whether the Compact is effectively implemented in compliance with human rights laws. In 2024, severe violations of migrants' rights in Tunisia were reported; see "Tunisia: Joint Statement Calling for End to Crackdown". *Human Rights Watch*, 18 June 2024, <https://www.hrw.org/news/2024/06/18/tunisia-joint-statement-calling-end-crackdown> (last accessed on 25 July 2024); see also: "Submission by the United Nations High Commissioner for Refugees to the Office of the High Commissioner for Human Rights' Compilation Report: Universal Periodic Review: 3rd Cycle, 27th Session: Tunisia". United Nations High Commissioner for Refugees, https://www.theadvocatesforhumanrights.org/Res/ahr_mra_shadow_report_tunisia_ccpr_w_mra_01_31_20.pdf (last accessed on 25 July 2024).

government submitted in the context of the GCM's review mechanism; reports published by civil society organisations; interviews¹¹ with some of those organisations; media reports; and, lastly, the relevant literature. We conclude that the Compact has considerable potential to promote the Convention as it created a political dialogue in which the Convention gained attention and visibility. Crucially, the implementation of Objective 6(a) GCM, calling for ratification of international labour instruments, resulted in a governmental decision to re-consider the ratification of the ICRMW. This finding invites conducting similar analysis with regard to the many other countries which, in common with Tunisia, endorsed the Compact but still have to ratify the Convention.

Secondly, we conducted a comparative legal analysis of the Convention and Compact's provisions related to ratification obstacles in order to establish the extent to which adherence to the Compact indirectly means Tunisia's adherence to the Convention, and, therefore, whether the Compact would attenuate existing obstacles (Sections 3–6).

Since the Tunisian government has not officially communicated the reasons for non-ratification, we have largely relied on the relevant literature to identify potential obstacles to Tunisia's ratification of the Convention. We first reviewed the scarce literature focusing on ratification obstacles in Tunisia (ILO 2022; Chekir et al. 2004; Ben Chikh and Chekir 2009) and the recording of a roundtable¹² meeting organised by the University of Tunis. To gain a broader picture of potential obstacles, we also consulted the literature addressing the obstacles in other African countries (Musette et al. 2004; Sall 2007; Williams et al. 2006; Venturi 2018), as well as in Member States of the European Union (MacDonald and Cholewinski 2007; European Commission 2010; De Guchteneire and Pécoud 2010).

Our literature review revealed four major potential obstacles to Tunisia's ratification of the Convention. The first is based on the understanding that the Convention grants extensive protection to undocumented migrants and, therefore, would create a pull factor for more 'irregular' migration. The second obstacle is the claim that the Convention's definition of the family is broad and would provide a strong right to reunification for all 'regular' migrant workers and their families. The third claim is that Tunisia would not have the necessary infrastructure to implement the Convention. The fourth obstacle is that ratification of the Convention will subject the country to the control of the UN Committee on Migrant Workers (CMW), which is in charge of monitoring the implementation of the Convention.¹³

To conduct the comparative analysis of the relevant Convention and Compact's provisions, we relied on the texts of the GCM and the ICRMW, the literature and the *travaux préparatoires*¹⁴ of the upcoming CMW's General Comment No. 6 (GC 6) on the convergence

¹¹ We used interviews to complement the civil society reports that we also draw on, and not as a main separate data source. The interviews took place between 2022 and 2024 in person, online and via email-correspondence. The interview questions focused on organisational positions and actions as opposed to personal stories. The idea was to give participants the opportunity to share the position and engagement of their organisations with the GCM. While participants agreed to disclose the names of their organisations, the personal identities of the persons we interviewed are kept confidential by removing all of the identifying information, including the name and also personal identifying information. In total, we interviewed eight organisations: *Avocats Sans Frontières Tunis*; *EuroMed Rights Tunis*; *Le Centre d'Information et d'Éducation au Développement (CIES) Tunisia Section*; *Association By l'Hwem*; *Association pour le Leadership et le Développement en Afrique (ALDA)*; *Terre d'Asile Tunisie*; *Caritas Tunis*; and *MAWJOU DIN WE EXIST*.

¹² Essaida FM (2023). 'Table ronde: l'immigration en Tunisie: état des lieux et contexte organisée par le laboratoire Histoire des Economies et des Sociétés méditerranéennes à la Faculté des Sciences Humaines et sociales de Tunis le 2 mars 2023', <https://www.facebook.com/EssaidaFm/videos/882810449603813> (last accessed on 25 July 2024).

¹³ Our focus on major obstacles and the corresponding Convention's provisions means that our analysis does not intend to cover neither all possible obstacles, nor all 93 provisions of the Convention. Such an exhaustive examination goes beyond the scope of this paper and necessitates another research question and method.

¹⁴ In particular: Draft outline GC 6; First Draft GC 6; Second Draft GC 6; and statements of the actors who participated in the half-day of General Discussion organised by the CMW in 2022 to discuss the draft of GC 6. See: 'Committee on Migrant Workers: Discusses Draft General Comment on the Convergence of the Convention and the Global Compact for Safe, Orderly and Regular Migration', <https://www.ohchr.org/en/press-releases/2022/09/committee-migrant-workers-discusses-draft-general-comment-convergence> (last accessed on 25 July 2024) and 'Call for submissions on concept paper and draft outline for its draft General

of the Convention and the Compact aiming to guide states in implementing the GCM in conformity with the Convention. We conclude that reading the Convention's provisions through the lens of corresponding GCM's Objectives, including Objective 6(a), indeed, attenuates the obstacles to ratification of the Convention. This finding is not only relevant for the Tunisian case but also for all other countries which endorsed the GCM but still have to ratify the Convention.

Overall, our findings exemplify the above-described influential function of soft law as a catalyst supporting hard law by reinforcing its legal standing and by providing an impetus for its endorsement.

2. National Practices Regarding the Compact: A Vehicle for the Convention to Shine

This section demonstrates that the GCM, its review mechanism and the national debate on its usefulness created a political dialogue in which the Convention, and its ratification, gained visibility and the government's attention. The fact that the government has been preparing a study to reconsider its position towards the ICRMW, in the context of implementing Objective 6(a) of the GCM, and the finding that civil society frequently referred to the Convention and the necessity to ratify it are strong indications of the GCM's potential to promote the Convention in Tunisia.

2.1. Government's Practices

At the outset, the Tunisian government actively participated in the negotiations leading to the adoption of the Compact. It contributed to establishing the pre-Compact position of the Arab group and to developing the African Union's implementation plan.¹⁵ In addition, the government organised, in 2018, an informal regional dialogue on the Compact and a national consultation round with civil society actors (Reliefweb 2018). In this context, the government communicated as follows:

“For Tunisia, which currently has 1 million and 200 thousand Tunisians living in other countries and 60,000 foreigners living on Tunisian soil, it is mandatory to strengthen the mechanisms of management and governance of migration as well as measurement and monitoring mechanisms to ensure the effectiveness of the Compact. The Global Compact is a unique opportunity to fill existing gaps in migration management and to reflect on long-term visions for sustainable solutions”. (Reliefweb 2018)

This active involvement in the negotiation process was followed by the government's endorsement of the GCM in 2018.

Turning to post-Compact practices, the government responded in various ways to the GCM's call to develop 'national responses for the implementation of the Global Compact, and to conduct regular and inclusive reviews of progress at the national level, such as through the voluntary elaboration and use of a national implementation plan' (GCM, para. 53). In this context, the government established in 2021 a national Work-Team in charge of coordinating the implementation of the GCM, including the drafting and execution of national implementation plans.¹⁶ Tunisia also participated in the GCM's regional reviews concerning the Arab and African region and submitted, to this aim, its First Voluntary Review Report addressing thirteen of the Compact's twenty-three Objectives.¹⁷ Subsequently, to effectively inform Tunisia's participation in the first IMRF (GCM, para. 49 and 53), the government submitted its Second Voluntary Review Report covering all

Comment No. 6 on the Convergence of the Convention and the Global Compact for Safe, Orderly and Regular Migration', <https://www.ohchr.org/en/calls-for-input/2022/call-submissions-concept-paper-and-draft-outline-its-draft-general-comment-no> (last accessed on 25 July 2024). The first and second draft of GC 6 are not available online.

¹⁵ Tunisian Second Voluntary Review Report, p. 6, <https://www.un.org/sites/un2.un.org/files/imrf-tunisia-ar.pdf> (last accessed on 25 July 2024).

¹⁶ Second Voluntary Review Report, p. 7.

¹⁷ <https://www.un.org/sites/un2.un.org/files/imrf-tunisia-ar.pdf> (last accessed on 25 July 2024).

of the Compact's Objectives.¹⁸ During the IMRF policy debate, held in New York in 2022, the government reiterated its commitment to implementing the GCM in conformity with human rights and that Tunisia supports the GCM's review process.¹⁹

Under Objective 6 of the GCM (aiming to facilitate fair and ethical recruitment and safeguard conditions that ensure decent work, and calling for the ratification of the Convention), the Second Voluntary Review Report first stresses that the number of ILO conventions ratified by Tunisia increased to reach 65 conventions, including those regarding basic labour rights. In addition to various pre-Compact achievements, the government lists the following post-Compact actions: the introduction of a 2021 law regulating domestic work; the adoption of national laws relating to the ratification of ILO conventions Nos. 129 and 187; and the preparation of a 'feasibility study' regarding the ratification of ILO conventions Nos. 97 and 143 and the ICRMW.²⁰

These practices demonstrate that the GCM was positively received by the Tunisian government and that this latter is committed to implementing its Objectives in conformity with the international core human rights convention on which the GCM, as well as the ICRMW, rest. The government's engagement with the Compact's review process resulted in the inclusion of the ICRMW into the political agenda of the government. This clearly illustrates the potential of the Compact and the GCM's review mechanism to promote and support the Convention in Tunisia. Crucially, Tunisia responded positively to the call of Objective 6(a) (which encourages states to promote the ratification of international instruments related to international labour migration) by deciding to consider the ratification of the ICRMW. This exemplifies the GCM's potential to pave the way for the ratification of the ICRMW through Objective 6(a). The GCM can, therefore, be seen as a first step towards the endorsement of the Convention. Further, the government's recent ratification of ILO conventions Nos. 129 and 187 and its willingness to ratify ILO conventions Nos. 97 and 143, in addition to the many ILO Conventions already ratified by Tunisia (as mentioned in the national GCM's review report), would indirectly support the authority of the ICRMW since this latter is also based on ILO conventions.

2.2. Civil Society Practices

With regard to the positions of Tunisian civil society organisations, there are three main groups of relevance, each with a differing position towards the Compact.²¹

The first group welcomes the Compact as a whole. It views the GCM as an appropriate tool for improving and monitoring international and national migration policies and as a legal framework on which civil society organisations can rely in their advocacy and litigation activities. Overall, this group views the GCM as having the potential to support and reinforce their advocacy based on pre-existing legal instruments.

In this sense, the *Association pour le Leadership et le Développement en Afrique (ALDA)* stated as follows:

'For us, the Compact represented a gleam of hope as it encourages global collaboration in the management of international migration. The urge to strengthen the mechanisms for managing and governing migration as well as the mechanisms for measuring and monitoring was a crucial reason for the civil society to support and ensure the effectiveness of the Compact. The fact that neither Tunisian society nor decision-makers saw migration as a priority has affected our work progression. In addition to that, the comparatively slow progress of

¹⁸ See note 17.

¹⁹ Tunisia. "International Migration Review Forum 2022, United Nations Network on Migration". UNNM, <https://migrationnetwork.un.org/system/files/docs/Tunisia%20Plenary%20Statement.pdf> (last accessed on 25 July 2024).

²⁰ Second Voluntary Review Report, pp. 37–38.

²¹ There are other organisations that have no position towards the GCM because of a lack of knowledge about it (email correspondence with *Caritas Tunis*) or because their main activities do not concern migrants but rather asylum seekers and refugees (email correspondence with *MAWJOU DIN WE EXIST*).

the Tunisian government's anticipated reforms [regarding national migration policies] complicates the mission of civil society. As a matter of consequence, the Compact was a great instrument and a new opportunity that supported our work and advocacy'.²²

In the same vein, the association *By l'hwem* views the GCM as an international legal document that protects migrants' human rights and dignity. This organisation stated that the GCM's Objectives 'go hand in hand with the aims and purposes of the association' and that they refer to those Objectives in their pleadings and awareness-raising campaigns.²³ Similarly, *Terre D'Asile Tunisie* relies on the GCM in their daily work because of the lack of a useful national framework. They stated as follows:

'In the absence of relevant national law preserving the rights of migrants and given that international instruments are superior to national laws, they can be utilised in a judgment. In order to preserve the dignity of those accompanied [i.e., migrants assisted by the organisation], we have sometimes relied on international documents, including the Compact in our advocacy, awareness-raising actions, legal advice and legal procedures'.²⁴

Lastly, *Le Centre d'Information et d'Education au Développement (CIES)* stated that even if they welcomed the adoption of the GCM, they do not rely on its text in their daily work because they are not trained on that aim.²⁵ This organisation obtained, nevertheless, a UN accreditation to participate in the first IMRF, which shows its willingness to engage with the GCM's review mechanism.²⁶

In contrast to the welcoming attitude of the first group, the second group of civil society organisations is sceptical and partly rejects the Compact's text. It claims that the Compact mainly serves immigration policies of the Global North. While these organisations reject the GCM because of the risk of it undermining pre-existing rules, they, nevertheless, consider at least one of its Objectives as having the potential to reinforce their advocacy.

For instance, *Avocats sans Frontières Tunis (ASF)* stated as follows:

"We believe that the Compact confirms and strengthens a European approach that aims to restrict the processes of selection and determination of the legal status of people moving outside the territory of the European Union. This border containment is achieved through cooperation with countries of origin and transit of migratory flows, and through the development of a "legal fiction of non-entry" in transit zones on European territory".²⁷

Likewise, *EuroMed Rights Tunisia* is of the opinion that the GCM serves immigration policies of the European Union, in particular return policies and externalisation of border control.²⁸

Nevertheless, both organisations partly use the GCM in their work. *ASF Tunis* refers to the Compact in its advocacy concerning the consequences of European externalisation policies on mobility in Africa, while *EuroMed Rights Tunisia* relies on Objective 8 of the Compact (encouraging states to save lives and establish coordinated international efforts

²² Email correspondence with the *Association pour le Leadership et le Développement en Afrique (ALDA)*.

²³ Interview with *By l'hwem*.

²⁴ Email correspondence with *Terre d'Asile Tunisie*.

²⁵ Interview with *Le Centre d'Information et d'Education au Développement (CIES) Section Tunisie*.

²⁶ UNNM, List of Entities applying for IMRF 2022, <https://www.un.org/pga/76/wp-content/uploads/sites/101/2022/02/LIST-OF-ENTITIES-APPLYING-FOR-IMRF-2022.pdf> (last accessed on 25 July 2024). However, *CIES* stated that they were unable to be present during the first IMRF due to unforeseen circumstances. There are two other organisations that also obtained a similar IMRF accreditation, namely, *Association des Étudiants et Stagiaires Africains en Tunisie* and *Global Young Leaders Organization*. Unfortunately, these two organisations did not respond to our repeated requests for an interview.

²⁷ Email correspondence with *Avocats Sans Frontières Tunis*.

²⁸ Interview with *EuroMed Rights Tunisia*.

on missing migrants) in its advocacy concerning border deaths in the Mediterranean Sea, as this organisation considers this Objective to have a strong human rights dimension.²⁹

The third group also views the GCM as serving Global North migration policies but, in contrast to the second group, rejects the Compact as a whole for two main reasons: the Compact is soft law and it marginalises the ICRMW by referring to it only in a footnote. This group, therefore, consistently and frequently reiterated the necessity to ratify the ICRMW. This third group is concerned about the risk of avoiding and undermining the ICRMW through the GCM.

So, the *Association Tunisienne des Femmes Démocrates (ATFD)*, the *Forum Tunisien pour les Droits Économiques et Sociaux (FTDES)* and the Tunisian General Labor Union (UGTT) argue that the Compact would not have any effect in terms of protecting human rights because of its soft character and that, instead of endorsing such a soft law instrument, Tunisia should first ratify and respect the legally binding Convention (Ben Khalifa 2018–2020, p. 220).

In the same vein, *Comité pour le respect des libertés et des droits de l'homme en Tunisie (CRLDHT)* and *FTDES* reiterate the weakness of the GCM because of its soft character and consider it as an instrument that legitimises the criminalisation of 'irregular' migration and selective immigration. In their view, by minimising and marginalising the ICRMW and by not taking a position regarding its ratification, the Compact contradicts its sixth Objective, which aims to ensure decent work for migrant workers. The two organisations are of the opinion that the GCM, therefore, 'amounts to a killing' of the ICRMW.³⁰

Further, one day after the adoption of the GCM, *Le Comité de Suivi du Forum Social Maghreb* stressed in a press release that the GCM will not protect migrants as effectively as the ICRMW would (FTDES 2018a). On the 2018 International Migrants Day, a coalition of civil society organisations recalled the necessity of ratifying the ICRMW and reiterated their criticism regarding the GCM's marginalisation of the Convention (FTDES 2018b).³¹ Lastly, a few months after the GCM's adoption, *FTDES* and *L'Observatoire Social Tunisien* published a report in which they reiterated civil society's concerns regarding the GCM's marginalisation of the ICRMW and recalled the necessity of ratifying it and taking its human rights standards into consideration when implementing the GCM (Ben Khalifa 2019, pp. 7–9).

These civil society practices show that the GCM is viewed both as bearing the risk of weakening the authority of the ICRMW and as having the potential to support civil society advocacy. Overall, the GCM inspired a spectrum of reactions: the first group welcomes the GCM and views it as a useful instrument that can be used for advocacy and litigation purposes; the second group criticises the GCM as mainly serving European migration policies, while strategically employing some of its Objectives; and the third group strongly opposes the Compact because of its soft nature and its marginalisation of the Convention, while frequently recalling the necessity of ratifying the latter. This shows that the national debate on the GCM created an opportunity for civil society organisations to give visibility to the Convention. This illustrates the potential of the Compact to create a public dialogue in which the Convention can be promoted. In fact, the government's decision to reconsider ratification of the ICRMW can also be seen as a positive response to civil society's call for ratification that was frequently made within the debate on the GCM. It is, however, unknown to what extent the government's decision was influenced by civil society. Unfortunately, the national GCM's review report does not specifically comment on the input of civil society in the implementation and review process of the GCM. In any case, civil society advocacy was not framed as a call for effective implementation of Objective 6(a) of the GCM, but rather as an argument to reject the GCM as a whole. Civil society organisations, in particular the third group, were concerned about the risk of undermining

²⁹ Interview with *EuroMed Rights Tunisia*; email correspondence with *Avocats Sans Frontières Tunis*.

³⁰ Déclaration de la société civile, le «Pacte Mondial pour une Migration Sure, Ordonnée et Régulière», Rabat 2018, pp. 3–5, <https://ftdes.net/rapports/Declaration%20sur%20le%20Pacte.pdf> (last accessed 18 July 2024).

³¹ The coalition involved, besides the FTDES, the following organisations: *Comité pour le Respect des libertés et des Droits de l'Homme en Tunisie (CRLDHT)*; *Fédération des Tunisiens pour une Citoyenneté des deux Rives (FTCR)*; and *Comité de Vigilance pour la Démocratie en Tunisie*.

the Convention (marginalisation in a footnote; no explicit call for ratification; soft character of the GCM) and overlooked the potential of Objective 6(a) of the GCM, which can be used strategically to advocate for ratification, even if civil society rejects the rest of the GCM's objectives.

That said, and awaiting the outcome of the government's study regarding the ratification of the Convention, we now move on to conduct a comparative legal analysis of the Convention and Compact's provisions, related to the above-mentioned four obstacles, to establish to what extent adherence to the Compact indirectly means adherence to the Convention and, therefore, whether the Compact has the potential to attenuate those obstacles (Sections 3–6). Our analysis here is relevant for all states that endorsed the GCM but have yet to ratify the ICRMW.

3. Obstacle 1: Rights of Undocumented Migrants

The first obstacle to ratification is the understanding that the Convention grants too many rights to undocumented migrants and, therefore, creates a pull factor for 'irregular' migration. Specifically, the claim is that the Convention grants extensive protection to undocumented migrants with regard to (1) access to healthcare, (2) labour rights and (3) regularisation.

3.1. Access to Healthcare

In this context, two questions are at play: the scope of required healthcare; and the implementation of 'firewalls' (Crépeau and Hastie 2015; Desmond 2022) intended to safeguard access for undocumented migrants, without having to fear that seeking access will result in details of their 'irregular' status being exchanged with immigration authorities.

As to the scope of required healthcare, Objective 15 of the GCM encourages states to 'ensure that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services', in particular healthcare. According to this Objective, 'any differential treatment must be based on law, proportionate, pursue a legitimate aim, in accordance with international human rights law'. In light of the principle of non-regression, the protection provided by this GCM Objective should not be inferior to the one offered by core human rights instruments on which the Compact rests, in particular the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is also ratified by Tunisia. The Committee on Economic, Social and Cultural Rights (CESCR) extends the principle of medical care for everyone to more than urgent medical care.³² This means that the Compact also grants access to *more than* urgent medical care. In contrast, the Convention grants undocumented migrants the right to receive *only* urgent medical care (Article 28). This protection is quite limited in comparison with what is required by Article 12 ICESCR as interpreted by the CESCR. In fact, the Committee on Migrant Workers (CMW) has noted in its General Comment 2 on the rights of migrant workers in an irregular situation that if state parties have ratified the ICESCR, they have broader healthcare obligations towards migrants.³³ Thus, the Convention, taken together with GC 2 of the CMW, and the Compact, viewed in the light of the ICESCR, provide similar protection with regard to healthcare for undocumented migrants.

With regard to firewalls, although the Convention and the Compact are not explicit in this respect, there are strong indications that both require this standard in order to ensure effective access to basic services (Desmond 2022, pp. 95–96). In its Concluding Observations on the second periodic report of Algeria³⁴ and in its GC 2³⁵ as well as in the Joint Comments with the Committee on the Rights of the Child³⁶, the CMW believes that such a rule is

³² General Comment No. 14, 2000, para. 43.

³³ CMW/C/GC/2.

³⁴ CMW/C/DZA/CO/2, para. 32(c).

³⁵ CMW/C/GC/2, paras 63, 74 and 77.

³⁶ Joint General Comment: CMW, No. 3 (2017) and CRC, No. 22 (2017); Joint General Comment: CMW, No. 4 (2017) and CRC No. 23 (2017).

necessary in order to make access and protection effective for undocumented migrants. The Joint General Comments are relevant for all state parties of the Convention on the Rights of the Child (CRC), including Tunisia. Meanwhile, Objective 15 of the GCM comprises an action aimed at ensuring that ‘cooperation between service providers and immigration authorities does not exacerbate vulnerabilities of irregular migrants by compromising their safe access to basic services’ (GCM, para. 31(b)). This obviously requires firewalls as, otherwise, access to services would not be effective. Firewalls are also needed to align with the GCM’s commitment to reduce ‘the risks and vulnerabilities migrants face at different stages of migration by respecting, protecting and fulfilling their human rights’ (GCM, para. 12). The Compact also aims to ensure that migrant victims of exploitation in the informal sector can report abuses ‘in a manner that does not exacerbate vulnerabilities of migrants that denounce such incidents’ (GCM, para. 22(j)). This also necessitates the effective provision of firewalls.

In Tunisia, the right to healthcare is not effectively guaranteed as it is limited to urgent healthcare and because of a lack of firewalls (ILO 2022, p. 54; Hanafi 2017, pp. 18–21; Mixed Migration Centre 2021, p. 42). Hence, Tunisian practice is neither in line with the Convention nor with the Compact. By effectively implementing the Compact, the country would indirectly implement the Convention.

So far, the claim that the Convention would give extensive access to healthcare to undocumented migrants is unfounded; the Compact and the Convention intend to give similar protection in terms of effective access and protection in terms of the scope of required healthcare. Admittedly, this similarity, viewed in combination with the fact that the GCM ‘rests’ on the ICRMW, shows that the GCM restates and confirms the ICRMW’s provisions regarding access to healthcare, and hence, reinforces the legal authority of the ICRMW.

3.2. Labour Rights

The Convention defines a migrant worker as ‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity’ (Article 2, para. 1). The Convention declares that all documented and undocumented migrant workers shall enjoy treatment no less favourable than that accorded to nationals with respect to conditions of employment. The aim is to prevent the employment of workers in an irregular situation from becoming an attractive alternative for employers and to prevent migrants in precarious situations from being exploited. The Convention obliges the employer to fulfil all applicable obligations for the period of work performed (Article 25, para. 3).

In the case of the Compact, Objective 6 encourages states to provide migrant workers engaged in ‘contractual labour with the same labour rights and protections extended to all workers in the respective sector’ (GCM, para. 22(i)). The use of the phrase ‘contractual labour’ could be interpreted as excluding undocumented migrants working in the informal sector from equal treatment with regard to decent working conditions, such as equal remuneration (Cholewinski 2020, p. 313; Desmond 2022, p. 88). This restrictive interpretation is, however, not in conformity with international labour standards, in particular ILO Convention No. 143, which is one of the conventions that Tunisia is considering ratifying. Indeed, the first Article of C-143 requires each member ‘to respect the basic human rights of all migrant workers’ as included in core international human rights instruments. In fact, the protection offered by the whole first part of C-143 applies to *all* migrant workers irrespective of migration status and regardless of the validity of the work contract (Cholewinski 2020, pp. 313–14).

Thus, a restrictive interpretation of the phrase ‘contractual labour’ would mean that the Compact diverges from the Convention with regard to labour rights of undocumented migrants—the Convention granting labour rights to undocumented migrants while the Compact excludes them. The ratification obstacle is still valid in this sense. Tunisian practice is in line with the restrictive interpretation of Objective 6 of the Compact as Tunisian labour

law excludes undocumented migrants from any kind of protection (Ben Chikh and Chekir 2009, p. 2; Nasraoui 2017, pp. 159–78; ILO 2022, p. 53; Mixed Migration Centre 2021, p. 18).

In view of this divergence, the GCM bears the risk of undermining the ICRMW with respect to labour rights of undocumented migrants. However, a progressive interpretation of the GCM in accordance with core international human rights and ILO convention No. 143 attenuates the ratification obstacle, especially if Tunisia indeed ratifies this latter convention as communicated in its Second Voluntary Review Report.

3.3. Regularisation

At the outset, it is worth noting that the fact that the Convention grants minimum rights to migrants in an irregular situation has no effect on their legal position and is not intended to regularise their working conditions, and even less so their residence status (Bosniak 1991, p. 762). However, although the Convention excludes any regularisation obligation (Article 35), it requires states to ‘take appropriate measures’ to ensure that ‘irregularity does not persist’ (Article 69(1)). The two measures appropriate for achieving this aim are regularisation or expulsion. This means that if expulsion is not possible to end the irregular situation, regularisation is required (Desmond 2022, pp. 92–93). In the view of the CMW, including in Joint GC with the CRC Committee³⁷, regularisation is ‘the most effective measure to address the extreme vulnerability of migrant workers and members of their families in an irregular situation’.³⁸

The Compact, in turn, implicitly encourages regularisation in order to safeguard effective protection of ‘the human rights of all migrants, regardless of their migration status’ (GCM, para. 15). In order to ensure ‘safe and regular’ migration, which is the overall goal of the Compact, regularisation is necessary because a continuous irregular situation is by definition ‘unsafe’ (Desmond 2022, p. 95). In addition, Objective 7 GCM, which deals with the reducing of vulnerabilities, contains a non-exhaustive list of measures that can be taken for that purpose; one of these actions is to implement ‘procedures that facilitate transitions from one status to another (. . .) so as to prevent migrants from falling into an irregular status,’ while another is to offer to migrants ‘an individual assessment that may lead to regular status, on a case by case basis and with clear and transparent criteria,’ especially where questions of family life are involved (GCM, para. 23(h) and (i)).

Thus, neither the Convention nor the Compact imposes any strict obligation on states to regularise undocumented migrants, although both support regularisation where expulsion is inadequate or impossible. The ratification obstacle is thus unfounded in this respect. This similarity shows that the GCM restates and confirms the ICRMW’s provisions regarding the regularisation of undocumented migrants, and hence, reinforces the legal authority of the ICRMW.

4. Obstacle 2: The Right to Family Reunification for Documented Migrants

The second obstacle to ratification is the claim that the Convention’s definition of the family is broad and would provide a strong right to reunification for all ‘regular’ migrant workers and their families.

To begin with, the Compact does not contain any strict obligation regarding family reunification. Under Objective 5 (enhance availability and flexibility of pathways for regular migration), states committed to ‘uphold the right to family life’ and to ‘facilitate access to procedures for family reunification for migrants at all skills levels through *appropriate measures* that promote the realisation of the right to family life’. The wording of this Objective shows that states maintain a certain margin of discretion, which is, as explained hereafter, also offered by the Convention.

³⁷ Joint General Comment: CMW, No. 3 (2017) and CRC, No. 22 (2017), para. 44; and Joint General Comment: CMW, No. 4 (2017) and CRC No. 23 (2017), paras 29 and 35.

³⁸ GC 2, para. 16.

As to the definition of the family, Article 4 of the Convention defines ‘members of the family’ as ‘persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognised as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the states concerned.’ The phrases ‘*according to applicable law*’ and ‘*recognised... by applicable legislation or applicable bilateral or multilateral agreements*’ clearly show that states maintain a wide margin of discretion when defining who belongs to the migrant worker’s family. Hence, the claim that the Convention’s definition of the family is too broad is based on a misreading of Article 4.

With regard to the right to family reunification, the first paragraph of Article 44 of the Convention stipulates that ‘States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.’ The wording ‘*appropriate measures*’ suggests that states’ obligation to protect the unity of the family is not strict, as states maintain a certain margin of discretion when defining which measures they deem to be appropriate. In the same vein, paragraph 2 of Article 44 grants states a similar margin of discretion when it comes to family reunification. This provision reads as follows (emphasis added): ‘States Parties shall take measures that they *deem appropriate* and that fall *within their competence* to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, *according to applicable law*, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.’ Thus, the claim that the Convention provides a strong right to reunification for all ‘regular’ migrant workers and their families is based on a misunderstanding of Article 44.

At the national level, the Tunisian migration system does not include any legislation on family reunification. Granting such reunification is subject to wide discretionary power, without any obligation to substantiate and motivate decisions (ILO 2022, p. 57; Ben Chikh and Chekir 2009, pp. 6–7). Although this practice reflects the discretion included in both instruments, the lack of national guidelines regulating that discretion is problematic as it can result in family reunification being arbitrarily denied, which is not in line with both instruments. Consequently, Tunisia still has to effectively comply with the Compact’s commitment to facilitate family reunification and, by doing this, it will simultaneously be implementing the related provision of the Convention. Since states maintain a similar margin of discretion in both contexts, the GCM, therefore, overlaps with the ICRMW and, hence, restates and confirms the ICRMW’s provisions regarding family reunification.

5. Obstacle 3: Implementation of the Convention

The third obstacle concerns the implementation burden after the ratification of the Convention. This burden would, however, not be significant in view of the fact that the implementation of the ICRMW is recommended under Objective 6 of the GCM (5.1 hereafter), and the large overlap and convergence between the Compact and the Convention (5.2 hereafter).

5.1. Implementing the Convention Through Implementing the Compact

As mentioned above, Objective 6(a) of the GCM encourages states to promote the ratification and implementation of the Convention. This means that the implementation of the convention is meant to take place as an integral part of the implementation of the Compact. Therefore, by implementing the Convention, Tunisia simultaneously implements the GCM. In fact, the Compact rests on core international human rights instruments, including the Convention, and it explicitly upholds the principle of non-regression (GCM, para. 15). This means that the protection offered by the Compact should not be less than the standards offered by core international human rights treaties, including the Convention. This confirms and restates the Convention’s legal authority.

5.2. Overlap and Convergence

To begin with, the Convention and the Compact are constructed around the tension between individual human rights and the sovereignty of states (GCM, paras. 7, 15, 27; Article 79 ICRMW). While acknowledging states' sovereignty to decide on the entry and stay of migrants, both instruments subject related decisions to human rights norms. In effect, therefore, both function as comprehensive frameworks for governing global migration through a rights-based approach. The Convention comprises minimum standards of protection for human rights that apply regardless of migration status. It codifies the rights comprised in core international human rights instruments in the context of labour migration.³⁹ Similarly, the Compact rests on core international human rights instruments and it explicitly upholds the principle of non-regression (GCM, para. 15). This means that the protection offered by the Compact should not be less than the standards offered by core international human rights treaties, including the Convention. One of the Compact's guiding principles is the effective protection of human rights, with states committing to 'ensure effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status' (GCM, para. 15). In addition, the Compact reaffirms states' commitment to implement it 'in a manner that is consistent' with international law (GCM, para. 41). The Compact and the Convention have, therefore, a similar strong human rights dimension.

In view of Objective 6(a) and the similar human rights dimension, it is not surprising that there is a large overlap and convergence between the Compact and the Convention (Desmond 2022, p. 86). In fact, both instruments rest on the principles and standards set forth in International Labour Organisation (ILO) conventions on promoting decent work and labour migration, including ILO Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers.⁴⁰ As stated by the Head of the International Migration Law Unit of IOM-Headquarters (Geneva) during the General Discussion of the Draft Outline of the CMW's GC 6, the Compact contains practical actions linked to the rights included in the Convention, such that we can say that '*whenever the Compact objectives were implemented, Convention objectives were implemented too*'⁴¹. The overlap and convergence between both instruments can be illustrated in two ways. First, the above-presented comparative analysis of the provisions regarding access to healthcare, regularisation and family reunification demonstrated that both instruments are overlapping. Second, the first and second drafts of GC 6 highlight the concordance and complementarity between both instruments. The first draft regroups the Compact's objectives under four broad interrelated axes covered by the Compact and the Convention, while the second draft rearranges the themes on which the two instruments converge in four groups based on similarity in terms of content, relevance and functionality. Table 1 presents for each of these axes, the GCM's Objectives overlapping with corresponding Articles of the Convention, and Table 2 presents these groups and the issues included under each group. In view of this overlap and convergence between the GCM and the ICRMW, we can declare that the first restates and confirms the latter.

³⁹ Preamble of the ICRMW.

⁴⁰ Preamble of the ICRMW; para. 2 of the GCM.

⁴¹ Statement by Vassily Yuzhanin, Head of the International Migration Law Unit at IOM, during the CMW's General Discussion of GC 6 drafts, <https://www.ohchr.org/en/press-releases/2022/09/committee-migrant-workers-discusses-draft-general-comment-convergence> (last accessed on 25 July 2024).

Table 1. Overlap between the Compact’s objectives and the Convention’s provisions⁴².

Axes	Compact’s Objectives	Corresponding Convention Articles
1. Ensuring regular migration	2	42, 43 and 45
	5	30, 35, 68 and 69
	6	66 and 25
	12	29 and 24
	18	33, 36 and 52
2. Improving evidence-based policymaking and enhancing cooperation on migration	1	77
	3	33
	7	8 to 35
	17	7
	23	64
3. Protecting migrants through rights-based border management	4	21 and 23
	8	71 and 9
	9	68
	10	68
	11	64 to 70
	13	16, 17 and 18
4. Stimulating migrants’ integration and their contribution to development	21	67
	14	23
	15	27, 28 and 30
	16	7 and 42(2)
	19	37
	20	47
	22	27

Table 2. Convergence between the GCM and the ICRMW⁴³.

Groups	Covered Issues
(1) Main areas of convergence	The vision of human rights, irregular migration, decent work, legal personality and identity, and non-discrimination.
(2) Impact on the country of origin	Return and reintegration, and remittances, income and savings.
(3) People in vulnerable situations	Children, women and the family.
(4) Protection of people in vulnerable situations	Access to justice and fair trial, detention and expulsion, smuggling and trafficking in human beings.

Importantly, the second draft of GC 6 stresses that each of the two instruments contains gaps compared to the other.⁴⁴ This means that taken together, both instruments complement each other. While the rights comprised in the Convention (containing 93 Articles) function as minimum standards for interpreting the Compact, the latter (comprising 23 Objectives and a large number of implementation actions) serves as an interpretation toolbox for the former as the language in the GCM is much detailed than that in the Convention (Draft outline GC 6, p. 7).

As stated by the representative of the *Quaker United Nations Office* during the discussion of GC 6, ‘the Compact had much stronger language than the Convention’ and ‘the directions

⁴² This table is based on the comparison included in CMW (2022), *First Draft General Comment No. 6*, pp. 2–5.

⁴³ Second draft GC 6, pp. 2–3.

⁴⁴ Second draft GC 6, p. 5. For example, while the Convention does not include the protection of personal data and the rights of the child, the GCM does not recognise the right to freely leave a state, freedom of thought, conscience and religion, property and prohibition of imprisonment for contractual debts.

for the States in the Compact were clearer than those of the Convention, yet the language of the Compact went beyond the Convention'.⁴⁵ Therefore, the Compact functions as a policy instrument that guides states to ensure the protection of migrants' human rights and, as such, indirectly guides them to operationalise the provisions of the Convention (Draft outline GC 6, p. 1). In this way, the Compact has a complementary function in relation to the Convention (Bast et al. 2023, p. 6).

Thus, while the Convention focuses on human rights and can be seen as a bill of rights codified in the context of migration, the Compact forms a menu of policies that can be used to implement those rights. Felipe Gonzales Morales, former Special Rapporteur on the Human Rights of Migrants, stated during the discussion of GC 6 as follows:

'While the Convention focused on human rights, the Compact had a wider scope. The Convention was constructed as a typical bill of rights whereas the Compact had a menu of standard policies. It was important to emphasise the human rights component of the Compact; it was not a human rights instrument as such, but it should be possible to develop the provisions related to human rights as much as possible'.⁴⁶

The GCM, therefore, functions as an authoritative interpretation confirming and complementing the Convention, and hence, reinforces the authority of the latter. While the GCM can be used by states when interpreting and implementing the provisions of the Convention, implementing the Convention, in turn, constitutes an integral part of the implementation of the GCM, in particular Objective 6. In this vein, the CMW's upcoming GC 6 (on the convergence between the GCM and the Convention) can be seen as an instrument that enhances the authority of the Convention through the Compact, while at the same time promoting this latter. This dynamic relationship vividly exemplifies the ongoing cross-fertilisation process between both instruments within which they mutually reinforce their legal authority.

Therefore, the two frameworks become mutually complementary in creating international norms regarding the protection of the human rights of migrants. Both instruments can be viewed as forming two interlinked parts of a joint charter comprising 'core global migration law' norms (Figure 1 below). We use the phrase 'core global' instead of 'international' to articulate that the Compact and the Convention are the only migration-specific instruments adopted at the UN level.⁴⁷ Even if both instruments diverge in the way in which they regulate certain issues, such as access to labour rights discussed above, if related provisions are simultaneously read from the perspective of their strong human rights dimension and relevant ILO conventions, the two frameworks become mutually complementary in creating international norms regarding the protection of human rights of migrants.

In the light of Objective 6(a) GCM's call to ratify and implement the Convention, the overlap, convergence and the complementary mutual relation between both instruments, it can, therefore, be argued that the Compact's implementation would facilitate the implementation of the Convention. The implementation burden would further be attenuated as the infrastructure already created by the Compact can be utilised to co-implement the Convention. Importantly, once adopted, GC 6 will also facilitate convergence in the implementation of both instruments. Overall, this shows that the Compact has the potential to support the Convention by facilitating its implementation.

⁴⁵ Statement by Laurel Townhead, Quaker United Nations Office, during the CMW's General Discussion of GC 6 drafts, <https://www.ohchr.org/en/press-releases/2022/09/committee-migrant-workers-discusses-draft-general-comment-convergence> (last accessed on 25 July 2024).

⁴⁶ <https://www.ohchr.org/en/press-releases/2022/09/committee-migrant-workers-discusses-draft-general-comment-convergence> (last accessed on 25 July 2024).

⁴⁷ The UN also adopted the Global Compact Refugees (UN, A/73/12 (Part II) and A/RES/73/151), but this instrument focuses on asylum seekers and refugees.

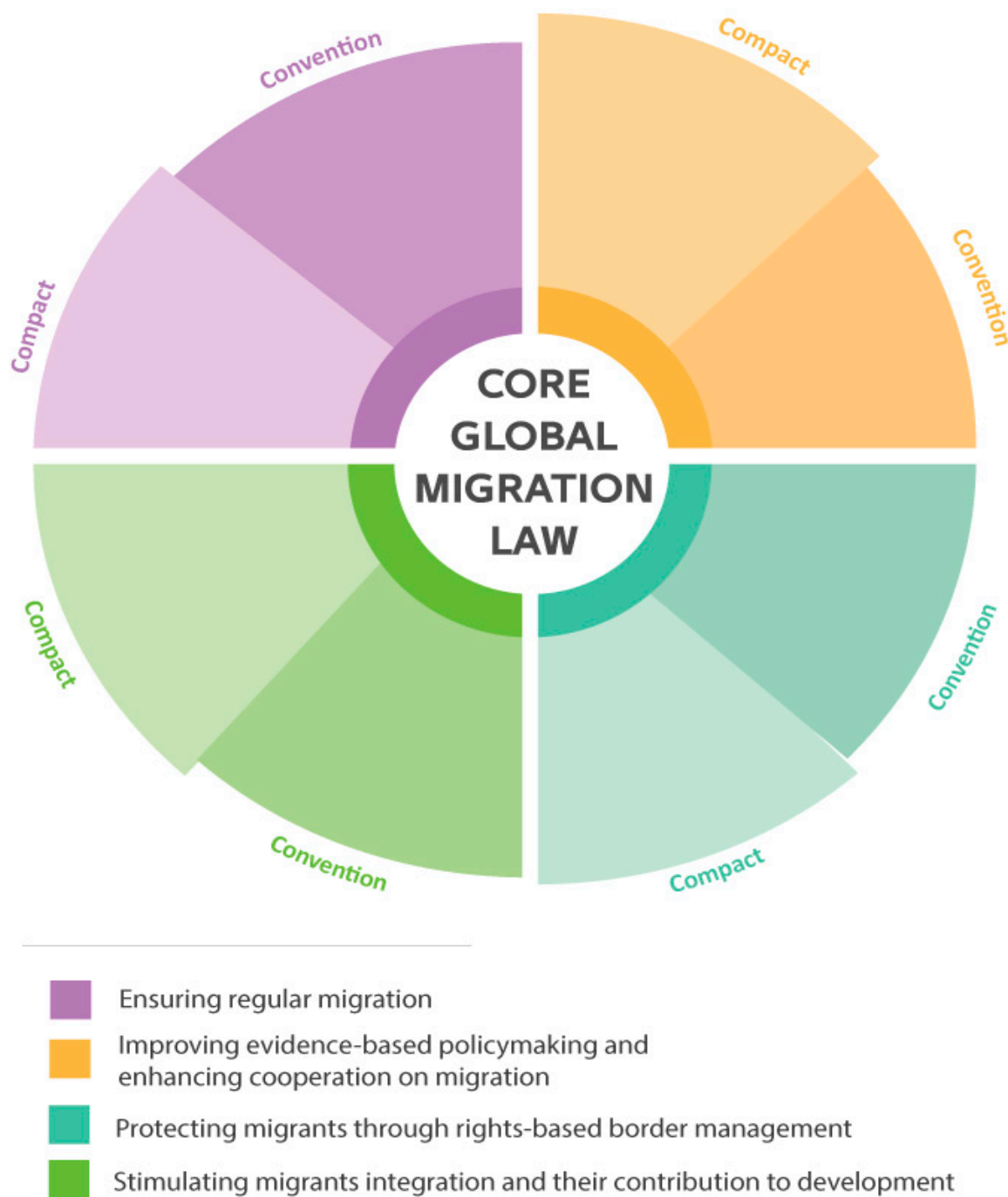


Figure 1. ‘Core global migration law’ charter.

6. Obstacle 4: Monitoring by the Committee on Migrant Workers

The final obstacle to ratification of the Convention relates to Tunisia’s reluctance to be subject to the control of the CMW, in particular, to the reporting obligation and complaint procedures.

As to complaint procedures, the Compact, being a soft law instrument, does not include any form of inter-state or individual complaint procedure. In contrast, Article 76 (1) of the Convention provides that a state ‘may’ declare that it recognises the competence of the Committee to consider communications from a state that claims that another state is not fulfilling its obligations under the Convention. In addition, Article 77 (1) provides that a state ‘may’ at any time declare that it recognises the competence of the Committee to receive communications from individuals who claim that their rights have been violated. States

parties are, therefore, not obliged to adhere to both complaint procedures. To date, both procedures have not yet entered into force because the required number of ten declarations has not yet been reached.⁴⁸ Even if both procedures enter into force, Tunisia can avoid being subject to both by refraining from making the required declarations. This would not be exceptional as this is what Tunisia did with regard to the complaint procedures under some core human rights instruments it ratified (Ben Chikh and Chekir 2009, p. 9).⁴⁹ The complaint procedures should not, therefore, be an obstacle to ratification.

As to reporting and review, the Compact encourages states to submit voluntary review reports containing details of challenges and the progress made towards achieving the Compact's objectives (GCM, para. 48–54). These reports are submitted to the United Nations Network on Migration (UNNM) and are meant to inform the IMRF taking place every four years. The UNNM has provided a template containing reporting guidelines to assist states draft review reports⁵⁰ and is currently drafting a list of implementation indicators⁵¹ aiming at assisting states in reviewing the implementation progress. The GCM's review process results in a Progress Declaration⁵² containing details of challenges and progress in the implementation, as well as recommendations not directed to specific states (GCM, par. 49 (e)).

With regard to reporting to the Committee, states are required to submit a periodic report on the measures taken to implement the Convention. While the first report has to be submitted one year after the ratification, subsequent reports should be submitted every five years.⁵³ In recent years, the Committee has adopted a simplified reporting procedure, consisting of a state's response to a 'list of issues' pre-determined by the Committee. The state's response is considered by the Committee to constitute a periodic report by the state in question.⁵⁴ Reports will then be considered by the CMW, which will provide comments and recommendations in the form of Concluding Observations which are non-legally binding.⁵⁵

Thus, just like the recommendations made in the context of the GCM's review process, the CMW's Concluding Observations are not legally binding. The reluctance to be subject to the CMW's reporting procedure is, therefore, attenuated. In addition, although, at first glance, what Tunisia should do as part of the GCM's review differs from reporting under the Convention, the contents of the respective reports would be largely overlapping in view of the overlap and convergence between the two instruments. Further, the UNNM template and list of implementation indicators, on the one hand, and the CMW's 'list of issues', on the other hand, would be overlapping, or at least inform each other, in view of the relationship between the Compact and the Convention. In particular, when reviewing the GCM's implementation, Tunisia will have to report on the progress made in the implementation of the ICRMW as this constitutes one of the actions to be taken to implement Objective 6 of the GCM. Hence, it can be argued that by reporting to the UNNM,

⁴⁸ See the declarations made in this respect: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&clang=_en (last accessed on 25 July 2024).

⁴⁹ Tunisia has not ratified the complaint procedures for three key human rights conventions: the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention for the Protection of All Persons from Enforced Disappearance.

⁵⁰ UNNM, Note on the implementation, follow-up and review of the Global Compact for Safe, Orderly and Regular Migration (GCM), p. 4, available at: <https://migrationnetwork.un.org/resources/imrf-roadmap-annexes-english> (last accessed 26 July 2024).

⁵¹ UNNM (2023) Measuring progress: GCM indicators, GCM Talk 27 February 2023, available at: <https://migrationnetwork.un.org/events/gcm-talks-measuring-progress-gcm-indicators> (last accessed 26 July 2024)

⁵² IMRF Progress Declaration, 2022, available at: <https://migrationnetwork.un.org/hub/discussion-space/international-migration-review-forum-2022/content/imrf-progress-declaration> (last accessed 26 July 2024).

⁵³ Article 73.

⁵⁴ Rules 33–34 of the Committee's Rules of Procedure (CMW/C/2).

⁵⁵ CMW, Reporting Guidelines, available at: <https://www.ohchr.org/en/treaty-bodies/cmw/reporting-guidelines> (last accessed 26 July 2024).

Tunisia would indirectly be reporting to the Committee. In this sense, GC 6 of the CMW can provide guidance on how to operationalise the alignment of the two reports.

In brief, the claim that ratification will subject Tunisia to the control of the Committee is tempered by the possibility of avoiding the complaints procedures and by the soft character of the CMW's concluding observations. In addition, in view of the overlap between the GCM and the Convention, the reporting burden is attenuated by Tunisia's engagement with the Compact's review mechanism. In particular, to review the national implementation of the GCM, Tunisia will have to review the progress made in implementing Objective 6(a); this national review would overlap with Tunisia's reporting to the CMW as it will cover the extent to which the Convention is effectively implemented in Tunisia.

7. Conclusions

This article sets out to examine the potential of the Compact to reinforce the legal authority of the Convention in Tunisia and to pave the way for the attenuation of the obstacles to its ratification.

We first conclude that the GCM has considerable potential to promote the Convention and its ratification in Tunisia. A strong indication of this potential is that the ratification of the Convention is addressed in Tunisia's second review report submitted to the GCM's review process. Second, the implementation of Objective 6 of the GCM in Tunisia resulted in the government being willing to reconsider its position towards the ICRMW. Third, the national debate on the GCM's usefulness created an opportunity for civil society to recall the need to ratify the ICRMW when debating the GCM. In short, the GCM created a public dialogue and legal context in which the Convention gained visibility and political attention. This exemplifies the GCM's potential to pave the way for the ratification of the ICRMW. The GCM, in particular Objective 6(a), can, therefore, be seen as a first step to the endorsement of the Convention.

Second, we conclude that reading the Convention's provisions, related to the four identified ratification obstacles, through corresponding GCM's Objectives, attenuates those obstacles. The understanding that the Convention grants extensive protection to undocumented migrants (obstacle 1) is tempered as the Compact and the Convention intend to give similar protection regarding access to healthcare and regularisation. The GCM, thus, supports the legal authority of the ICRMW. Regarding labour rights of undocumented migrants, a restrictive interpretation of the GCM's phrase 'contractual labour' bears the risk of weakening the Convention. However, a progressive interpretation of the GCM in accordance with core international human rights and ILO Convention No. 143 would soften this obstacle. Furthermore, the claim that the Convention provides a strong right to reunification for all 'regular' migrant workers and their families (obstacle 2) is based on a misunderstanding of the Convention. In fact, the GCM and the Convention regulate family reunification in a similar way so that we can declare that the GCM is confirming the Convention. Further, the implementation burden (obstacle 3) would be attenuated as the Convention's implementation can be aligned with the implementation of Objective 6 of the GCM and other GCM Objectives overlapping with the Convention's provisions. Finally, the claim that ratification will subject Tunisia to the control of the Committee (obstacle 4) is tempered by the possibility of avoiding the complaints procedures; the soft character of the CMW's concluding observations; and the possibility of juxtaposing the GCM's national review, including Objective 6(a), and the national reporting to the CMW.

In sum, this article confirms the well-established (see Introduction) function of soft law as a catalyst supporting hard law by reinforcing its legal standing and by providing an impetus for its endorsement. Indeed, the Compact has considerable potential to reinforce the legal authority of the Convention and to pave the way for the attenuation of the obstacles to its ratification, not only in Tunisia but also in other countries. There are three main vehicles through which this reinforcement takes place: the public and political debate about the GCM, including its review mechanism, which creates an opportunity to give visibility to the Convention; the implementation of Objective 6(a) of the GCM, which

encourages states to promote the ratification and implementation of the Convention; and a reading of the Convention and the Compact as two converging instruments based on core human rights instruments and ILO Conventions.

An eventual future ratification of the ICRMW by Tunisia bears the potential to further stimulate the interaction between the Compact and the Convention when implementing and reporting on both instruments, with the result that the boundaries between both norms would become blurred. This depends, however, on whether the two instruments would be approached as forming two interlinked parts of what we have called a ‘core global migration law’ charter.

The cross-fertilisation between both frameworks can be reinforced by civil society as both the Convention and the Compact require⁵⁶ their effective participation in the implementation and review/monitoring process. In view of the overlap and complementarity between the Convention and the Compact, combining the efforts of the identified three civil society groups would reinforce the alignment of the implementation of the two instruments. If the organisations fully engaging with the Compact, those using it pragmatically, and those exclusively engaging with the Convention align their advocacy and shadow reports, the cross-fertilisation between the two mechanisms would be reinforced. To this aim, civil society can draw on the upcoming GC 6 for simultaneously monitoring the implementation of the Compact and the Convention, and in this way, enable the Convention to further shine in Tunisia. Crucially, civil society’s advocacy may be more effective when it is framed around Objective 6(a) of the GCM, which clearly calls for the ratification and implementation of the ICRMW.

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⁵⁶ The CMW considers cooperation with civil society organisations to be ‘extremely important for the promotion and implementation’ of the Convention (CMW, 2014). Similarly, the Compact includes the guiding principle of the ‘whole society approach’, which requires the effective participation of the various actors, especially civil society (GCM, para. 15).

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