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Comprehensive Approaches in the Global Compact for Migration and the EU Border Policies: A Critical Appraisal

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Abstract: The quest for safe, orderly and regular migration underpins the UN Global Compact for Migration (GCM) and translates into "comprehensive and integrated" responses to large movements of refugees and migrants. The effort to de-compartmentalise the governance of cross-border human mobility through "comprehensiveness" shapes the overall search for greater policy coherence via regime interaction and shared responsibility within the GCM. A similar effort has been made at the EU level to overcome the "silos approach" characterising the distinct policies on migration, asylum, and border management. This parallelism is particularly meaningful as the reason is twofold: at the operational level, because of the role played by the EU in fashioning the cooperation models underpinning the GCM, which enhances the relevance of EU law and practice for the implementation of the GCM; at the normative level, because the GCM draws on four guiding principles—i.e., sovereignty, good governance, human-centricity, and the rule of law—which are also key features of the EU legal system. Departing from these premises, this article reveals the meaning of "comprehensive and integrated" responses to large movements of refugees and migrants in the GCM and EU border policies. It does so in order to provide a critical appraisal of the legal and policy implications of comprehensive approaches in the global and European governance of cross-border human mobility.

Keywords: large movements of refugees and migrants; governance of cross-border human mobility; the Global Compact for Migration; the Global Compact on Refugees; guiding principles; the European Union; comprehensiveness versus fragmentation; de-compartmentalisation

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1. Introduction

The quest for safe, orderly and regular migration is the quintessence of the UN Global Compact for Migration (GCM), as made immediately evident by its *nomen*. The Compact's denomination underscores the substantive aspiration that underpins its normative structure and institutional architecture, in line with indicator 10.7.2 of the Sustainable Development Goals, i.e., turning dangerous routes and unsafe journeys into regular pathways. According to Objective 23, this goal shall be attained by strengthening international cooperation and global partnerships for "a comprehensive and integrated approach to facilitate safe, orderly and regular migration". This commitment follows up the New York Declaration, which calls for greater international cooperation to deal effectively with large movements of refugees and migrants, and frames this endeavour as the centrepiece of the search for "comprehensiveness" in the new global response to migration and human mobility (Annex I, para. 7 and Annex II, para. 1).

In addition, the New York Declaration acknowledges that the pursuit of "durable solutions" for refugees is a global responsibility, to be addressed through a whole-of-society and whole-of-government approach (para. 16). In the UN Global Compact on Refugees (GCR), this approach to "comprehensiveness" translates into international cooperation and the mobilisation of civil society under the auspices of the Global Refugee Forum and the Global Refugee Sponsorship Initiative. Thus, both Compacts seem to provide a more comprehensive "architecture" to the substance of international migration law (IML)—to

use the very effective metaphor by Aleinikoff (2007) describing international legal norms on migration as "substance without architecture".

Revealing and reflecting on gaps, pitfalls, and the potential of "comprehensiveness" to hinder or, on the contrary, enhance good governance and individual agency within the GCM is the prime aim of this research (see, *mutatis mutandis*, Biermann et al. 2009; Young 2018). Comprehensiveness, in the sense of the GCM (para. 41), is intended as the search for greater policy coherence via regime interaction, having as a touchstone the overarching respect for the rule of law and the human rights of people on the move (Betts and Kainz 2017). In the GCM, this endeavour is accompanied concurrently by States' commitment to integrate the management of their borders (Objective 11 GCM), while securitising international travel is a cross-cutting and comprehensive concern, occupying at least one-third of its objectives (Koslowski 2019). These goals are connected to the basic premises of IML as rooted in the sovereign right of States to decide on the admission of aliens to the territory. The principle of sovereignty is indeed a core guiding principle of the GCM (para. 15(c)), which shapes cooperation on integrated border management (IBM) within the remit of Objective 11, together with "the rule of law, obligations under international law, and the human rights of all migrants, regardless of their migration status" (para. 27) (Carrera et al. 2018).

While border management is intrinsically linked to the well-established sovereign power to exclude aliens from access to the territory[1], the call for cooperation on IBM is quite novel in the international setting. The operational notion of IBM has been developed at national and regional levels and plays a crucial role within the EU legal system (see, among many, Hobbing 2005; Carrera 2007), where it is devoted to "eliminate loopholes between border protection, security, return, migration, while always ensuring the protection of fundamental rights" (COM(2022)303, para. 1). As such, this notion goes necessarily beyond the scope of international cooperation within the framework of the protocols attached to the Palermo Convention (see Molnár and Brière 2022). Its distinctiveness relates to the effort to overcome the "silos approach" characterising national policies on migration, asylum, and border management through a comprehensive and intersectoral governance of cross-border human mobility (Moreno-Lax 2017a; Wagner 2021).

Although the EU has not yet adopted the GCM[2], its input towards framing IBM as a global goal within the remit of the GCM has been lucidly demonstrated (Molnár 2020, p. 331). In this sense, the EU integrated management system for external borders may be considered a model for the development of "international, regional and cross-regional border management cooperation", with a view to "facilitating safe and regular cross-border movements of people while preventing irregular migration" (Objective 11 GCM, para. 27(a)). Furthermore, the EU integrated border management system does not operate in a vacuum, as it is embedded into a legal system premised upon the prominent role given to the rule of law and protecting the human rights of all, regardless—at least in principle—of their migration status. These axiological components of the EU legal system are shared by the GCM, which also has the centrality of national sovereignty in common. This explains why insights from the EU trend towards de-compartmentalisation of EU migration, asylum, and border management policies might be also significant for the implementation of the GCM.

Departing from a reflection on the principle of sovereignty as the major source of fragmentation of the IML (Section 2), this article explores the search for comprehensiveness in the GCM and EU border policies, by focusing on the interplay between the quest for safe pathways and the commitment to integrated border management. First, it does so at a theoretical level, through a systemic and contextual interpretation of the GCM (Section 3). Subsequently, analysis draws on the lessons learned from the EU governance of cross-

[1] See, eloquently, ECtHR [GC], decision of 5 May 2020, No. 3599/18, *M.N. and Others v. Belgium*, para. 89.

[2] The *Proposal for a Council Decision authorising the Commission to approve, on behalf of the Union, the Global Compact for Safe, Orderly and Regular Migration in the field of immigration*, COM(2018)168, was withdrawn by the European Commission in 2019.

border human mobility for advancing the understanding of "comprehensiveness" at the operational level (Section 4).

This analysis adds to existing literature on the fragmentation of international law (see, among many, Sur 1997; Fischer-Lescano and Teubner 2004; Dupuy 2007; Koskenniemi 2007; Broude and Shany 2011; Young 2012; Peters 2016) and the "asymmetry" of IML (see, e.g., Lillich 1984, p. 122; Cole 2006; Opeskin 2009, p. 27; Molnár 2015) by showing that the call for a comprehensive and integrated response to migration and human mobility cannot be considered an element of intrinsic advancement in terms of consistency between the aims and means of the IML. On the one hand, such a call may be framed as a trigger to strengthen migrant and refugee rights; on the other, it may turn into a particularly insidious conceptual framework for innovative techniques of "cooperative deterrence" (Gammeltoft-Hansen and Hathaway 2015), expanding the legal hiatus between the individual right to leave any country and the state prerogative to exclude aliens from access to their territory. The conditions under which this ambivalent interaction between the quest for safe and regular pathways and cooperation on border management may lead to the enhancement—or (vice versa) to a further dilution—of the legal entitlements of migrants and refugees are identified in the concluding section (Section 5), with a view to contributing to the debate stimulated by the International Migration Review Forum (IMRF).

2. The Sovereign and the Migrant: Retrospectives on the Fragmentation of IML

Free movement is among the earliest rules on the treatment of aliens by political entities (Purcell 2007). Plato, in his fifth book of *The Laws*, already warned that "the absolute prohibition of foreign travel, or the exclusion of strangers, is impossible, and would appear barbarous to the rest of mankind" (Jowett 2010, p. 156). As a result, the right to leave and the right to enter any country have developed in parallel for centuries. These rights were naturally tempered by the interests of the governing entity, as they have never been conceived of as absolute rights (Chetail 2017, p. 19). However, early developments of the corpus iuris governing human mobility clearly confirm that the ethos of hospitality has underpinned the first elaborations of the right to asylum (Crépeau 1995). At the same time, the Westphalian endorsement of Hobbesian sovereignty as the overarching principle steering international relations[3] triggered a decisive fracture between emigration and immigration. The asymmetry between the human right to leave any country and the octroyed concession to enter a foreign country, to be granted by the sovereign State, is the major heritage of this fracture in contemporary international law (Chetail 2014).

The impact of sovereignty on the development of the IML as a fragmented and complex regime has been widely explored (see, among many, Opeskin et al. 2012; Chetail 2019). National sovereignty is the primary source and a key determinant of the asymmetry between the two poles of the movement of people across international borders, which has contributed to the fragmentation of IML in a number of different ways.

At first, freedom of movement and residence rights were only recognised within state borders, while the right to leave any country was framed as universal (see Art. 13 of the Universal Declaration of Human Rights—UDHR; Art. 12 of the International Covenant on Civil and Political Rights—ICCPR).[4] Meanwhile, attempts at reconciling emigration as a human right with immigration as a matter for national regulators have triggered the liberalisation of human mobility within the Global North (Minderhoud et al. 2019). Alongside the proliferation of sectoral and regional designs on the free movement of persons—such as the multilateral cooperation framework on service providers in the General Agreement on Trade in Services and the Schengen cooperation within the European Union—the "bifurcation of human mobility" along the North/South axis has expanded the room for externalisation and double standards (Spijkerboer 2018). Similarly, differential

[3] On national sovereignty as the overarching principle framing the State—i.e., sovereignty as a frame—and steering international relations—i.e., sovereignty as a claim—see further, Walker (2013).

[4] See also OHCHR-IOM, *Migration, Human Rights and Governance: Handbook for Parliamentarians*, No. 24/2015, pp. 19–20.

legal treatment of aliens rooted in nationality remains commonplace, because—as recently reaffirmed by the International Court of Justice (ICJ) in *Qatar v. United Arab Emirates*—it falls beyond the scope of the prohibition of discrimination on "national origin" set forth in Art. (2) and (3) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)[5].

Second, the protection offered by international refugee law (IRL) to certain groups of aliens mirrors the fracture between the regulatory levels at which the international movement of people has been traditionally addressed by configuring refugee status as a self-contained exception to the rule (Goodwin-Gill and McAdam 2021). Complementary protection afforded by international human rights law (IHRL)—although universal (Art. 14 UDHR)—does not go beyond the right to seek protection, while it frames the enjoyment of asylum as a state-dependent right (Grahl-Madsen 1980). Thus, the most prominent limitation to the sovereign power to control access to the territory consists of a ban on States wishing to remove aliens who may risk severe and irreparable harm in the country of origin. In this sense, the prohibition of refoulement has been neatly qualified as "a piece in the international struggle for the enforcement of fundamental rights" (Schabas 2007, p. 47). This prohibition has offered individuals a *locus standi* before international and municipal *fora* to complain against removals leading to a real risk of persecution or serious harm, while interdicting penalisation for spontaneous arrivals and unauthorised entry of would-be refugees (Goodwin-Gill 2001).

Third, the tide of human rights, together with globalisation, have prompted a revival of the Hobbesian will to punish (Fassin and Kutz 2018). On the one hand, IHRL challenges state sovereignty from the inside, while on the other, by making state borders more porous and less manageable, globalisation challenges it from the outside, disproportionally affecting migration and refuge at the borders. Coupled with the functional outsourcing of public powers to disembodied and delocalised entities by receiving States, this revival of the cogency of borders has triggered the development of a rich toolbox of *non-entré* policies, which has been thoroughly explored and illustrated by the scholarship (see, among many, Gammeltoft-Hansen and Hathaway 2015; Gammeltoft-Hansen and Tan 2017; Carrera et al. 2019b).

This explains why—with over 281 million people on the move[6]—the adoption of Global Compacts has been seen as an unprecedented opportunity. Even if they are non-binding frameworks of result-oriented commitments (Gammeltoft-Hansen et al. 2017; Guild and Grant 2017), it has been claimed that they could "become a pivotal regulative tool", leveraging on a global governance approach to develop "a new understanding of normativity in international law" (Hilpold 2021, p. 18).

The legal aspiration for a new legal paradigm governing human mobility across international borders has—in turn—called into question how to make the global governance of large movements of migrants and refugees "work for all" (UN Doc. A/72/643). The responses provided by the Global Compacts, especially by the GCM, seem to reverse the fragmentation of the IML by developing a comprehensive normative framework for the governance of cross-border human mobility. These developments are illustrated in the next section, in order to offer an overview of their potential impact on the asymmetry between the sovereign right to exclude and the human right to move across the borders.

3. Clustering the GCM's Guiding Principles: Bridging the Gap or Widening the Hiatus?

This section examines the scope and content of "comprehensiveness" within the normative architecture of the GCM, by taking into account the interplay between the quest for safe, orderly and regular migration and cooperation on border management. This interplay is featured in the guiding principles outlined in para. 15 of the GCM, which

[5] ICJ, judgment of 4 February 2021 (preliminary objections), *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Qatar v. United Arab Emirates*), para. 83.

[6] *World Migration Report 2022*, International Organisation for Migration (IOM), Geneva, p. 2.

pivot around four determinants building and explaining interconnections among all soft commitments; i.e., national sovereignty, good governance, human-centricity, and the rule of law[7].

These determinants intersect all migration-specific objectives—as listed in para. 16—and can be further articulated as cutting across two main clusters of commitments, the first intergovernmental and second human centred. Yet, the potential effect this cross-cutting and interconnected approach might have on the implementation of the GCM remains undetermined, primarily because of the lack of any political option on the normative or logical pre-eminence of one determinant over the others (Panizzon 2022)[8]. Indeed, as the scholarship has demonstrated (see, among others, Pécoud 2021; Martín Díaz and Aris Escarcena 2019), the negotiation and implementation of the GCM has been affected by a marked tendency to de-politicise the major dilemmas fragmenting the global governance of international migration—a tendency that has sharply diluted the original commitment (and aspiration) to make migration "work for all" (UN Doc. A/72/643).

Thus, the following subsections attempt to capture the inherent tension between the old logic of fragmentation and the new search for policy coherence through comprehensive approaches. On the one hand, they show how the lack of political consensus over the normative or logical differentiation (Elias and Lim 1997) of the GCM's commitments, together with a defective proceduralisation of the mechanisms and indicators to make migration management more unbiased (Kleinlein 2019), reproduce the fragmentation of IML within the GCM. On the other, analysis shows how the very same idea "that we are all countries of origin, transit, and destination" (Objective 23, para. 39, GCM) might advance—at least on paper—a more equitable and comprehensive model of responsibility-sharing. The areas of major friction are examined from the perspective of the two main clusters identified above—that of international cooperation and that of the human rights' holders.

3.1. Cluster 1: International Cooperation

This subsection investigates the interrelation between Objectives 23 and 11 of the GCM, as steered by the GCM's principles pertaining to the intergovernmental realm; i.e., national sovereignty and migration governance. It does so in order to assess how this interrelation may shape international cooperation in the field of migration and asylum; that is, either by consolidating existing trends of global migration governance "without migrants" (Rother 2013b; on the notion of "migration governance", see also Betts 2011; Koslowski 2011) or envisaging innovative models of cooperation in line with the claim for *good* governance[9].

3.1.1. Shared Responsibility within the "Migration Cycle": A Possible Reading of Objectives 23, 2, and 5, in Combination with Objectives 11 and 21

The rationale upon which the call for international cooperation in managing large movements of migrants and refugees is rooted is twofold: first, it is linked to the idea that promoting closer cooperation among all countries throughout the "migration cycle" (para. 16 GCM) may contribute to better governance at the bilateral, regional, and global level (para. 39(e) GCM); second, it puts forward the assumption that the achievement of better governance of migration may reinforce the principles of solidarity and shared responsibility (para. 39 GCM).

The causal nexus between a less fragmented migration governance—aligning cooperation with the migration cycle—and the principle of equitable burden and responsibility sharing is mediated, within the GCM, by the idea that cross-border human mobility may

[7] The *IMRF Progress Declaration* (UN Doc. A/AC.293/2022/L.1), endorsed by the UN General Assembly on 7 June 2022 (under item 15 A/76/L.58), reiterates their central role.

[8] This is confirmed by the *Second Report on the Implementation of the GCM*, UN Doc. A/76/642, which has been rightly criticised for its vagueness, making it difficult to secure good faith implementation (Grundler and Guild 2022).

[9] On establishing "good governance of migration" as an explicit goal of the UN, see UN Doc. A/71/728, para. 41.

represent, if well-managed, a global common good, in connection with the values and principles embodied in the UN Charter (see Arbour's Closing remarks at GCM). That is why para. 11 of the GCM frames the "overarching obligation to respect, protect and fulfil the human rights of all migrants, regardless of their migration status" as a shared responsibility—a notion with a well-established relevance for international cooperation in the human rights field (Salomon 2007) and vis-à-vis the collective responsibility towards refugees (Hurwitz 2009).

Objective 23, therefore, is closely connected to two other goals: the one enshrined in Objective 2, which concerns the root causes of forced migration, and that put forward in Objective 5, which refers to the availability and enhancement of regular pathways. The interplay between Objectives 23 and 2 provides upstream solutions to forced migration. It pinpoints cooperative patterns based on "the rule of law and good governance, access to justice, and protection of human rights" (para. 18(b) GCM) with a view to minimising adverse drivers and structural factors that compel people to leave their country of origin. The interrelation between Objectives 23 and 5 offers, in turn, downstream responses to mass and protracted displacement, "in which refugees find themselves in a long-lasting and intractable state of limbo" (UNHCR ExCom EC/54/SC/CRP.14).

In addition to this goal, which is significant for the GCR too, the GCM extends the notion of regular pathways beyond the remit of IRL, by putting forward the idea that a better management of large movements of migrants and refugees cannot help but facilitate labour mobility (paras 21 and 22(g)) and family reunification (para. 21(i)). That facilitating human mobility is intended as the key premise to successful cooperation on migration is evident from the recurrent reference to this goal—mentioned 62 times in the text of the GCM (Crépeau 2018). The emphasis on facilitating human mobility translates into three major commitments: first, the de-casualisation of the migration status, by the recognition of legal identity (para. 20) and easing the transition from one status to another (paras 22(g) and 23(h)); second, the adoption of a rights-based approach to the principle of non-discrimination, which allows differential treatment only in accordance with IHRL (para. 31); and third, the promotion of an evidence-based public discourse and data-driven policies, in order to re-shape perceptions concerning migration and fight persistent stereotypes (para. 33).

By advancing the idea that large movements of migrants and refugees can be governed by granting safe passage and regular statuses, the GCM proposes an alternative to the dominant containment approach steering international cooperation on migration under the headship of the Global North (Gammeltoft-Hansen and Tan 2017). This alternative model, relinking "the rule of law and good governance" with "access to justice and protection of human rights" (para. 18(b) GCM), is, however, merely sketched out and presented as the re-statement of existing governance models. Moreover, its central feature—i.e., the facilitation of safe and regular cross-border movements of people—is construed in a dyadic relationship with the prevention of irregular migration (para. 27).

In this way, the containment rationale, embedded in the dominant approach to cooperation on migration, resurfaces from the legal texture of the GCM and downplays the call for regularisation of human mobility. The word choice confirms this reading: indeed, while the notion of "labour mobility" crosscuts all GCM Objectives dealing with regularisation of migration pathways, the expression "labour migration" is confined to very specific aspects, mostly concerning the implementation of existing commitments. As "labour mobility" invariably alludes to frequent to-and-from movements between countries of origin and destination, but does not refer to settlement, behind this notion lies the idea that "mobile" labour migrants are not in principle eligible for stable settlement in destination countries.

The intrinsic source of inconsistency laying at the very basis of the quest for safe pathways becomes apparent when considering the other principle shaping intergovernmental cooperation within the GCM: i.e., national sovereignty. The new global governance of large movements of migrants does not only uphold this principle (recital 7 of the preamble), but elevates it to a guiding principle, compacting the unity of purpose of participating States

(para. 15), and to the fundamental organisational principle governing integrated border management (para. 27).

Due to the prerogative of States to distinguish between regular and irregular migration[10], the shared responsibility "to respect, protect and fulfil the human rights of all migrants, regardless of their migration status"—set forth in para. 11 of the GCM—has to be squared with "different national realities, policies, priorities, and requirements for entry, residence, and work", set forth at the domestic level (para. 15, *lit.* c).

As domestic authorities are primarily in charge of the balancing exercise inherent in these different realities, policies, priorities, and requirements, national responses are the prime implementing instrument of the GCM. The interconnectedness between the border regime and human mobility (Betts 2010) thus rests on those state authorities that determine the ultimate significance of the borders; either as a means to prevent unauthorised journeys or as a tool to organise safe passages (Arbel 2016). As a result, within the sense of Objective 23, the management of cross-border human mobility in a coherent and effective fashion is disconnected from the commitment to "responsible" migration—to be intended as a responsibility *for* and *towards* migrants and refugees, within the meaning of indicator 10.7 of the 2030 Agenda for Sustainable Development (Guild 2018). Cooperation on cross-border human mobility is made dependent, instead, upon the blending of operational cooperation on integrated border management (Objective 11) and deformalized partnerships on readmission and reintegration (Objective 21).

The interplay between Objectives 11 and 21 GCM reveals that the efficiency of return and reintegration mechanisms shall be chiefly achieved via anticipatory border governance. This necessitates an emphasis on pre-departure cooperation, aimed at pre-filtering people on the move and curbing the migration journey, in order to reduce the resulting number of returnees (para. 27(c)) and the related risk of displacement upon return (para. 37(b)). Correspondingly, managing national borders "in a coordinated manner, promoting bilateral and regional cooperation, ensuring security for States, communities, and migrants" (para. 27) requires enhanced "cooperation on the identification of nationals and issuance of travel documents to facilitate returns and readmission" (para. 37(c))—a goal that, within the GCM, is connected to the duty on States to readmit their own nationals (Objective 21), while within the GCR, it is associated with refugees' dignified return (para. 11).

3.1.2. On Possible Inferences: Does the GCM Advance a Duty of Intergovernmental Cooperation on Return/Readmission?

Remarkably, both Compacts negatively construe the right to leave any country and to return to the country of origin/habitual residence, emphasising the importance of the return dimension, in connection with the duty to "[m]inimize the adverse drivers and structural factors that compel people to leave" (Objective 2). This limited and partial understanding of the right to leave will be considered in the next section from the perspective of individual entitlements. However, the exegesis of the right to leave in the GCM is also relevant regarding international cooperation on migration because it "fragments" the migration cycle (para. 16 GCM) by neatly separating cooperation on readmission from the activation of new channels for regular migration. As a consequence, the good governance of large movements of migrants and refugees throughout the migration cycle appears restricted to labour migration based on skills-matching with national economies of receiving countries (Objective 5).

In addition, although the customary nature of the right to return to one's own country—as reproduced in Art. 12(4) ICCPR—is undisputed, it has been rightly pointed out that the existence (and nature) of a corresponding duty of intergovernmental cooperation on return/readmission of nationals is more controversial (Guild and Weatherhead 2018), especially when it comes to the removal and deportation of rejected asylum seekers (Noll 1999). In this sense, the GCM's emphasis on the responsibility towards the international

[10] On the need to keep and reinforce existing legal categories, refer to the GCM co-facilitators' position of 5 March 2018, available here.

community of migrant-sending countries for large movements of migrants and refugees appears problematic.

From a legal viewpoint, it allows migrant-receiving countries to advance a normative claim in negotiations on minimising drivers and factors of involuntary migration (Objective 2). This shift cannot be regarded as having a mere "para-law" function—in the sense indicated by Peters (2018)[11]. It seems, instead, to mark an attempt to streamline international cooperation on readmission by advancing an *opinio necessitatis*—if not yet *iuris*—to making countries of origin accountable for unauthorised departures and difficult returns.

Content-wise, "helping migrants at home", before they are compelled to leave, and escorting them back home when they have no legal title to stay is the motto synthetising this shift. The legal aspiration to trace and control human mobility across borders is, therefore, theoretically and practically connected to the reproduction of unbalanced international relations between the Global North and the Global South, rhetorically mediated by protection needs. Thus, notwithstanding the GCM's call for interconnectedness between migration-specific policies (e.g., labour migration) and non-migration-specific policies (trade, education, energy, and investment), this unbalanced relationship cutting across the GCM may replicate and even fortify cooperation on externalisation and responsibility shifting, along the lines of the "consensual containment" paradigm (Giuffré and Moreno-Lax 2019; see also Lavenex 2016; Vitiello 2019; Panizzon and Vitiello 2019).

3.1.3. On Ambivalent Models and Tricky Assumptions: What Does "Data-Driven Governance" Mean for "Good Governance"?

Operational cooperation affecting migrants in transit and assistance with border management are represented as a means to reduce unauthorised human mobility for life-saving purposes, as clearly enshrined in Objective 8 on coordinated efforts for search and rescue at sea, or for humanitarian purposes, as indicated in Objective 9 on transnational responses to migrant smuggling.

From this perspective, the GCM crystallises data-driven and evidence-based state practice and regulation, which legitimises the recourse to the protection argument to put forward containment cooperation (Moreno-Lax 2018). This is the case of cooperation protocols aimed at facilitating "cross-border law enforcement and intelligence cooperation in order to prevent and counter smuggling of migrants so as to end impunity for smugglers and prevent irregular migration" (para. 25(c)) and for the other types of deformalized cooperation (e.g., technical arrangements and migration partnerships) listed in Objective 23.

Similarly, the anticipatory approach to integrated border management emerges from the prominent role assigned to information and communications technology, alongside intelligence cooperation, in steering human mobility across the borders. Objective 3 expressly prioritises the information of migrants to raise awareness of the risks of irregular migration, while Objective 1 endorses an evidence-based model of decision-making on migration, based on "accurate and disaggregated data". Objective 12, aimed at strengthening the predictability of migration procedures, alongside the identification of migrants required under Objective 4, are other fundamental elements connected to this model of evidence-based governance.

While procedural standardisation (para. 28, *lit.* c) and universal recognition of travel documents (para. 20, *lit.* b) may enhance the protection of people on the move, their clashing with the return rationale may turn them into the means to downplay migrants' right to an effective remedy at the borders and privacy rights. Similarly, evidence-based governance of migration may help reverse anti-immigrant narratives spreading in the

[11] As Peters (2018) points out, the GCM may have different functions: first, bolstering the progressive development of IML, by supporting the formation of an *opinio iuris* on the recognition of safe pathways ("pre-law"-function); second, codifying customary international norms and being a hermeneutic parameter for integrating lacunae ("para-law"-function); and third, enhancing the effective implementation of hard law by providing operational and interpretative guidance ("law-plus"-function).

Global North. However, if comprehensive data collection is not guided by any overarching principle other than national interest, the result cannot but reflect this premise.

3.2. Cluster 2: Migrant and Refugee Rights

This subsection matches the results obtained from the analysis of the normative interplay between Objectives 23 and 11 of the GCM at the intergovernmental level with the other core determinants steering and orienting the implementation of the GCM; i.e., human-centricity and the rule of law. It does so in order to assess the potential impact on migrant and refugee (substantive and procedural) rights of international cooperation in the two fields of action identified by Objectives 23 and 11. Therefore, the rights covered by the analysis belong to two macro areas: those connected to the right of entry and those related to the right to stay.

The analysis departs from the major issue at stake during the negotiation process of the GCM—which lucidly emerges from most of the plenary statements rendered at the Marrakech Conference; i.e., the exigency to reassure States that the quest for safe pathways would not further erode sovereign control over external borders[12]. The emphasis on leaving untouched the dichotomy between migrants and refugees responds to this exigency of mitigating States' concerns and affects the implications of "comprehensiveness". Yet, it does not merely translate into the adoption of two different Compacts. It also implies the need for a complex balancing act—within the scope of the GCM—between the quest for human centricity and the preservation of state prerogatives of border control.

Entry and exit rights are impacted by this inherent tension in a twofold manner: first, in relation to the function of the principle of non-refoulement as a "method of promoting global observance of human rights" of people on the move (Schabas 2007, p. 47), and second, with reference to the function of the right to leave as a trigger of the right to seek asylum (Guild 2013; Moreno-Lax 2017a, p. 378; Goldner Lang and Nagy 2021, p. 447). Similarly, the rights to stay and to legal identity of migrants are affected by this tension, which also makes the prohibition of discrimination conditional on the "distinctions, exclusions, restrictions, or preferences [. . .] between citizens and non-citizens"—in the sense of Art. 1(2) CERD.

This understanding of the prohibition of discrimination has been recently upheld by the ICJ, in the abovementioned case *Qatar v. United Arab Emirates*, where it aligned with the ordinary meaning of Art. 1(2) CERD, as well as with the consolidated jurisprudence of specialised human rights courts such as the European Court of Human Rights (ECtHR)[13]. Nonetheless, the ICJ's decision to negate its jurisdiction *ratione materiae* appears striking in light of the CERD Committee's view—as expressed early on in a parallel case—that discrimination based on nationality may fall within the scope of the Convention[14]. In addition, although the case was decided by a solid majority, it is remarkable that most of the minority judges came from developing countries (see further on this Ulfstein 2022). Among the extra-legal factors that may have influenced the ICJ's decision, there is the alleged risk of impacting the rigid compartmentalisation of migrant categories underpinning IML and IRL.

Although the GCM upholds this rigid compartmentalisation, the following analysis challenges it by showing its intrinsic contradiction with the goal of creating a comprehensive "cooperative framework addressing migration in all its dimensions" (para. 4 GCM), and—more specifically—with human-centricity and the rule of law.

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[12] All of the statements are available on the website of the Intergovernmental Conference on the GCM. See, among others, the Statement by the UN Secretary-General, António Guterres, dispelling the myth that "The Compact will allow the United Nations to impose migration policies on Member States, infringing on their sovereignty".

[13] See, e.g., ECtHR [GC], judgment of 23 June 2008, No. 1638/03, *Maslov v. Austria*.

[14] CERD Committee, decision of 27 August 2019 on the Admissibility of the Inter-State Communication Submitted by Qatar Against the UAE, para. 63, UN Doc. CERD/C/99/4.

3.2.1. Entry Rights and Non-Refoulement: Or Why the GCM Does Not Call a Spade a Spade

Objective 21, committing States to "facilitate and cooperate for safe and dignified return", codifies the principle of non-refoulement in its extensive form, covering developments under IHRL and EU law[15]. The definition of the non-refoulement principle is accompanied by the prohibition of collective expulsion and the call for recognising due process rights to returnees.

Nonetheless, the GCM does not contain any textual reference to the expression "non-refoulement". The lack of any terminological reference to this internationally recognised expression is not without significance. Although the content of the principle is upheld and endorsed by the GCM, the choice to omit any reference to the evocative terminology of "non-refoulement", alongside the positioning of this duty within the remit of Objective 21, downplays the principle's function as both a source of positive obligations triggering access to rights for people on the move and an expression of "the collective responsibility of the community of States, stated already by Grotius and Vattel, that persons seeking asylum shall be able to find an abode somewhere" (Grahl-Madsen 1980, p. 54). This choice appears to be restraining any progressive development of a universal "human right to flee"[16], opposable vis-à-vis destination countries.

Such a right—situated at the interplay between the individual's right to leave and the state's obligation not to remove aliens-in-peril—would be seemingly consistent with the acknowledgment that "migrants and refugees may face many common challenges and similar vulnerabilities" (para. 3 GCM) and that all migrants may be *compelled* to leave (paras 12, 18, 18(b), 21(g), and 21(h) GCM). The progressive development of this right would mirror the principle of "leaving no one behind", which commits States to delivering the Sustainable Development Goals under the 2030 Agenda. Furthermore, such a development would document the existence of a grey area of migrants who fall beyond or between consolidated legal statuses (Guild and Weatherhead 2018) and whose unmet protection request is at the origin of many contemporary migratory crises.

However, as lacking international binding norms recognising a human right to flee, its enjoyment would remain bound to regional/national legislation granting asylum seekers a temporary right to enter and remain pending the determination of their status. In addition, an extensive exegesis of the right to leave any country, in conjunction with positive obligations extending from non-refoulement, would bridge the gap between the limited right to remain and the full entitlement to enter and reside on the territory of the host State—an outcome that cannot be inferred from state practice (Higgins 1973; Hailbronner 1996; Guild 2017; Hannum 2021). Finally, the affirmation of a human right to flee would presuppose the rebuttal of the presumption that the attainment of any stable and fair distribution of the responsibility for large movements of migrants and refugees requires the limitation of human mobility of aliens-at-risk (Noll 2007). Although the Compacts do not expressly envisage the development of responsibility-sharing frameworks based on physical relocation—such as, at the regional EU level, the Dublin system (Maiani 2017)—a systemic interpretation of the call for "innovative solutions" (para. 14 GCM and paras 20–27 GCR) does not allow to exclude the endurance of the paradigm based on limited human mobility.

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[15] Objective 21 contains a clear reference to the obligation not to expel an alien to a State where his or her life would be threatened, set forth in Art. 23 of the Draft Articles on the Expulsion of Aliens. In addition, by adopting a broad notion of "irreparable harm", the GCM goes beyond the scope of Art. 33 of the Geneva Convention and upholds the development of the concept in IHRL and EU law. This is confirmed by a note of the OHCHR, stressing the importance of the principle within the framework of readmission (Objective 21), IBM (Objective 11), and search and rescue (SAR) activities (Objective 8).

[16] Such a potential development was envisaged (inter alia) by Moreno Lax at the Thematic Discussion IV of the GCR.

3.2.2. Exit Rights and Push Factors: On the Ambivalent Purpose of the Right "Not to Migrate"

Human-centricity necessitates putting human dignity at the core of any decision affecting people on the move. GCM Objective 2, on cooperation aimed at minimising the adverse drivers and structural factors that compel people to leave their country of origin, is clearly inspired by this rationale. The goal of minimising the adverse drivers of forced migration is grounded on a number of interrelated actions, including investment in human capital (para. 18, a–g) and the development of crisis-management tools to curb the effects of environmental degradation (para. 18, h–l). Its fulfilment would need the eradication of poverty; a genuine engagement to reverse the trend of climate change; and empowerment paths through education, food security, protection of vulnerabilities, and enhancement of the rule of law in migration countries. That is why Objective 2 is by far the most ambitious objective of the GCM.

The attainment of this goal may have a twofold impact on human mobility across international borders. By backing a faster, safer, and cheaper transfer of remittances, it could help reduce emigration and forced displacement, especially if the money that migrants send back home is channelled into virtuous circles of sustainable development. However, reducing the adverse drivers of migration may also expand voluntary departures and elevate the circularity of human capital across transnational frontiers. That is why Objective 2 of the GCM should be read in combination with Objective 5, stressing the key role of labour mobility partnerships, along with the need to expand and diversify the "availability of pathways for safe, orderly and regular migration" for vulnerable aliens (para. 21 GCM).

While the liberalisation of labour mobility is grounded on existing options and draws from relevant ILO standards and guidelines (para. 21, a–f), the expansion of safe passages for vulnerable aliens builds upon national and regional practices for humanitarian admission through visa options, private sponsorship, family reunification, and planned relocation and refugee resettlement (para. 21, *lit.* g, h, i), lacking any proceduralisation of related cooperation at the global level[17]. Nonetheless, the acknowledgement of the disaster–migration nexus in the GCM adds to national and regional practices by formalising a direct link between forced displacement and environmental degradation at the international level (Kälin 2018). This move should not be underestimated, especially by comparison with the GCR, where it is merely stated that the adverse effects of climate change "increasingly interact with the drivers of refugee movements" (para. 8).

From this analysis, it might be inferred that the right "not to migrate"—as put forward in GCM para. 13—is to be understood as an expression of the individual freedom of choice about migration, which imposes on States the correspondent duty to "work together to create conditions that allow communities and individuals to live in safety and dignity in their own countries". However, respecting the individual decision to migrate may clash with Objectives 9–11, prioritising cooperation on migration "management" and the fight against unauthorised migration, including "pre-reporting by carriers of passengers" (Objective 11, para. 27, *lit.* b). Indeed, while cooperation on ensuring the right "not to migrate" is theoretically linked to individual choice about migration, in practice, this freedom of choice may be pre-empted by cooperation on migration containment and border security, which often goes beyond the mere fight against irregular migration.

The way in which these contrasting goals may trigger a sharp limitation of migrant and refugee mobility rights has been underlined by leading scholars (see, among many, Gammeltoft-Hansen et al. 2017; Costello 2018), who have pointed out that the very same concept of migration and refugee "management" (Geiger and Pécoud 2010) embeds individual protection claims within the remit of travel and border security policies (Betts 2010), preventing migrants from gaining agency and representation (Rother 2013a). Thus, the right "not to migrate", as carved out from the human right to leave, appears to suit

[17] The importance of opening these pathways to allow States to "regain control over their borders" has been stressed by the Special Rapporteur on Human Rights of Migrants, Felipe González Morales, in the *Report on a 2035 Agenda for Facilitating Human Mobility*, UN Doc. A/HRC/35/25, para. 17.

an ambivalent interpretation in the follow-up processes of the GCM. A systemic interpretation of the right "not to migrate" in light of the interplay between Objectives 23 and 11 may in fact represent a leeway to strengthening consensual containment policies even further, especially if the commitment to tackle the root causes of forced migration and mass displacement is not taken seriously.

All in all, both the lack of nominal reference to the principle of non-refoulement and the affirmation that migration shall not be "an act of desperation"[18] are not problematic per se. Yet, their contextual and systemic reading within a system of governance prioritising cooperation on integrated border management over human-centricity risks divesting their content from the expected function as bridges to the fragmentary relation between the human right to leave and the sovereign right to exclude.

3.2.3. Aliens' Treatment upon Entry: On the Rights to Legal Identity and Non-Discrimination

The comprehensive solutions for inter-state cooperation on Objectives 23 and 11 GCM have the potential to adversely affect key individual rights set forth in the GCM, such as the right "not to migrate" and the principle of non-refoulement. Similarly, they seem to affect the right to legal identity, which is of incommensurable importance to preserving the safety and regularity of international mobility, as well as to reducing statelessness.

This right is recalled in Objective 4, committing receiving States to provide migrants with adequate documentation and to "facilitate interoperable and universal recognition of travel documents, as well as to combat identity fraud and document forgery, including by investing in [...] biometric data-sharing, while upholding the right to privacy and protecting personal data" (para. 20, *lit.* b). This goal aligns with the commitment of States of origin to cooperate "on identification of nationals and issuance of travel documents for safe and dignified return and readmission", including through biometric identifiers (para. 37, *lit.* c).

The close correlation of the State's duty to recognise migrants' right to legal identity with the digitalisation of border controls, as well as with cooperation on return and readmission, dilutes the potential of this right in terms of advancing the human centricity of the global governance of large movements of migrants and refugees. Again, the digitalisation of the borders triggers the risk of transformation—at the operational level—of the right to legal identity into the right to be identified for return purposes.

Setbacks dependent on the prioritisation of the cluster of rules on global governance over human centricity and the rule of law may also materialise in the realm of aliens' treatment during their stay. The GCM does not commit States to limit recourse to criminal liability against *sans papiers*, nor does it expressly refer to regularisation of undocumented migrants—as it was the case in the Zero Draft (Brouillette 2019, p. 5). Thus, even if Objective 7 commits States to address and reduce vulnerabilities in migration, inter alia by facilitating access to rights for irregular migrants and members of their families (para. 23, *lit.* i), this leaves States' discretion towards undocumented migrants totally untouched.

More generally, the limitation of States' discretion, on the basis of the "overarching obligation to respect, protect and fulfil the human rights of all migrants, regardless of their migration status" (para. 11), rests on a delicate balancing exercise to be conducted at the national level. States' power to differentiate the treatment of aliens is, from this viewpoint, a key trigger of the fragmentation among migratory statuses, aimed at limiting the enjoyment of universal human rights by irregular aliens.

This is confirmed by Objective 17 GCM, dealing with the elimination of all forms of discrimination, which focuses on the application of the general non-discrimination clause for personal characteristics, but does not commit States to curb differential treatment based on nationality or migration status in domestic law. Rather, the regular/irregular

[18] Statement of Archbishop Bernardito Auza, Permanent Observer of the Holy See to the UN, *The Holy See in the Preparatory Processes of the Global Compact For Safe, Orderly And Regular Migration*, 19 October 2018.

divide adds to the dichotomy migrant/refugee, outlining intersecting areas of exclusion and denialism.

Although it can be doubted that effective cooperation on regular migration presupposes this compartmentalisation[19], the GCM perpetuates a limited understanding of the principle of non-discrimination when it comes to the recognition of the universality of human rights of people on the move. Examples of this limitation in binding international rules can be drawn from Arts 14, 21, and 22 ICCPR and Art. 15 of the European Convention on Human Rights (ECHR), which legitimise a differentiated treatment between aliens and citizens justified by democratic society's interests. Even more strikingly, Art. 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) allows distinctions among citizens and denizens on the basis of States' interest in "promoting general welfare".

These distinctions are often justified by reference to migration policy and state sovereign right to protect the borders[20]. However, the trend to reframe any migratory issue at the domestic level as an issue of migration control, to be covered by the exception of Art. 1(2) CERD, has been aptly questioned by prominent scholars (Spijkerboer 2018) and human rights bodies (e.g., the CERD Committee in *Qatar v. United Arab Emirates*)[21]. And, yet, this trend resurfaces from the GCM and its emphasis on well-managed transnational movement of people.

4. On Implementing the GCM through Comprehensive Approaches: Lessons Learned from the EU Border Policies

The systemic interpretation of the GCM, which was highlighted in Section 3, reveals that the legal implications of "comprehensiveness" may differ markedly when applied to the cluster of rules on international cooperation and to that on human centricity. This observation raises further questions concerning how to streamline the impact of comprehensive approaches at the implementing stage, with a view to enhancing, simultaneously, good governance and individual agency. This section draws on the lessons learned from the EU governance of cross-border human mobility pertaining to the functioning of "comprehensiveness" at the operational level, with the aim of contributing to the IMRF follow up. Comprehensiveness is in fact one of the distinctive features of cross-regional border management cooperation at the EU level. In the 2020 Strategic Risk Analysis for European Integrated Border Management (EIBM), the EU Border and Coast Guard Agency—Frontex—identified key challenges in the area of border management and return that need to be addressed "in a coherent, integrated and systematic manner".

Among them, two are particularly relevant, as they shape the overall search for greater policy coherence within the EIBM and related external cooperation. The first is the facilitation of "legal crossing, including for the benefit of tourism and trade", which is pursued through the "use of non-intrusive identification technologies (e.g., fingerprints, facial recognition), while fully respecting fundamental rights" (COM(2022)303, para. 3(g)). The second is the need to tackle "increased international migration, secondary (intra-EU) migratory movements and cross-border smuggling activities" (para. 3(d)(ii)) via prevention of unauthorised border crossings and enhanced return, in order to "strengthen the internal security of the EU and its citizens" (para. 5).

The preventive rationale of the EU border policies is, therefore, mitigated by the facilitation of legitimate travel, alongside the recognition that "[i]ndividuals who seek protection must be granted access to the procedures, while those who do not must also be protected against non-refoulement" (para. 5). In addition to the full acknowledgement of asylum-related rights, the protection of fundamental rights is recognised as an overarching component, which crosscuts all dimensions of the EIBM, ensuring "that effective border

[19] For instance, as pointed out by Guild and Weatherhead (2018), the acknowledgement of the regular/irregular divide in Arts 5 and 68 ICRMW did not enhance international cooperation on labour migration.

[20] ECHR, judgment of 28 May 1985, No. 9214/80 and two others, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, para. 67.

[21] See *supra* at 13.

control and return policy are in line with EU and Member States' international obligations and values" (para. 5). This goal is to be attained in the spirit of solidarity and shared responsibility by EU Member States[22], holding primary responsibility for law enforcement activities, and EU Institutions and Agencies, orchestrating and coordinating cooperation both at the policy level and at the implementation stage. Thus, the principle of shared responsibility works as "an operational translation of the shared competence of the EU and Member States for the implementation of integrated management of the EU's external borders" and is complemented by the duty to cooperate in good faith and the obligation to exchange information (para. 4).

Within this layered migration governance (Kunz et al. 2011; Scholten and Penninx 2016), the nexus established between the sovereign right to control borders and large movements of migrants and refugees is, therefore, steered by internal security concerns, also related to the protection of EU citizens (Carrera et al. 2019a). At the same time, this goal is mediated by the promotion and protection of fundamental rights and the rule of law, which also applies extraterritorially, when EIBM-related activities, imputable to the EU and its Member States, take place inside the territory of third countries (Moreno-Lax and Costello 2014).

This approach feeds the Union's self-representation as a promoter of good governance in its relations with the wider world (Art. 3(5) of the Treaty on EU—TEU) and sketches out an axiological hierarchy between the border security regime and the human rights and refugee regimes, in both EU internal and external action. However, this axiological hierarchy, which operates at the normative level, does not shield the EIBM from its security-driven rationale at the operational level, nor does it create an effective and comprehensive remedial toolbox to ensure normative or logical pre-eminence of human and refugee rights through justiciability (Fink 2020). Rather, the recent expansion of the EIBM's operational dimension, with the most recent reform of Frontex and the establishment of its standing corps, has the potential to further expand the gap between the security-driven rationale of cooperation at the EU's external borders and the prominent role of fundamental rights and the rule of law within the EU legal framework (Section 4.1). Moreover, the security-driven rationale not only guides operational cooperation within the EIBM, it is also embedded in border procedures under the New Pact on Migration and Asylum (Section 4.2) and affects TCNs' treatment within the EU territory (Section 4.3). However, while in the first two areas—i.e., EIBM and border procedures—the security-driven rationale is advanced through comprehensive approaches, in the latter—i.e., the treatment of aliens in Europe—the application of "comprehensiveness" to migrants' fundamental rights appears retrogressive. EU policies on legal migration and TCN integration are, therefore, still dominated by a "silos approach", which appears only in part justified by the inherent limits of EU competences.

4.1. Comprehensiveness under the EIBM

The link between the management of human mobility, asylum, border surveillance, and the internal security of the Schengen area has been established and reinforced in EU policy and practice through recent decades (Brouwer 2008; De Bruycker et al. 2019; Mitsilegas et al. 2020). This development has been paralleled by a tendency to blur the legal boundaries between the respective legal regimes for purposes of operational cooperation within the EIBM, advancing a security-driven understanding of "comprehensiveness" (Hanke and Vitiello 2019).

The construction of the EU's smart borders clearly points in this direction. On the normative side, this goal has required the creation of a layered infostructure, integrating the functioning of the so-called Entry Exit System (EES) with the Visa Information System (VIS) and the European Travel Information and Authorisation System (ETIAS). On the operational side, the adoption of the EES led to the amendment of the Schengen Border Code (SBC) in order to operationalise automated border controls via the introduction of

[22] On the legally enforceable trust-based loyalty among EU Member States, deriving from the principle of solidarity, see the Court of Justice of the EU (CJEU) [GC], judgment of 6 September 2017, C-643/15 and C-647/15, *Slovakia and Hungary v. Council*, for which Labayle (2017).

"e-gates" and "self-service systems" (see Regulation (EU) 2017/2225). The digitalisation of visa processing, envisaged by the Commission in order to create "better synergies between EU visa policy and EU external relations", completes the construction of the EU's smart borders (see Regulation (EU) 2021/1134 and COM(2018)251).

Additionally, the strengthening of the EIBM counter-terrorism component has been pursued through amendments of the SBC allowing for systematic checks against law enforcement databases on all persons (Regulation (EU) 2017/458). Furthermore, three other layers of amendment to existing legislation have contributed to shaping the EU's "smart borders": the recasting of the Schengen Information System (SIS II), to improve the use of biometric identifiers and include automated fingerprint search functionality for law enforcement and return purposes (Tassinari 2022); the extension of the European Criminal Records Information System to third country nationals (ECRIS-TNC); and the empowerment of the EU Agency for the operational management of large scale IT systems in the area of freedom, security, and justice (eu-LISA).

The comprehensive control over human mobility has also been boosted by means of enhanced interoperability of information systems for borders and visas, on the one hand, and for police and judicial cooperation, asylum, and migration, on the other (Curtin 2017; Brouwer 2020; Vavoula 2020). Concurrently, Frontex has been mandated to boost the "operational interoperability" between the Eurosur system and a complex web of non-EU risk analysis networks dispersed along key migratory routes (Regulation (EU) 2019/1896, Art. 8(1)(s)). Moreover, de-compartmentalisation has been pursued through the integration of the Eurosur Fusion Services within the European Maritime Information Sharing System by means of a massive deployment of sensor and satellite technology and enhanced inter-agency cooperation (Val Garijo 2020).

In this way, the EU's smart borders become part of an anticipatory border governance, based upon pre-emption of unauthorised human mobility and automated data gathering/processing. Within the European Agenda on Security, they allow "a more joined-up inter-agency and cross-sectoral approach" to hybrid threats, by blending migration management, counterterrorism, and external defence policy settings (Carrera and Mitsilegas 2017, p. 8). This approach prompts the blurring of regulatory boundaries between different EU policies and overcomes the division of rules and competences characterising the "different silos" of European policies having a security component within the realms of the Common Security and Defence Policy (CSDP) and the Area of Freedom, Security and Justice (AFSJ)[23].

Comprehensiveness under the EIBM is, therefore, purposed to enhance the interconnectedness between the border regime and human mobility in order to improve the protection of borders. Even if this approach is intended to promote a less-fragmented EIBM, operating in full compliance with fundamental rights, including data protection, its security-driven rationale dilutes the quest for human centricity and respect for the rule of law. As a result, human mobility across external borders has been managed by neatly distinguishing the treatment and access rights of people from the Global North from those belonging to the Global South, with the former widely liberalised and the latter stringently regulated (Mau et al. 2015).

However, this is not necessarily a consequence-by-design of high-tech and digitalised borders. Digitalisation is, in fact, theoretically neutral for fundamental rights and may even be used to enhance protection, for instance, by using Eurosur Fusion Services to enhance the search and rescue capability of saving lives at sea or to help identify vulnerable persons and channel asylum seekers by the appropriate procedure (COM(2022)303, paras 5(12) and (17)). Similarly, high-tech innovation may be devoted to enhance monitoring for accountability purposes, by allowing the recording of any possible incident happening at the external sea borders and involving potential human rights violations via forensic technologies (Pezzani 2019). Nonetheless, as the system is risk-driven and unauthorised

[23] On the legal challenges linked to this cross-sectoral approach, see, e.g., EDPS, *Reflection paper of 17 November 2017 on the interoperability of information systems in the area of Freedom, Security and Justice*, p. 9.

mobility is *ipso facto* considered to be a hybrid threat[24], such an outcome is hindered, in practice. Thus, the quest for comprehensiveness contributes to widening the gap between the normative and operational cornerstones of the management of large movements of people across the European borders.

4.2. De-Compartmentalisation under Schengen Cooperation and EU Migration and Asylum Law

Schengen cooperation is premised on the preservation of internal security, triggering (inter alia) the prevention of irregular migration headed to the EU, the intensification of migration-related policy checks inside the territory of the EU to curb the so-called secondary movements (De Somer 2020), and the establishment of an integrated return management system to facilitate the removal of third country nationals who do not enjoy the right to remain in the EU. The same security rationale guides the allocation of asylum responsibilities under Dublin cooperation, which is inspired by the "idea that each Member State is answerable to all the other Member States for its actions concerning the entry and residence of third-country nationals and must bear the consequences thereof"[25].

Furthermore, the multifaceted strategy for surveillance and control—carried out by EU Member States in response to mass displacement beyond its external borders—has led to the development of two parallel trends. First, the externalisation of these responsibilities to neighbouring countries through increasingly advanced forms of de-territorialised surveillance and contactless control (Moreno-Lax 2020), which are premised on bilateral relations with third countries (e.g., Italy and Libya, Spain and Morocco, Greece and Turkey), but also among the Member States (e.g., the cooperation on "informal readmission" between Italy, Slovenia, and Croatia)[26]. Second, the reproduction of the main features of the extraterritorial governance of migration at the Member States' internal borders, intended to exclude unauthorised mobility from the reach of core universal human rights.

The latter trend has been shaped by two interrelated legal premises revolving around the rivalry of territorial access to rights (Schlegel 2020): *(i)* the legal fiction of non-entry within the Member States' territorial jurisdiction[27] and *(ii)* the functional approximation of internal border checks to external border surveillance, prompted by an extensive reading of the public policy exceptions to the prohibition of internal border controls[28].

The combined effect of these trends has sharply restricted the access to and enjoyment of asylum in Europe, while raising further human rights concerns due to the militarisation of migration management (Mitsilegas 2019), the proliferation of border violence (Kuskonmaz and Guild 2022), and the de-humanisation of people on the move (Moreno-Lax 2018).

The proposals set forth in the New Pact on Migration and Asylum add to this complexity by advancing the idea of de-compartmentalising EU policies on international protection, migration, and border management for purposes of efficiency and sustainability. The combined reading of the proposals for a Regulation on the pre-entry screening (COM(2020)612) and a Regulation on migration and asylum management (COM(2020)611) seems to uphold the development of this idea, by strengthening the "extraterritoriality triggers" in the governance of territorial asylum in Europe, while presupposing a further expansion of the EU external action to divert migration to third countries (Cassarino and Marin 2022).

This picture is completed by the proposed reform of the SBC (COM(2021)891) to respond to the unscrupulous recourse to the clauses for the temporary reintroduction of border controls by the Member States (Guild 2021a; Morvillo and Cebulak 2022)[29]. While attempting to preserve the area of free movement from inter-state mistrust and external

[24] See, e.g., European Council Conclusions of 21–22 October 2021, EUCO 17/21, para. 19.

[25] CJEU, judgment of 26 July 2017, C-646/16, *Jafari*, para. 88.

[26] This cooperation led to chain refoulement on the Balkan route, also condemned by the ECtHR, judgment of 18 November 2021, Nos 15670/18 and 43115/18, *M.H. and Others v. Croatia*.

[27] See, e.g., European Parliament Resolution of 10 February 2021, *Implementation of Article 43 of the Asylum Procedures Directive*, P9_TA(2021)0042.

[28] For which see CJEU [GC], judgment of 19 March 2019, C-444/17, *Arib*.

[29] For which, see CJEU [GC], judgment of 26 April 2022, C-368/20 and C-369/20, *Landespolizeidirektion Steiermark*.

shocks, the reform may legitimate a further expansion of interstate cooperation on informal readmissions. That could be a foreseeable consequence of abandoning the stand-still clause set forth in Art. 6(3) of the so-called Return Directive, which limits this cooperation to existing bilateral arrangements on the removal of irregular aliens detected "outside of the vicinity of internal borders" (recital 27 of the proposed reform of the SBC). Additionally, the reform promotes comprehensiveness through enhanced police cooperation under Art. 23 SBC[30], pointing out how police cooperation and the digitalisation of internal borders may help bridge the gap between the freedom of movement in Art. 22 SBC—which does not allow differential application on national basis[31]—and the safeguarding of internal security under Art. 72 of the Treaty on the Functioning of the EU (TFEU). In doing so, it is grounded on the proposals to add a Eurodac category to fingerprint people given temporary protection[32] and to adopt an EU bill on screening covering people rescued during SAR operations at external borders[33]. These proposals are accompanied by a (new) solidarity mechanism for the (voluntary) relocation of people rescued at sea, which should help reach a fairer balance between solidarity and responsibility within the framework of EU immigration and asylum policies.

Although these proposals use de-compartmentalisation to overcome the impasse of Schengen cooperation and the Dublin system, they are construed such that they expand the recourse to the abovementioned legal fiction of non-entry for "undesirable" migrants and asylum seekers. For them, the de-compartmentalisation of EU Schengen and asylum cooperation seems fated to dilute or postpone territorial access to rights and to asylum within the jurisdiction of the Member States[34]. From this perspective, administrative requirements at the external borders and migration-related policy checks at the internal borders become "the most dangerous law of the land" (Crépeau 2017, p. 13).

4.3. Compartmentalisation of Regular Migration and EU Citizen-TCN Denizen Divide

Security-driven comprehensiveness impacts the human-centricity of EU migration and asylum policies at both the external borders and extraterritorially. Compartmentalisation and a "silos approach" in tandem affect the treatment of aliens within the territory of Member States, triggering multiple intertwining fractures between different lanes of regular or quasi-regular residence.

For migrants holding a regular residence permit, this approach translates into a plurality of legal statuses—mostly linked to the skills divide—which create a patchy picture of many shades of "fairness" (Vitiello 2022a, p. 175). For asylum seekers and undocumented migrants at risk of refoulement, the sectoral approach triggers the fracture between the right to remain—framed as a diminished condition, which cannot be equated to the entitlement to a residence permit[35]—and the right to enter the labour market. As confirmed by the Report "Making Integration Work" of the Organisation for Economic Co-operation and Development (OECD), the split between asylum and labour paths for TCNs holding a right to remain represents one of the main hindrances to comprehensive strategies of integration and inclusion. The overall result is an increasing casualisation of access to socio-economic rights for TCNs (UN Doc. A/HRC/47/30, para. 55 ff.), thwarting the European rule of law (Tsourdi 2021).

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30 Justice and Home Affairs Council, 9–10 June 2022, Press Release 534/22.

31 Refer, e.g., to CJEU, judgment of 13 December 2018, C-412/17 and C-474/17, *Touring Tours*, underlining that national legislation on carrier sanctions, requiring transport operators to check passengers' passports and residence permits in intra-EU services, has an equivalent effect on external border checks and is, therefore, contrary to the SBC. See also CJEU [GC], judgment of 22 June 2010, C-188/10 and C-189/10, *Melki and Abdeli*.

32 On the recourse to this form of protection for Ukrainian refugees, see Council Implementing Decision (EU) 2022/382.

33 Council of the EU, *Asylum and migration: the Council approves negotiating mandates on the Eurodac and screening regulations and 21 states adopt a* declaration *on solidarity*, Press Release 580/22.

34 The CJEU has reacted to this trend in a number of recent judgments, among which refer to the judgment of 30 June 2022, C-72/22 PPU, *Valstybės sienos apsaugos tarnyba*. On the self-restraint of the ECtHR, see, e.g., the judgment of 5 April 2022, Nos 55798/16 and four others, *A.A. et al. v. North Macedonia*, paras. 114–15.

35 See Art. 9 of Directive 2013/32/EU.

The compartmentalisation of TCN legal statuses is accompanied by a limited understanding of the principle of non-discrimination on national basis (Art. 18 TEU; Art. 21(2) EU Charter of Fundamental Rights—EUCFR)[36], compared with the general non-discrimination clause based on personal characteristics (Art. 19 TFEU, Art. 21(1) EUCFR). This fragmented approach to non-discrimination does not allow the principle of equality laid out in Art. 20 EUCFR to play a role in firming up the enjoyment of national treatment or proximate rights for TCNs within the EU legal system (Robin-Olivier 2022).

This fragmentation is justified by the EU citizen-TCN denizen divide under EU law[37]. On the one hand, European citizens' right to free movement has been connoted as a full right to immigrate to a Member State that is different from the State of origin. In this way, the enjoyment of the so-called fourth freedom (Trachtman 2009) has realigned the universal human right to emigrate with European citizens' right to immigrate, sharply limiting—if not setting aside—EU Member States' sovereign power to determine the conditions for admission of foreigners who are European citizens and their families[38]. On the other hand, for TCNs holding a regular residence permit, whose family members are EU citizens, compartmentalisation ensures the preservation of the privileged status of EU citizens; however, if this family link is lost, the other connection criteria (e.g., duration of legal residence and exercise of free movement rights as a former family member of an EU citizen) remain weak and unable to ensure stable residence and the preservation of a regular status[39].

More generally, compartmentalisation, alongside the degree of discretion left by EU law to national authorities in the fields of TCN integration and legal migration, allows Member States to disconnect issues of territorial admission and legal sojourn of aliens from those of TCN treatment and access to rights, including socio-economic rights (Carrera et al. 2019c). This "lane switching" (Vankova 2022) contributes to putting the feasibility of a holistic human rights exegesis of migrant and refugee rights into jeopardy and, simultaneously, fosters a binary nexus between the preservation of States' sovereign control on borders and cooperation with third countries in the field of readmission (Cassarino 2022) and development aid (Panizzon 2017; Seeberg and Zardo 2020).

5. Conclusions

The role of the EU in advancing a less fragmented global governance of migration has been highly significant, both as a source of innovative cooperative models and as a laboratory for their implementation. As reaffirmed by the 2020 European Regional Review of the GCM, EU law and practice seem equally pertinent to the debate on future applications of the GCM in the aftermath of the IMRF.

One key aspect on which further attention should be devoted regards the relation between policy coherence and comprehensive responses to large movements of migrants and refugees. At the EU level, this dyad has been high on the political and institutional agenda since the launch of the Global Approach to Migration and Mobility (GAMM), back in 2011, gathering particular momentum with the 2015 refugee crisis[40]. Most recent developments, linked to the increasing risks of dismantling Schengen and Dublin cooperation, and aggravated by the war in Ukraine, have further strengthened the functional nexus between the quest for policy coherence and a holistic approach to migration, asylum, and border management.

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[36] For which, see CJEU, judgment of 4 June 2009, C-22/08 and C-23/08, *Vatsouras and Koupatantze*, para. 52.

[37] CJEU [GC], judgment of 2 September 2021, C-930/19, *Belgian State*.

[38] On the nature of this limitation and its strict application to citizens of EU Member States, which excludes a possible extension to TCNs by analogy, see CJEU, judgment of 9 June 2022, C-673/20, *Préfet du Gers et Institut national de la statistique et des études économiques*.

[39] CJEU [GC], judgment of 2 September 2021, *Belgian State (Right of residence in the event of domestic violence)*, case C-930/19.

[40] European Parliament Resolution of 12 April 2016, *The Situation in the Mediterranean and the Need for a Holistic EU Approach to Migration*, P8_TA(2016)0102.

As a result, the direction in which the reform of EU migration governance seems to be heading shows the prospective expansion of de-compartmentalisation strategies, based on the notion of "comprehensiveness", in the search for an efficient and sustainable balance between solidarity and responsibility. In this sense, de-compartmentalisation of EU policies appears to be part of a stable trend targeting comprehensive and holistic approaches as the appropriate means to an end of reducing "the distributive asymmetries on the ground"[41]. At the same time, the aim embedded in the New Pact of de-compartmentalising EU policies on international protection, migration, and border management seems to be deeply affected by national interests, which are mostly conveyed by claims over the pre-eminence of the principle of sovereignty in the management of external borders.

At the EU level, this principle is well recognised and ensures equality of the Member States before the Treaties and respect for their "national identity" (Art. 4(2) TEU). However, its degradation to national interest has impacted the exercise of EU competences, especially in the AFSJ, while negatively affecting solidarity and responsibility sharing (Karageorgiou and Noll 2022; Moreno-Lax 2017b; Thym and Tsourdi 2017), also within the New Pact (De Bruycker 2020).

In connection with this trend, compartmentalisation remains the rule within the governance of regular migration, affecting the treatment of aliens holding a legal entitlement to stay in Europe and their prospects of integration. Though a silver lining may be found in the pursuit of synergies between the EU immigrant integration policy and the European Pillar of Social Rights (COM(2020)758, para. 3), legal migration and the treatment of aliens in the EU remain anchored to a retrogressive understanding of comprehensiveness. Partly justified by the EU citizen–TCN denizen divide, this understanding seems much more dependent upon the lack of political will to overcome the "silos approach" than on the limits of EU competence in the field (Vitiello 2022a, p. 184).

The case of the EU migration governance clearly confirms that comprehensiveness is an ambivalent concept that may serve the purpose of a more balanced and sustainable understanding of human mobility, but may also strengthen existing patterns of securitisation and containment. As such, its relationship with the notion of policy coherence should be better substantiated. If we accept "the systemic promotion of mutually reinforcing policy actions [. . .] creating synergies towards achieving the agreed objectives" as a viable definition of "policy coherence"[42], then overcoming fragmentation or siloed approaches is just one facet. Without making sure that policy actions are owned by people and integrate their claims, this facet alone may be unsuited to promote any transformative agenda. This is clearly demonstrated by the systemic and contextual interpretation of the GCM highlighted in Section 3. Indeed, within the GCM, the outcome of comprehensive and interconnected approaches seems to depend on a blurred differentiation between the two main clusters of rules around which the GCM's Objectives pivot. This differentiation may be construed along two axes: the first matching national sovereignty and good global governance and the second running along the *continuum* between human-centricity and the rule of law.

This article contends that the GCM establishes a stronger nexus between the determinants of the axis pertaining to the intergovernmental realm, by plainly functionalising good governance to national sovereignty claims. As a result, the main achievements of the GCM are likely to be obtained in the portion of the "quadrant" matching international cooperation on migration management with sovereignty-based concerns, while the degree of consideration for individual agency remains variable and undetermined (see Figure A1, Appendix A). At the same time, a functional nexus between the determinants of the other axis can hardly be detected, so that the new global governance of migration appears largely reproductive of existing trends of migration management "without migrants" (Rother 2013b).

Content-wise, the tangible result is a blurred connection between the GCM's guiding principles, which has been attained either through legal and operational layering

41 On the failure of the EU to "accurately gauging the distributive asymmetries on the ground", see Maiani (2020).

42 *Policy Coherence for Sustainable Development 2018: Towards Sustainable and Resilient Societies*, Organisation for Economic Co-operation and Development (OECD), Paris.

(Panizzon 2022) or "lane switching" (Vankova 2022). Layering has allowed the targeting of integrated border management as the prime venue for cooperation on safe, orderly and regular migration, while lane switching has granted the endurance of a conservative approach to the immigrant/refugee dichotomy[43]. Although this blurring exercise may be seen as an attempt to curb the fragmentation of IML, it risks expanding the room for cherry-picking and deviation at the national level, by offering States *à la carte* solutions for security-driven migration policies (Farahat and Bast 2022). This risk, which has materialised in relation to the EU policy on integrated border management and its defective accountability system (Guild 2021b; Kilpatrick 2022), has been acknowledged by the UN Special Rapporteur on the Human Rights of Migrants in his 2021 Report on pushback practices (UN Doc. A/HRC/47/30, paras. 53–56).

At the same time, this article argues that the volatile and unbalanced relation between the determinants of the two axes along which the GCM's commitments are construed may trigger the progressive development of nascent rules of international law, especially in the field of international cooperation on the readmission of aliens. Even if this progressive development may enhance the overall comprehensiveness of the global governance of migration, by unifying existing trends that have developed at the local/regional level, it may, simultaneously, produce retrogressive results in terms of policy coherence. Similarly, if not channelled through a shared understanding of policy coherence, those comprehensive responses to the quest for safe, orderly and regular migration risk thwart the accomplishment of the GCR's goals, which seem to be equally trapped in an obsolete "contained mobility" approach (Carrera and Cortinovis 2019).

Reversing these trends would necessitate a further development of the axis on human-centricity and the rule of law within the global governance of migration. This would require a strong political consensus on the substance of procedural rights associated with human mobility—a consensus of the type on which effectiveness and legitimacy of international law generally rest (Peters 2017). By exerting leverage on a broad understanding of the rule of law, such a shift may provide a more balanced exegesis of the different normative inferences that may be determined by departing from the same GCM's objectives. Enhancing accountability for human rights violations at the borders, together with a rule-of-law-based understanding "good governance", would thus become a more achievable result.

Additionally, reorienting the quest for safe, orderly and regular migration onto a rule-of-law/human-centricity track may help counter the wide discretion enjoyed by national authorities in migration matters, by putting the emphasis on collective responsibility for migrants and refugees. This would in turn reconnect the search for comprehensiveness to the quest for policy coherence, while diluting durable hurdles impacting intergovernmental cooperation on human mobility—as has been proven by the EU's response to the war in Ukraine (Vitiello 2022b).

This may seem an impossible path. Nonetheless, this perception may change if the search for "comprehensiveness" is fully aligned with a rule-of-law-based understanding of policy coherence, which fully acknowledges that "the rule of law is not a passive standard but a shape-shifter of long pedigree" (Dauvergne 2004, p. 607).

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[43] The immigrant/refugee dichotomy is a distinctive feature of the new global governance of large movements of migrants and refugees. As eloquently affirmed by the Ambassador Mr. João Vale de Almeida, Head of the EU Delegation to the UN, at the opening session for the GCM's Zero Draft: "since the aim of the Global Compact is to enhance international cooperation on safe, orderly and regular migration and reduce irregular migration—and the negative implications it has for countries of origin, transit, and destination as well as for migrants themselves—the text should better distinguish between regular and irregular migrants. It should avoid any language that might be interpreted as justification or even an incentive for irregular migration".

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Appendix A

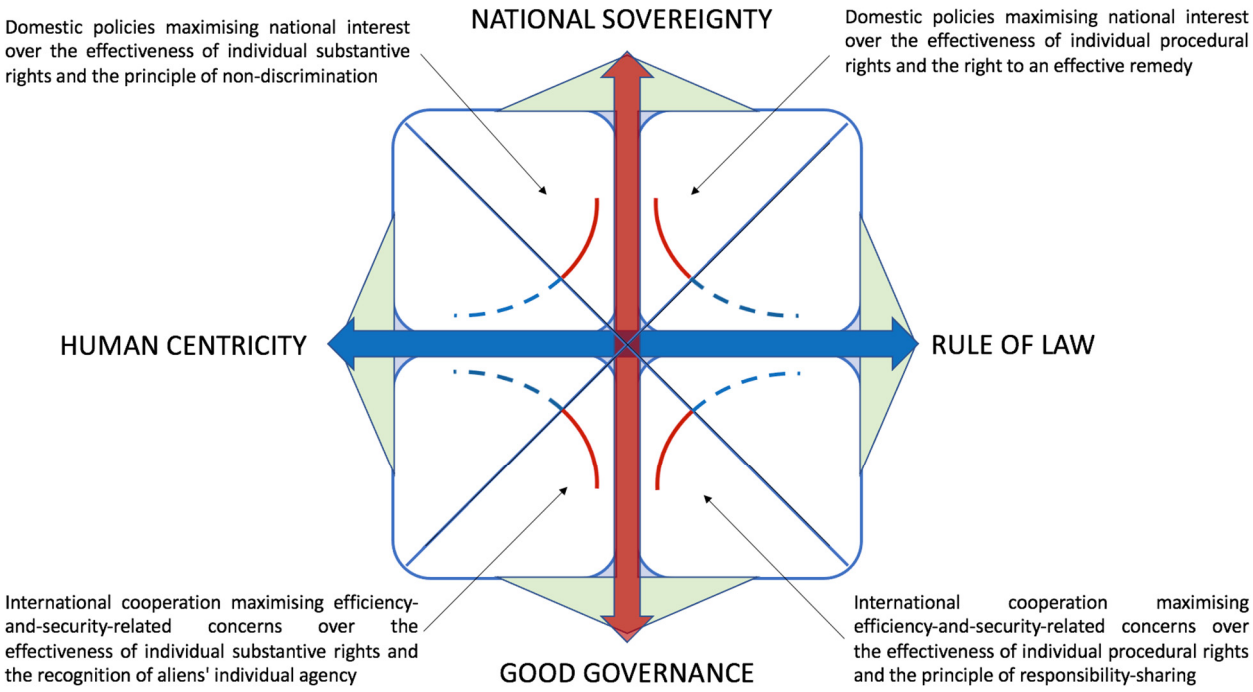

Figure A1. Determinants of the comprehensive approach interconnecting the GCM objectives.

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