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BRIEF

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UN migration pact – a framework for Völkerwanderung?

By Dr. Kristijan Kotarski

On December 10th 2018 the body of international soft law was enriched with the Global compact for safe, orderly and regular migration (from here on - UN migration pact) that was adopted by 164 out of 193 UN member states during their meeting in Marrakesh, Morocco. On December 19th the UN General Assembly officially endorsed the document with 152 member states voting in favor, five voting against, and twelve abstaining. It's unknown what changed the mind of twelve countries which have adopted the pact in Marrakech, but failed to endorse it in New York.

Even though the UN migration pact stipulates that it is merely a “cooperative framework” it has nonetheless deepened the political divide on the migration controversy among states as well as within them. The polemic that has evolved around the document in recent months centered on two contentious issues: 1. its quasilegality and 2. the potential outcomes of its 23 objectives. This paper will only briefly touch upon the issue of the quasilegality of international soft law and concentrate on the content analysis of the pact itself.

The soft law vs. hard law dilemma

As an explicitly non-legally binding international agreement, the UN migration pact falls into the disputed category of international soft law. Legal scholars have gone back and forth in trying to define the term and so far haven't been able to reach a conclusion. However, a good explanation can be found in Andrew T. Guzman's and Timothy L. Meyer's scholarly article published in 2010 in the Journal of Legal Analysis. Guzman and Meyer state that „soft law is best understood as a continuum, or spectrum, running between fully binding treaties and fully political positions“. From this we can derive that soft law is a grey area in which political preferences of decision-makers dictate the actual impact of non-legally binding documents. Concretely, an adopting government with a more or less securitarian stance on migration may choose not to implement the UN migration pact fully or even partially by referring to its non-legally binding character, whereas a government with a humanitarian stance may choose to implement it entirely by invoking article 41 which states: “We commit to fulfill the objectives and commitments outlined in the Global Compact”. In short, there is simply no certainty as to the extent to which soft law regarding migration will eventually become hard law. Primarily, this will depend upon proclivities and ideological leanings of each particular signatory. For instance, the

legal addendum on the part of current Dutch government that the UN migration pact cannot be used as a valid juridical document and an instrument of legal support in asylum claims, keeps hard law interpretation at bay.

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Regulation as the solution for the migrant crisis?

The phrasing of the document itself is clearly favorable to migration. The introductory chapter, titled “Our vision and guiding principles”, sees migration as “a source of prosperity, innovation and sustainable development”, omitting that migration can also be a source of fundamental demographic change in the host society, leading to a fierce rivalry between natives and newcomers on the job market and – in more advanced stages – to a clash of cultures. Migration is also described as “a defining feature of our globalized world, connecting societies within and across all regions, making us all countries of origin, transit and destination”. The argument presented here is rather dubious as it suggests that countries of origin, for example Somalia, experience similar challenges as the countries of destination, for example Sweden.

The introductory chapter also clearly states that the mission of the UN migration pact is “to facilitate safe, orderly and regular migration, while reducing the incidence and negative impact of irregular migration”. Shortly, its aim is by no means to stop or reduce migration. On the contrary, its purpose is to promote migration by regulating it and making it safer. This is to be achieved through the fulfillment of 23 objectives, of which some are more than questionable.

Objective № 3, subsection c, calls for the establishment of “open and accessible information points along relevant migration routes that can refer migrants to child-sensitive and gender-responsive support and counseling, offer opportunities to communicate with consular representatives of the country of origin, and make available relevant information”. The first series of questions pertains to the formulation “relevant migration routes”. How are they defined? Where are they to be found? Do they include routes that are heavily used for illegal migration, such as the Balkan route from Greece to Germany, or the Mesoamerican route from Nicaragua to the United States? And most importantly – does objective № 3 formalize these routes as UN-sanctioned corridors for the Völkerwanderung from the Global South to the Global North? Furthermore, what exactly are “open and accessible information points”? Do they include accommodation facilities? How

far apart from each other are they supposed to be located? Who is responsible for their maintenance and administration – the UN or the countries situated on the “relevant migration routes”? What happens when a country like Austria refuses to adopt the UN migration pact, thus severing the Balkan route and stranding migrants in the preceding country, in this case Slovenia?

Establish open and accessible information points along relevant migration routes.

Objective № 4 commits countries which have adopted the UN migration pact to guarantee “that migrants are issued adequate documentation and civil registry documents, such as birth, marriage and death certificates, at all stages of migration, as a means to empower migrants to effectively exercise their human rights”. The formulation “at all stages of migration” obligates countries of transit and destination to provide documents for migrants who are often lying about their nationality, age, name, place of birth and other crucial information, such as the reason for leaving their country of origin, in order to increase their chances of receiving asylum in the preferred country of destination. Also, many of them tend to “lose” documentation on the way so that they could cover their tracks and avoid being returned to the country of first entry. Objective № 4 offers no solution

for this conundrum even though it rightfully acknowledges the lack of documentation as a major problem.

Objective Nº 9 commits participating parties “to ensure that migrants shall not become liable to criminal prosecution for the fact of having been the object of smuggling”. The phrase “object of smuggling” is intended to mirror the established term “victim of trafficking”, hereby muddling the legal distinction between the crimes of people smuggling and human trafficking and compelling countries that have adopted the UN migration pact to treat smuggled migrants if not as victims per se, than at least as non-complicit in the crime. This is in stark contrast to earlier UN documents on the matter. Consider the 2003 UN report “Distinguishing between Human Trafficking and People Smuggling” by Brian Iselin and Melanie Adams, which says: “In people smuggling there is no victim in the traditional sense beyond the State which immigration laws have been broken. In people smuggling, generally, a smuggler is paid a sum or promised a sum of money by the person wanting to move from one country to another. This smuggler provides a service by facilitating the smuggling. The person being moved is a client of the smuggler... at the end of the day it is an illegal but essentially commercial relationship between the smuggler and the intending immigrant”. On the matter of the migrant’s complicity, Iselin and Adams write:

“Almost without exception, people smuggling occurs with complete consent... In short, the intending migrant is complicit”. It’s quite interesting to observe how the UN changed its own definition of a smuggled migrant from a complicit client of the smuggler to an “object of smuggling”.

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Changing the host society

Objective Nº 16, subsection a, calls for the promotion of “mutual respect for the cultures, traditions and customs of communities of destination and of migrants by exchanging and implementing best practices on integration policies, programmes and activities, including on ways to promote acceptance of diversity and facilitate social cohesion and inclusion”. Legitimate as it might sound, this demand does however raise the question why “communities of destination”, i.e. natives, should feel obligated in any way to culturally accommodate immigrants? The politically correct view that integration should be understood as a two-way street, or as a process resulting in the transformation of both the host society and the newcomers, unsettles a substantial (and growing) number of people, not

only in the West, who feel alienated from their own homelands and who increasingly blame immigrant communities for this gradual loss of identity. Acknowledging these trends as hard reality, integration programs should instead focus on migrants' acceptance of preexisting societal norms and rules in the countries of destination. In the parlance of late ex-chancellor Helmut Schmidt multiculturalism is an illusion of intellectuals. Numerous empirical studies point out that cultural integration based on assimilation represents the key ingredient for successful integration of newcomers in terms of their labour market participation and educational attainment. Hence, cultural integration should come first and structural integration second. The UN migration pact seems to turn this relationship upside down. Development economist at Oxford University, Paul Collier, sums it up succinctly by referring to the so-called trilemma of immigration policy, whereby one can have only two out of three options at hand: multiculturalism, welfare state and relatively free immigration.

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Finally, objective № 17 delineates a wide array

of measures aimed at the total elimination of all forms of discrimination and intolerance against migrants. Subsection c calls for the promotion of “independent, objective and quality reporting of media outlets, including internet-based information, including by sensitizing and educating media professionals on migration-related issues and terminology, investing in ethical reporting standards and advertising, and stopping allocation of public funding or material support to media outlets that systematically promote intolerance, xenophobia, racism and other forms of discrimination towards migrants, in full respect for the freedom of the media”. Obviously, the purpose of objective № 17, among other things, is to bring media outlets into line with official policy on migration. The dissenters are to be denied public funding and material support, but the Marrakesh conference also showed that they would be denied access and the possibility to report from venues reserved for complying journalists. Namely, reporters from the Canadian conservative website The Rebel Media were denied entry to the compound in Marrakesh where the conference on the UN migration pact was held in December. In light of all this, the postscript “in full respect for the freedom of the media” feels disingenuous if not outright cynical.

There are other controversial segments of the UN migration pact, such as the one mentioning

climate change as a valid reason for migration, or the one recommending that the return of migrants to their countries of origin takes place “on the basis of the migrant’s free, prior and informed consent”. Hence, it is no wonder that the document has ignited heated debates in international and national forums. While most UN member states have adopted it, there are still notable exceptions including the United States, Australia, Israel, Brazil, Chile and Singapore. The biggest concentration of naysayers is found in Central Europe, where Switzerland, Austria, Italy, Romania and the countries of the Visegrád Group either abstained or voted against the pact. In Croatia, President Grabar-Kitarović refused to endorse the UN migration pact, while Prime Minister Plenković, along with his cabinet members, supported it vigorously.

Conclusion: Thinking beyond the resettlement logic

Unfortunately, the UN migration pact misses to identify sustainable migration as migration that has the democratic support of the receiving society, meets the long-term interest of the receiving state, sending society and migrants themselves, and fulfills basic ethical obligations. This would entail a clear differentiation between refugees fleeing persecution and economic migrants, by underlining the fact that there is neither a ‘natural right’ nor an international law which would grant economic migrants the

right to choose their preferred jurisdiction. This decision rests solely in the hands of the receiving state (reciprocal relationship). Furthermore, assistance to refugees can take many forms besides organizing their resettlement to developed countries.

In that regard, developed countries have a moral duty (un-reciprocal relationship) to improve the wellbeing of poor and fragile societies worldwide but the form of assistance can and must range from: clamping down on tax havens sheltering illicit wealth of various dictators and warlords, beefing up efficiency of international sanctions, setting up special economic zones and granting tariff-free access to goods produced by refugees hosted in safe havens to discourage secondary movement, developing political and military capacity to be able to carry out R2P missions, improving the disbursement of humanitarian and development aid, etc. In that regard, the UN migration pact has been too narrow in its focus as it offers migration and resettlement as the only solution to the problems plaguing poor, conflict-ridden and fragile countries.

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In practical terms, over the last couple of

years norms for the treatment of refugees and migrants have shifted from being set by elites to those of their citizens. This is a welcome trend and has to be accommodated by offering a framework for sustainable and ethical migration. Unfortunately, the UN migration pact is not that kind of framework. In important aspects it remains silent, while on the other hand it offers enough vagueness to serve as a wedge for unselective and mass immigration and subsequent political backlash against it. Instead of claiming that all migrants are either victims (extreme Left) or threats (extreme Right) it is necessary to claim the middle ground. Unless the basic proposition that Europe must accommodate the mass influx of foreign-born population at all cost changes, this phenomenon is ultimately poised to undermine the entire European project and have a ripple effect globally.

Dr. Kristijan Kotarski is an Assistant Professor in International Political Economy and Economic Policy at Faculty of Political Science, University of Zagreb.

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Institut za razvoj i međunarodne odnose
Institute for Development and International Relations



Hanns
Seidel
Stiftung

Ured u Zagrebu

Institute for Development and International
Relations - IRMO
Lj. F. Vukotinovića 2, Zagreb, Croatia
www.irmo.hr

Hanns Seidel Stiftung
Amruševa 9, Zagreb, Croatia
www.hanns-seidel-stiftung.com.hr