

The Global Compact and national legislation: *quid iuris?*

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1. *Introduction*

With regard to the possible approaches of national legislation to its ongoing process of refinement, the Global Compact for safe, orderly and regular migration¹ raises a number of questions:

a) The first question concerns the relationship between Government and Parliament: what role can the two institutions play, and what role have they in fact had in relation to Italy's (non) involvement in the Compact?

b) The second question is in regards to the specific content of the Global Compact and the real effects of Italy's non-accession: in other words, what impact does Italy's non-involvement have? Further does the outcome change anything with regard to the current legislation on migration and the actual scope of the rights of the persons involved?

c) The third question is a 'flip' of the previous one: if it *were* to sign the agreement, what would change for Italy?

At this stage we can provide a tentative answer to each of these questions.

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¹ Resolution adopted by the General Assembly on 19 December 2018, UN Doc A/RES/73/195 (11 January 2019) Annex: Global Compact for Safe, Orderly and Regular Migration. For an initial commentary, see M Buccarella, 'Il Global Compact for Migration: una svolta per il futuro della migrazione internazionale?' (7 January 2019) DPCE on line <www.dpceonline.it/index.php/dpceonline/article/view/593/575>.

2. *The relationship between Government and Parliament*

As is well known, when the Global Compact agreement was adopted on 10 December 2018, during an ad hoc intergovernmental conference held in Marrakech under the auspices of the United Nations, in which 164 government representatives from all over the world took part, there was no representative of the Italian Republic and Italy chose not to be a signatory to the Compact.

Italy's lack of participation in this meeting sparked a broad debate, both before and after the Marrakech conference. This happened, not only because of the delicate nature of the topics covered in the text to be approved, but also because those topics were particularly sensitive as an issue for the current government (or at least a part of it) and the socio-political context of the country. The debate was also based on the contradiction whereby, while the Italian Government had taken an active part from the start in the work that led to the drafting of the text, the current Government had suddenly assumed an opposing point of view and sought to involve Parliament in defining the direction to be taken towards the Compact's approval in the intergovernmental conference.

It was in fact the Prime Minister who opted for this solution. In an official note from 28 November 2018,² specifying that the Global Compact 'is a document that raises issues and questions that resonate with citizens', he clarified that it was necessary to 'submit the debate to Parliament and defer the final decisions to the outcome of such debate, as also happened in Switzerland'. This led to the decision that 'the Government will not participate in Marrakech, reserving the decision whether or not to sign the agreement only once Parliament has delivered its opinion'.

Parliament, for its part, actually supported this solution. This happened through the approval in the Chamber, on 19 December 2018, of a motion by the Government majority (the motion was presented by Deputies D'Uva and Molinari, of the *Movimento 5 Stelle* and *Lega* respectively), through which, with the approval of the Government, the latter

² Presidenza del Consiglio dei Ministri, 'Global Migration Compact, nota del Presidente Conte' (28 November 2018) <www.governo.it/articolo/global-migration-compact-nota-del-presidente-conte/10446>.



undertook ‘to postpone the decision [...], following a wide evaluation of its actual scope’.³

The broader parliamentary debate did actually take place, but, although a firm position was reached, it was less far-reaching than might have been expected. On 27 February 2019 the Chamber ruled again, with the approval of another motion – presented this time by opposition deputies (and in particular by deputies of far-right party *Fratelli d’Italia*) – through which the Government commits ‘not to subscribe to the Global Compact for safe, orderly and regular migration and to not contribute in any way to the financing of the relative trust fund’.⁴

The circumstances of the approval of this motion are worth mentioning: the approval happened with the total abstention of the majority parties’ deputies (*Movimento 5 Stelle* and *Lega*), with *Fratelli d’Italia* and *Forza Italia*⁵ voting in favour, and the *Partito Democratico* and *Liberi e Uguali*⁶ voting against. This means that, because of the majority’s abstention (which in any case would have had a decisive part in the calculation of the number of Deputies necessary to make the vote valid), the negative restriction that the Government therefore faced came from the vote of a specific minority (112 votes out of the total number of Deputies, which is 630).

Examining this result and how it came about, we have all the elements we need to answer the first question. In terms of the relationship between Parliament and the Government, we could conclude, in a nutshell, that the Government majority followed an approach that is not wholly unprecedented and is perfectly consistent with its particular nature since its inception.

In fact, strictly speaking, the decision as to whether or not to participate in the Marrakech intergovernmental conference could have been a

³ Camera dei Deputati (19 December 2018) motion 1/00102 <<https://aic.camera.it/aic/scheda.html?numero=1-00102&ramo=C&leg=18>>. On the same day the Chamber rejected further motions presented by the opposition parties (some were markedly negative with the contents of the motion that had been approved; others were more positive).

⁴ Camera dei Deputati (30 January 2019) motion 1/00113 <<https://aic.camera.it/aic/scheda.html?numero=1-00113&ramo=C&leg=18>>.

⁵ *Fratelli d’Italia* is a right-wing party, whereas *Forza Italia* is a centre-right party. In fact none of them is part of the governmental majority, but both of them has been traditionally opposing migration.

⁶ *Partito Democratico* is a centre-left party, whereas *Liberi e Uguali* is a left-wing party.

decision solely left to the prerogatives of the Government. At stake were not the respect for and application of Article 80 of the Constitution⁷ and, with it, the need for Parliament to express its opinion: this is not a treaty after all.⁸

The Prime Minister, however, in exercising his specific prerogatives (in accordance with Article 95 of the Constitution), after acknowledging that it was practically impossible to guarantee a single political direction within the Government, ‘pushed’ for a solution to the issue to be found by majority in Parliament. The majority parties at first decided not to come to a decision, in full awareness of the opinions of the other parties involved; so, after understanding the relative stability of those opinions, they probably ‘took advantage’ of the relative dominance of certain factions of the opposition so as to attribute to them a decision which, if it had been expressed directly, would have risked reproducing the conflict within the Government in Parliament.

As mentioned, this strategy is entirely consistent with the nature of this Government, which is the product of a ‘contract’ between two political forces which often have radically opposing positions on a number of issues. It is therefore no wonder that the Prime Minister, caught between two Vice Presidents who clearly represent two political forces in constant danger of short-circuiting (*Movimento 5 Stelle* and *Lega*), would choose not to take an explicit position and to shift the conflict elsewhere. On the other hand, if we look at the most recent developments in Government policies, we can observe a certain similarity between the behaviours described above and the positions (‘wait and see’ and partial postponement) shown recently with regard to the start of the construction of the high-speed Turin-Lyon rail line.⁹

⁷ Under art 80 of Italian Constitution: ‘Parliament shall authorise by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation’.

⁸ This is the prevailing opinion on the nature of art 80 of the Constitution. For a critical overview about the Italian praxis concerning international migration policies, see F De Vittor, ‘Responsabilità degli Stati e dell’Unione europea nella conclusione e nell’esecuzione di ‘accordi’ per il controllo extraterritoriale della migrazione’, in G Nesi (ed), *Migrazioni e diritto internazionale: verso il superamento dell'emergenza?* (Editoriale Scientifica 2018) 208.

⁹ See the press conference held by the Prime Minister (7 March 2019) <www.governo.it/media/tav-conferenza-stampa-del-presidente-conte/11072> and the subsequent letter that the Prime Minister himself sent on 9 March 2019 to the Italo-

It is also worth mentioning that this *modus operandi* has allowed the Government to avoid contradicting itself in relation to the approval that Italy itself seemed to give the Global Compact on refugees during the United Nations General Assembly:¹⁰ a text that in its own way has some synergies with the Global Compact commented herein,¹¹ but which needs to be assessed positively, and was signed almost at the same time (17 December 2018) that the other document was being further pushed back on the Government's agenda.

3. *The effects of Italy's non-accession*

The decision by the Italian Republic not to sign the Global Compact and the negative constraint that for the time being has been imposed on the Government by Parliament do not mean that the document will not have any repercussions on national law.

This is down to the fact that there are parts (or wording) of the text that merely summarise or elaborate on matters that are already of binding in Italy, as in other countries. There are, in other words, dispositions that expressly emphasise the scope and inspiration of the commitments that are already part of current internal legislation.¹² The failure to sign the

French company in charge of the work <www.governo.it/articolo/tav-la-lettera-del-presidente-conte-alla-societa-telt/11091>.

¹⁰ 'Report of the United Nations High Commissioner for Refugees, Global compact on refugees' (A/73/12 Part II), affirmed by UN General Assembly (UNGA) resolution A/RES/73/151 (17 December 2018) para 23, with the positive vote of Italy.

¹¹ Both are in fact the product of a process that was set off by the *New York Declaration on Refugees and Migrants* of 19 September 2016, adopted unanimously by the United Nations General Assembly. See UN General Assembly (UNGA) resolution A/RES/71/1 (3 October 2016) <www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html>.

¹² See the conventional tools to which the *Global Compact* expressly refers in Point 2 of the Preamble. But see also the various objectives and their different parts, where the need is stated to ensure outcomes that are already the object of equal, if not often stricter, requirements in national legislation: see, for example, Objective 3 and art 3 of Legislative Decree no 142/2015, as well as art 10 of Legislative Decree no 25/2008; Objective 4 and art 4 of Legislative Decree no 142/2015, as well as art 6 of Legislative Decree no 286/1998; Objective 7 and art 19 of Legislative Decree no 286/1998, art 19 of Legislative Decree no 25/2008, as well as arts 17-19 *bis* of Legislative Decree no 145/2015; Objective 15 and arts 34-41 of Legislative Decree no 286/1998.

Global Compact simply does not have any exclusionary effect, but it could have in a broader sense a descriptive and interpretative value.

This point can be clarified by pointing to a totally different episode, which may serve as a useful comparison.

We refer here to the ‘notorious’ fate of the so-called Oviedo Convention (‘Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine’), which emerged within the Council of Europe and was signed in 1997.

Italy, in that context, signed the Convention, whose ratification was authorised by Parliament through Law no 145/2001 (Article 1), ordering its full and complete implementation (Article 2) and authorising the Government to adopt ‘one or more legislative decrees indicating further provisions required to adapt the Italian legal system to the principles and norms of the Convention’ (Article 3). The authorisation in question has never been implemented. Indeed, Italy has never filed the instrument of ratification, so the procedure to ensure that the rules generated by the Convention could have internal effects – of any kind – has never been implemented.¹³

It can be said, then, that, in the case of that Convention, which is a real international treaty, and which aims to have very specific effects, that the Italian legal system has in no way been transformed.

The result, however, is not at all dissimilar to that in which – as in the case of the Global Compact – the effects of adherence to certain international provisions (also qualified as non-binding) could have derived from actions by the Government, but this did not actually happen. In both hypotheses, in fact, the effects (strong or weak) of an action performed in an international context cannot be manifested within the internal legal system.

Nonetheless, despite this, it is known that the Oviedo Convention was on the other hand invoked in the case law of Italian Courts¹⁴ and in

¹³ On the issue see S Penasa, ‘Alla ricerca dell’anello mancante: il deposito dello strumento di ratifica della Convenzione di Oviedo’ (December 2007) *Forum di Quaderni Costituzionali* <www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0007_penasa.pdf>.

¹⁴ This is the famous case of Englaro, see Corte di Cassazione (16 October 2007) judgment no 21748/2007.



legal theory,¹⁵ and specifically as a supplemental interpretative aid, destined to yield only to expressly conflicting national laws.

This circumstance certainly cannot be used to maintain the accuracy of the arguments behind that case law and legal theory. The case law, above all, has been wrongly based on the fact that law no 145/2001 exists, and it has therefore been considered authorised, in some way, to infer a positive will of the legislator. It is true, on the contrary, that on a conceptual level this will has no effect in the internal legal order unless accompanied by the ‘closure’ of the procedure that fully defines the binding nature of the international obligation.

The fact is that, in the case of the Global Compact – and in particular in the case of its parts (or wording) which, as stated above, summarise or elaborate upon international legal provisions already in force in national law – the reference on the interpretative level to what the international community can mean with regard to certain obligations does not seem, at least in the abstract, at all incompatible.

We might also add that this possible phenomenon – referring to ‘sources not yet recognised’ by the law – could also translate into a practice similar to that followed in some other legal systems (for example, in the Spanish system): there are judges, in fact, who have also been able to refer, in the interpretation of existing national law, to systematic and comparative operations based purely on legal theory. This did not happen due to some presumed internal efficacy of those works, but rather because of the rationality and consequentiality that the solutions expressed in them guaranteed by themselves, on a logical level, to the full expression of the only national norms concretely applicable.¹⁶

There is no doubt that, with regard to the contents of the Global Compact, they can always take on this latter value.

¹⁵ C Casonato, ‘Il caso di dj Fabo: il quadro costituzionale (23 March 2017) laCostituzione.info <www.lacostituzione.info/index.php/2017/03/23/il-caso-di-dj-fabo-il-quadro-costituzionale/#more-2268>.

¹⁶ F Cortese, ‘Los principios europeos de la responsabilidad civil en las jurisprudencia: el problema de las “citas no reconocidas”’, in MS Herrador Guardia (coord), *Derecho de daños* (Sepin 2011) 113-140.

4. *The domestic effects of the Global Compact, if Italy were to sign*

In reference to the answer to the first question, it would seem unlikely that Italy could ‘join’ the Global Compact soon, because the Government would expose itself to a possible reproach by Parliament, in terms of political responsibility.

At the same time, however, the ways in which the negative direction of Parliament has been formed also leave room for a ‘rethinking’: or, rather, for an ‘express decision’, which the majority – which had abstained – could also decide to make at a later date, without there being any contradiction. This option could be said through the form of a Parliamentary Government, to be equivalent in all respect to the possibility that a new majority will express itself in the future, by means of a new Government.

What could be the domestic effects, then, of the Global Compact, if Italy were ever to sign?

On the one hand, the Compact could be invoked by Parliament against the Government itself, which had initially approved its contents and, albeit exercising its administrative duties, had shown a contradictory behaviour at a later stage.

On the other hand, although it is an act of soft law, its invocation as an interpretative key, as explained above, could easily be extended: the Global Compact could, that is, be used (in this case correctly) in the sense invoked in the case law (in that case wrongly) with reference to the Oviedo Convention and its ability to integrate specific interpretative solutions in an innovative direction.

But there would also be another effect, which is not formally in any way excluded from the ‘weak’ nature of the statements contained in the Global Compact.

While establishing provisions that are not binding, in fact, the Global Compact, when expressly agreed upon, would still operate as a vehicle for international obligations, based on the first paragraph of Article 117 of the Constitution.¹⁷ In other words, the Global Compact provisions would be obligations that cannot be invoked with a particular effect outside the Italian legal system, whereas they could produce an effect at the

¹⁷ ‘Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations’.

internal level, in particular by virtue of the strength of the constitutional provision itself. Undoubtedly, these effects are certain where the Global Compact provisions strengthen already existing international treaties.

In this respect, as an authoritative commentator has noted,¹⁸ these obligations operate in two directions. Firstly, they make the legal provisions that the Parliament approves and which are in conflict with them constitutionally illegitimate. Secondly, they require the law-maker to introduce norms that implement the internal legal order.

The first situation cannot be *a priori* excluded, both in the face of hypothetical and gross violations of certain general obligations that are not already unequivocally present in the current treaty-based law, and in the face of violations of more specific and already positivised obligations, with respect to which the Global Compact could act as a further strengthening element.

The second situation, however, is more interesting, because what is truly new in the Global Compact is the adoption of a positive and progressive strategy of international cooperation.

The approach seems as superficially simple as it is virtually effective: the highest number of states converge towards the reaffirmation of particularly widespread and common principles or standards; the reaffirmation takes place in a single context, with the express reciprocal link between individual parts of the same reaffirmation; from this derives a general commitment to identify policies that allow the concrete implementation of all those principles or standards, and to do so cooperatively.

The mechanism, thus conceived, could be defined, from a theoretical point of view, as a coordination tool based on the construction of a 'learning community'; a tool, that is as effective as it is de-juridical in a formal sense, because its success is not tied to the respect of formal obligations or prohibitions in the classical sense, but to the mutual incentive that its immediate recipients can have from a widespread and overall convergence.¹⁹ In these cases, obviously, the subjects primarily interested in convergence are not the indirect recipients of the principles or standards (as

¹⁸ F Sorrentino, 'Nuovi profili costituzionali dei rapporti tra diritto interno e diritto internazionale e comunitario' (2002) 3 *Diritto pubblico comparato ed europeo* 1356-1357.

¹⁹ On the existence of these forms of coordination, for example in contexts in which European integration is formally less strong, see F Cortese, *Il coordinamento amministrativo. Dinamiche e interpretazioni* (Franco Angeli 2012) in particular 150.

inviolable rights holders would be), but the direct recipients of the collaboration strategy (ie the States and institutions that operate in them).

If this is true, this strategy, in the case of Italian membership, would become, by means of the first paragraph of Article 117 of the Constitution (in other words, its strength), the expression, within the Italian legal system, of a coherent and dutiful political-constitutional orientation.

This direction, in turn, could translate not only into the constraint to introduce new rules that make the strategy practicable and effective.

It could also consequently translate into certain actions or behaviours by the constitutional bodies: for example, the President of the Republic may seek to send a motivated message to the Chambers, where situations or institutional behaviours are in open conflict with that strategy. But another possible situation is analogous to what happened during the formation of the current Government, in which the President of the Republic expressly reiterated the strength of some supranational restrictions as regards the opportunity to assign specific Ministries, in spite of support by the majority, to certain subjects.²⁰

Or – although it may seem a more difficult prospect to realise – the existence of a political-constitutional orientation of this type could also help the Constitutional Court to justify any addition to the legislation, in the face of the persistence of national disciplines that are not entirely adequate and for this reason only incomplete or unreasonably partial in the logic of the overall strategy described above.

One might then ask what could have happened if Italy had signed the Global Compact before the events that gave rise to the well-known ‘Diciotti case’.

Indeed, independently of the Global Compact, we might agree with those who maintain that it is unlikely that Parliament would believe that the Minister of the Interior acted ‘for the protection of a constitutionally significant State interest or for the pursuit of a prominent public interest

²⁰ Constitutional theory, in truth, has not expressed a unanimous opinion on this. On the thesis of the substantial correctness of the action of President Mattarella, see R Bin, ‘Mattarella non poteva, ma doveva rifiutare la nomina’ (29 May 2018) laCostituzione.info <www.lacostituzione.info/index.php/2018/05/29/mattarella-non-poteva-ma-doveva-rifiutare-la-nomina/>. *Contra*, S Curreri, ‘Le ragioni di Mattarella nel rifiutare quella nomina, ma lo ha fatto nella sede sbagliata’ (29 May 2018) laCostituzione.info <www.lacostituzione.info/index.php/2018/05/29/le-ragioni-di-mattarella-nel-rifiutare-quella-nomina-ma-lo-ha-fatto-nella-sede-sbagliata/>.



in the exercise of the function of Government' (based on what is provided for by Article 9 of constitutional law no 1/1989, which dictates the criteria that can motivate the refusal, based on Article 96 of the Constitution,²¹ of the parliamentary authorisation to proceed in court for crimes committed by members of the Government in the exercise of their functions).²² In fact, Parliament (unbelievably) voted that way: on 20th March 2019 the Senate rejected to provide the authorisation for the Minister's criminal prosecution.

Faced with the possible Italian participation in an international co-operation strategy such as the one introduced by the Global Compact, the arguments followed by the Italian Senate would have been even more sustainable.

These last examples of the potential impact of a clear participation make clear what the real reason was for the decision not to join: that is to say, to avoid, particularly in the future, additional risks for a Government that continues to move towards, already, dangerously, to the brink of failure to comply with international obligations that are as compulsory as they are specific and susceptible, as such, to unilateral interpretations that are restrictive from time to time.

²¹ 'The President of the Council of Ministers and the Ministers, even if they resign from office, are subject to normal justice for crimes committed in the exercise of their duties, provided authorisation is given by the Senate of the Republic or the Chamber of Deputies, in accordance with the norms established by Constitutional Law'.

²² Some commentators highlight the fact that the protection of constitutionally significant interests or prominent ones tied to the exercise of the functions of Government should 'yield' to the need to guarantee the respect of inviolable rights: see V Onida, 'I criteri per valutare la condotta del ministro' (8 February 2019) *Corriere della Sera* <www.corriere.it/opinioni/19_febbraio_08/diciotti-criteri-valutare-condotta-ministro-f3880f36-2bc3-11e9-8efb-2677649d01c7.shtml?intcmp=googleamp>.