

EXPERTS INITIATIVE ON THE GLOBAL COMPACT ON REFUGEES

On October 2-3, 2017, the Zolberg Institute on Migration and Mobility of The New School convened a meeting of experts on refugee law and policy to deliberate on, and to make concrete recommendations for, the Global Compact on Refugees (GCR). The meeting was convened with support from the Open Society Policy Center and held at the offices of the Open Society Foundations in New York City.

The following is a working paper prepared for the Experts Group.

Compromises and Commitments: The normative impact of the Global Compact on Refugees

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Problem

Among the two compacts currently being negotiated, the Global Compact on Refugees has a clear advantage from a normative perspective. Whereas state leaders agreed to reaffirm the continued importance of the 1951 Convention Relating to the Status of Refugees, global governance in regard to migration is notoriously fragmented and there is no similar legally binding instrument to build upon. At the same time, it is clear that the 1951 Convention leaves certain issues, e.g. responsibility-sharing and refugee status determination, wide open. Moreover, developments the last decades have similarly prompted calls for review or amendments in areas such as the definition and access to asylum. Several commentators have pushed for the Compact to fill at least some of these normative gaps and expressed hope that the Compact will pave the way for subsequent legal developments, such as a new protocol to the 1951 Convention.²

To assess the likelihood of any such possibilities it is, however, necessary first to understand what kind of animal the Global Compact for Refugees is in the zoo of international relations and law. The present contribution sets out a short analysis of the term ‘compact’ as a political-legal instrument and on this basis asks how the Global Compact on Refugees relates to existing international refugee law, and what, if any, normative implications are likely to follow from this new instrument.

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² Volker Türk and Madeline Garlick, ‘From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees’, *International Journal of Refugee Law* 2016, Vol. 28, No. 4, 656–78 at 673.

Discussion

The term ‘compact’, or simply ‘pact’,³ has become increasingly popular in international governance the last decade and a half. The UN launched its Global Compact in 2000 as a set of principles on corporate social responsibility that businesses can endorse and report on. At the EU level, the term ‘compact’ has been used by former EU Central Bank president Jean Claude Trichet to describe the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union in 2012. The upcoming migration and refugee compacts further follow on from a number of regional ‘compacts’ within the migration/refugee field. In 2016, the EU, a number of third states, the World Bank and select international donors adopted two compacts with Jordan and Lebanon, respectively. Presented as ‘package deals’ both in terms of the actors and mechanisms involved, each of these seek to secure refugee rights and livelihood opportunities in these host countries based on a broader package of material and technical support as well as international trade and export benefits. Compacts have similarly been negotiated by the EU with a number of third countries as part of the Partnership Framework under the auspice of the European Agenda for Migration. These compacts are seen as intervention mechanisms below existing international agreements, e.g. EU association agreements, that can be adopted more quickly and without the involvement of the European Parliament.⁴

As the word suggests, a *com-pact* may be conceived as a bundling of different deals or agreements across actors and issues. Common to the compacts above is their focus on multi-stakeholder involvement, best practices and issue-linkage as means to ensure cooperation and accountability in areas where direct reciprocity and more formal institutionalization are difficult to achieve.⁵ The compact as a choice of instrument further tend to place emphasis on political and practical cooperation as opposed to legal commitments. As in the present case, compacts may further spell out more technical and operational principles and parameters, linked to, but clearly subsidiary to, existing binding international agreements.

As such, for those who had hoped that a new global agreement on refugees would come to fill some or all of the normative vacuums above, the eventual Global Compact on Refugees is bound

³ The English translation of the New York Declaration is the only one employing the term ‘compact’. In French and Spanish, the terms are ‘*pacte mondiale*’ and ‘*pacto mundial*’.

⁴ Marion Panizzon, ‘The Global Migration Compact and the Limits of ‘Package Deals’ for Migration Law and Policy’ in Thomas Gammeltoft-Hansen, Elspeth Guild et al, ‘What is a Compact? Migrants’ Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration’, RWI Working Paper 1:2017.

⁵ Ibid.

to disappoint. The September 2016 New York Declaration commits states only to adopt a political instrument mobilizing states around certain principles and a common plan of action. There is a notable absence of legal language in the New York Declaration and Annex I, the emphasis rather on different political commitments and processes.⁶ Indeed, the non-binding character of the compact seems to have been perceived as an essential precondition for broader state support.⁷

That does not mean, however, that the Global Compact on Refugees will not have a considerable normative impact in regard to international refugee law. As others have pointed out, the fact that the New York Declaration unequivocally reaffirms *non-refoulement* and other core principles of international refugee law was not a foregone conclusion.⁸ More generally, the compact may be considered a soft law instrument with the potential to shape and move forward the current normative framework in regard to refugee protection, despite its non-binding status.⁹

An increasing part of the normative standards developed the last decades have taken the form of non-binding agreements and other instruments short of positive international law. The trend towards increasing use of soft law is particularly pronounced in the area of human rights. While relatively few human rights treaties have been adopted at the UN level in the last two decades, the number of declarations, resolutions, conclusions and principles has grown almost exponentially.¹⁰ This new realm of soft law can be seen to shape and impact upon the content of international law in multiple ways: from being a first step in a norm-making process, to providing detailed rules and more technical standards required for the interpretation and the implementation of existing rules of positive law.

Looking at these different developments, it is possible to qualify speculation about the different normative roles that the Global Compact on Refugees may come to play. In some areas of human

⁶ Isobel Roele, 'What are the forms of UN international agreements/understandings and what is their legal effect?' in Thomas Gammeltoft-Hansen, Elspeth Guild et al, 'What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration', RWI Working Paper 1:2017.

⁷ Ibid.

⁸ Elizabeth Ferris, 'In Search of Commitments: The 2016 refugee summits', Policy Brief 3, Kaldor Centre for International Refugee Law, November 2016.

⁹ A soft law instrument is here understood as referring to any instrument with normative content that by its form and provenance provides support sufficient to establish the minimum threshold of traction for at least some of the norms contained therein to be regarded as soft law. The emphasis is thus on the substantive norms as opposed to the formal status of the instrument itself. See John Cerone, 'A Taxonomy of Soft Law' in: Stephanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), *The Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).

¹⁰ Thomas Gammeltoft-Hansen, John Cerone and Stephanie Lagoutte, 'Tracing the Roles of Soft Law in Human Rights', in Stephanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), *The Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).

rights law, soft law has come to fill a void in the absence of treaty law, exerting a significant degree of normative force notwithstanding its non-binding character. While, as noted, above, the starting point for the two compacts on migration and refugees are very different in this respect, the Global Compact on Refugees may nonetheless come to fulfil such a role in regard to non-signatory states to the 1951 Convention and other core instruments of international refugee law. In addition, the more flexible character of a soft law instrument such as the compact may help overcome the traditional boundaries associated with international law in terms of allocating accountability to a broader set of actors, including third states, the private sector, international organizations, NGOs (see further the contribution by Audrey Macklin and Michael Doyle to this workshop).

Substantively, one might further hope that the final compact will come to set out principles and non-binding norms in regard to some of the identified gaps mentioned above and in other contributions to this workshop. Such principles and norms may eventually pave the way for binding international law in the form of either custom or treaty. As argued by Volker Türk and Madeline Garlick, the obvious needs for responsibility-sharing in the area of refugee protection ‘would ideally be addressed through an additional Protocol to the 1951 Convention in the longer term.’¹¹ More generally, the nature of a compact could involve the bundling of norms and principles pertaining to different bodies of international law that serve as a framework for the subsequent conclusion of a new treaty.¹²

The closest thing to setting out a substantively new commitment in the New York Declaration is the ambition to develop to ‘a more equitable sharing of the burden and responsibility,’ which in its formulation moves somewhat beyond the emphasis on ‘international cooperation’ set out in the Preamble to the 1951 Convention. As others have pointed out, however, the formulation in itself presents a rather abstract principle with little if any normative specificity. Looking at Annex I to the declaration, it is further difficult to see any serious political appetite for developing substantively new norms as part of the compact. The scope is deliberately narrow, shying away from any concrete commitments in regard to sensitive areas, such as responsibility-sharing. Any prospects for the compact to fulfil such a role would thus necessitate a push for broadening the existing negotiation mandate.

¹¹ Volker Türk and Madeline Garlick, ‘From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees’, *International Journal of Refugee Law* 2016, Vol. 28, No. 4, 656–78 at 673.

¹² This point was made by the Secretary General’s Special Representative for International Migration, Peter Sutherland, in regard to the Global Compact for Safe, Orderly and Regular migration. UN Doc. A/71/28, para 87.

Within the scope of the Comprehensive Refugee Response Framework the compact may, however, well come to serve as an ‘umbrella’ for a range of different standards, recommendations, best practices etc. addressed both to state and non-state actors. The compact could thus be expected to set out a number of more technical and standard-setting norms and principles in relation to both overall cooperation and the different parts of the implementation framework, e.g. reception, livelihoods and durable solutions. While again, these are formally not-binding, other areas of international law highlight that such norms, principles and standards may nonetheless be hugely important in governing state behavior.¹³

Last, but not least, the compact may come to have a ‘norm-filling’ role¹⁴ by setting out common principles, commitments and understandings in regard to existing rules of international law and their interpretation. Given the continued gaps, interpretative uncertainties and ongoing policy developments in regard to several key areas of refugee protection, how and to what extent the final compact references existing international refugee law and other instruments and principles of international law are thus important. The Global Compact on Refugees represents a major opportunity not just to ensure continued state support for international law, but also to address interpretive gaps, clarify the inter-operation between different international legal regimes and to integrate and build on the large corpus of existing standards and principles developed in this area over the last decades.

Conclusion

This paper has attempted to analyze the possible normative impact of the Global Compact on Refugees. It has done so by considering the compact as a particular form of soft law instrument and lay out the different roles such an instrument can play in relation to existing international law. It should be underscored, however, that even if the final compact may come to spell out new non-binding norms and principles, clarify interpretation of existing international law or set technical standards etc., this in itself is no guarantee that the compact will have any significant normative impact.

¹³ One such example is the standards and recommended practice developed by the ICAO Council annexed to the 1944 Chicago Convention on International Civil Aviation, governing among other things the responsibilities of airlines in regard to inadmissible passengers (Annex 9).

¹⁴ Thomas Gammeltoft-Hansen, John Cerone and Stephanie Lagoutte, 'Tracing the Roles of Soft Law in Human Rights', in Stephanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), *The Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).

Within liberal human rights theory there is often an implicit assumption that soft law plays a progressive role, raising protection standards, and that soft law will eventually solidify or lead to 'norm cascade'.¹⁵ This builds on the idea that the existence of non-binding norms and the consensus that emerges as states begin to comply with them appears to stimulate the development of legally-binding norms.¹⁶ As documented elsewhere, however, these assumptions are far from always true.¹⁷

First, in some areas today soft law constitutes a primary reference point, and yet there seem to be no immediate prospects for codification or crystallization of soft law into hard law. Soft law may be a preferred means by states in order to respond more quickly, with less paucity and more flexibility. Yet, it can also be used to block or delay the subsequent development of hard law instruments, and states may prefer the sometimes contradictory language of soft law instruments in order to retain political maneuvering room.

Second, the normative impact of the Compact on Refugees depends on the subsequent acceptance by states of any normative content therein not simply reflecting existing international law. In other words, the eventual Compact becomes a soft law instrument only once it acquires a degree of traction. While adoption of the Compact by the UN General Assembly may be seen as an important step in this regard, the provenance of a soft law instrument such as the Compact does not in and of itself imbue any norms contained therein with a particular normative force.¹⁸

Third, in some areas soft law has today become the battleground for interpretive struggles where some state parties may actively seek to backtrack or hedge against dynamic developments in the interpretation of international law.¹⁹ In this light, the degree to which the final text of the compact comes to properly reflect existing principles and understandings of international law is extremely important.

¹⁵ M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change', *International Organization* vol. 52 (1998): 887-917.

¹⁶ Dina Shelton, 'Commentary and Conclusions' (on human rights and soft-law), in Dina Shelton, ed., *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000), pp. 449-463 at 461.

¹⁷ Stephanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), *The Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).

¹⁸ John Cerone, 'A Taxonomy of Soft Law' in Stephanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), *The Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).

¹⁹ Thomas Gammeltoft-Hansen, John Cerone and Stephanie Lagoutte, 'Tracing the Roles of Soft Law in Human Rights', in Stephanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds.), *The Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016).

In sum, what the Global Compact on Refugees will mean for the future development of international refugee law is still unclear. Under the right circumstances, the compact may well come to shape both existing interpretation of international law and set out more technical norms and standards that can impact the protection of refugees on the ground. Yet, this potential depends both on the degree to which the final text comes to reflect such content and on the subsequent normative traction and support it receives.