

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.

Designing an Accountability Mechanism for a Reimagined Refugee Regime

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Introduction

Producing (or revising) a more functional and responsive refugee regime is the primary goal of a global refugee compact. An accountability mechanism would be a valuable supplement to this project. As discussed below, the international refugee regime currently lacks any formal mechanism. This means that there is no formal mechanism for assessing treaty compliance by States party, no means of ensuring adherence to human rights norms by countries of first asylum, no oversight on the functionality of refugee status determination procedures by the UNHCR or by states, no audit of the efficiency of humanitarian operations, no means of holding states that fund UNHCR to their annual pledges. Accountability is directed at ensuring that the system (and the various actors within it) is doing what it was devised to do. An effective accountability mechanism also generates information that can facilitate incremental adjustments and improvements. Accountability mechanisms that are transparent can also enhance legitimacy in the eyes of stakeholders and wider publics. Ordinarily, an accountability framework takes its shape from the governance model to which it applies. For present purposes we will set out broad contours and, where necessary, use a hypothetical model for illustration.

1. ACCOUNTABILITY IN THE INTERNATIONAL REFUGEE REGIME

What does accountability mean for the global refugee regime? At present, accountability discussions usually address the state compliance with the Refugee Convention or the impact of soft funding on UNHCR operations and positions.

Unlike other UN instruments, the 1951 Refugee Convention / 1967 Protocol is not accompanied by a treaty body tasked with monitoring state compliance with their obligations under the Refugee Convention, or receiving complaints about non-compliance. The interpretation of the refugee definition, and the process of refugee status determination (RSD), are both left to states (and their national courts). The inevitable variation between states' interpretation of the definition and approach to RSD remains unresolved, although the UN Executive Committee (ExCom) issues various non-binding policies, guidelines and, of course, the Handbook.

Because the UNHCR relies on donor states' largesse, states exercise a crude form of accountability through annual budgetary allocation. This soft funding model creates the risk that donors may reduce or withdraw of financial support as a result of dissatisfaction over UNHCR activities, programs, expenditures or positions.

In what follows, we will look beyond these existing frames and map out a wider landscape of accountability.

2. A BROADER IDEA OF ACCOUNTABILITY

As we contemplate innovating about how we respond to refugee flows, manage crisis situations, protect refugees better and coordinate responsibilities, we should also think about a broader conception of accountability in respect of these functions. This raises obvious preliminary questions: Who ought to be accountable? To whom? About what?

In order to begin answering these questions, we will postulate a hypothetical governance scheme that focuses on a geographically specific refugee exodus (e.g. Syria, South Sudan, Eritrea, Bosnia, Vietnam, etc.). A designated body ("the Council") comprising some subset of the ExCom states and other entities from among those described below would take leadership on broad strategy and implementation issues across the full range of issues related to the designated region/population. We are not making the arguments that would reasonably be required to

advance this model, and do not assume any support for it except for purposes of providing a platform for thinking about accountability.

The accountability mechanism may be embedded within the Council itself. One could also set up a free-standing institution within the UN (or the UNHCR) tasked with accountability across a range of subject or geographically specific Councils. For present purposes, we will refer simply to an 'accountability unit', and remain agnostic on its institutional location.

3. WHO OUGHT TO BE ACCOUNTABLE?

Based on long term and recent experience, managing a refugee exodus of the sort described above will engage a range of actors:

A. STATES OF ORIGIN

Guy Goodwin-Gill and Selim Sazak recently raised the possibility of holding the state of origin accountable for the costs incurred by its creation of refugee populations through massive violations of human rights and/or humanitarian law. A remedial option flowing from this liability would involve seizure of assets held abroad by the state's leaders (and perhaps parastatals), which would then be allocated to assisting the refugees and the states that host them. It seems reasonable to suppose that the state of origin is unlikely to participate in the Council.

For various practical and principled reasons, it seems unlikely that the accountability mechanism envisaged here would be suitable for determinations of legal liability. The International Criminal Court or the Security Council are more appropriate loci for legal and political accountability.

B. NON-STATE ACTORS

Conflict-induced migration may involve state and non-state actors, such as armed groups, insurgents, or corporate actors. The extent and bases of legal liability for non-state actors remains controversial, and like states of origin responsible for refugee movements, we think that accountability of non-state actors lies outside the scope of the accountability unit.

C. OTHER STATES

Other state participants include the following:

- Host states (states of first asylum) who are States party to the Refugee Convention
- Host states who are not States party to the Refugee Convention
- States party who have undertaken a specific obligation regarding funding and/or resettlement

D. IGOs

Although the UNHCR is the primary UN agency tasked with refugee issues, other UN bodies are also involved to varying degrees in humanitarian relief:

- Other Inter-Agency Standing Committee member agencies (IOM, OCHA, WHO, WFP, FAO, UNFPA, UNHABITAT, UNICEF)
- UNHCHR
- UN Special Rapporteur on IDPs
- World Bank

E. NGOs

Non-Governmental Organizations (NGOs) are too numerous to identify, and would also vary according to the location of the refugee exodus. Here are a few big, recurring players (but there will be many more engaged in any give situation):

- Red Cross/Red Crescent (ICRC, IFRC)
- International Council of Voluntary Agencies
- Oxfam
- InterAction
- MSF

F. PRIVATE SECTOR

Private corporations/commercial entities may engage with the refugee regime in negative and positive ways. Corporations may be involved in creating the conditions that precipitate refugee movements, whether by supplying arms to armed forces that wage war on civilians, or by engaging in business activities (e.g. resource extraction) that foment or exacerbate conflict. On the positive side of the ledger, private actors may donate funds or goods in kind. Secondly, they may participate in employment creation programs, possibly in collaboration with governmental organizations. These are recent, nascent and innovative projects whose goal is to enable refugees in countries of first asylum to work, to become financially self-sufficient, and even to contribute to the host economy. The Jordanian experiment described by Alexander Betts and Paul Collier engaged the EU, the Jordanian government and companies operating in Jordanian export processing zones to enable Syrian refugees to obtain work permits to work for those companies. To the extent that similar initiatives might be pursued in a given circumstances, the actors might include financial institutions (including the World Bank) as well as specific corporations.

4. ACCOUNTABLE TO WHOM?

A. REFUGEES

Refugees are the absent presence at the governance table. To a limited extent, refugees may be represented in local decision making within refugee camps, but they do not play a visible role at higher levels where major policy decisions and system design take place. Their exclusion is glaringly problematic from an ethical perspective. At the same time, the challenges of representation and voice are equally obvious. Which refugees speak for refugees? And what authority do refugees in respect of the constituency they represent?

For some of the same reasons that refugees do not participate in governance, neither are they considered the addressees of accountability. States—at best—regard themselves as answerable to their own citizens, not to refugees inside or outside their borders. International and domestic legal obligations may indirectly create accountability via adjudication, but this tends to be modest in scope and sporadic. The UNHCR is answerable to States Party and the United Nations. A robust conception of refugees as rights holders would support a claim that States Party owe them a duty of protection, and are thus accountable to refugees for fulfillment of that duty. Even non-States Party are obliged to respect human rights of non-citizens within their jurisdiction. In practice, the pervasive popular understanding of refugees as beneficiaries of discretionary humanitarian

charity subverts that relationship. Benefactors are not usually understood as accountable to the recipients of their generosity. The symbolic importance of including refugees within the sphere of accountability is not insignificant.

B. MUTUAL ACCOUNTABILITY AMONG PARTICIPANTS

Assuming the existence of a Council that devises a plan or strategy focused on a particular refugee movement, each actor would undertake to perform certain tasks over a given time horizon. Participants would be accountable to one another for performance of their respective roles. The least intrusive method of promoting accountability would be to impose a regular reporting requirement on each actor, and to enable other members of the Council to raise questions or concerns regarding the report (with knowledge that they, too, will be subject to the same scrutiny). One might expect that staff to the Council might include persons with experience and expertise in auditing functions in order to provide support to the participants.

5. ACCOUNTABLE FOR WHAT?

The operative principle is that actors would be accountable for fulfillment of their undertakings efficiently, competently, responsibly, and with due regard to the norms governing them as an entity. Financial and political accountability are dimensions of accountability, but they are neither exhaustive nor responsive to the diversity of actors, mandates and tasks. All states are bound to comply with international human rights norms applicable to them; States Party are also accountable for compliance with the Refugee Convention. Funders should be accountable for fulfilling their pledges of support. There exist various hard and 'soft law' regimes applicable to different actors beyond states. For instance, the Ruggie Principles on Business and Human Rights provide a framework for understanding and assessing how corporations should and can respect human rights in the course of pursuing their business operations. Related to the design of an accountability regime is the issue of transparency. The advantages and disadvantages to full transparency in this setting warrants closer attention.

Conclusion

This is only a preliminary sketch intended to make the case that an accountability mechanism is both feasible and desirable, and to catalogue the basic elements of that mechanism. Once the architecture of a refugee governance regime is in place, the design of an accountability mechanism that articulates with the refugee regime can proceed.

Draft principles

TBD = To Be Determined

1. An Accountability Unit should be established to monitor and report on the performance of states, private actors, corporate entities, non-governmental organizations and international governmental organizations in relation to specific commitments undertaken in furtherance of a governance regime regarding refugees.
2. The Accountability Unit would be housed in [TBD]
3. Each party to a plan shall report [annually/semi-annually/regularly] on fulfillment of its specific commitments
4. Commitments may take the form of financial, procedural, operational, or temporal undertakings.
5. Each party to the plan will receive the report of each party and may comment or otherwise respond to the report within a reasonable time.
6. A consolidated accountability report comprising a [synopsis of] each party's report will be submitted to [TBD] on an annual basis.
7. Consequences for non-compliance with specific undertakings shall be determined by the Council, and may include [TBD].