Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?

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I. INTRODUCTION

The New York Declaration for Refugees and Migrants is a unanimous United Nations (UN) General Assembly Resolution which was adopted by Heads of State and Government on 19 September 2016. It contains common provisions on both refugees and migrants, as well as sections dealing with these categories separately. The Declaration repeatedly reaffirms commitments to the human rights of refugees and migrants, confirms the centrality of the 1951 Refugee Convention, and emphasizes the importance of a humanitarian approach to both migrants and refugees. As it states in paragraph 5:

We reaffirm and will fully protect the human rights of all refugees and migrants, regardless of status; all are rights holders. Our response will demonstrate full respect for international law and international human rights law and, where applicable, international refugee law and international humanitarian law. [emphasis added]

The New York Declaration set up the process to create the two Global Compacts, with different processes and assumptions underpinning the Global Compact on Refugees (Refugee Compact) and the Global Compact for Safe, Orderly and Regular Migration (Migration Compact). The Refugee Compact principally aims to address the long-acknowledged missing element in the global refugee regime, namely ‘predictable and equitable burden- and responsibility-sharing’ (para 3). In contrast, the Migration Compact is broader, and reflects a range of competing priorities (with little guidance on how to reconcile them, or trade them off), aiming to ensure ‘international cooperation’ in order to foster ‘safe, orderly and regular migration’.

The Compacts are not legally binding, evidently, but like many such processes, they could come to have legal effects. Their impact remains to be seen. Both could easily

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remain dead letter. Indeed, the Migration Compact in particular is so facultative in the range of options it endorses that States could do very little, or even nothing, and still claim to be acting in pursuit of its 23 objectives. However, the Compacts’ very existence demonstrates a degree of political commitment, as well as linkages with other processes (including the Sustainable Development Goals) which recognize that migration and refugee protection warrant increased political attention.

In this piece, I assess some of the implications of the split between the two separate Compacts, and in particular, what that split connotes for refugees’ mobility. While the bifurcation of the Compacts between refugees and migrants is understandable, it also throws up problems that are especially germane, given their political context. Mass drowning of those seeking refuge in Europe shocked the public conscience in 2015. The most plausible explanation behind those drownings, and the mass arrivals of refugees in Europe that were characterized as the 2015 ‘refugee crisis’, is the spectacular failure of refugee containment policies. Moreover, those policies are not isolated – they are embedded in the global refugee regime, which sees most refugees enduring the rights deprivation of protracted displacement in the global South, combined with few legal routes to move onward. Refugee containment practices, which failed so spectacularly in 2015, have been problematized in refugee studies for decades as the defining negative feature of the global refugee regime. That background in part explains my focus here – namely, on the implications of the Global Compacts for refugee flight and mobility. This is not to suggest that refugee mobility is a panacea for all the ills suffered by refugees, but rather that its suppression is a serious deficit in the global protection regime.

To this end, I examine two important aspects of the Global Compacts. First, the Compacts assume certain categorical distinctions between refugees and migrants, which are more fluid than they imagine. I am not suggesting that the particular legal and political status of refugees should be undermined, but rather that the dividing line that has been drawn requires scrutiny. Secondly, as the literature on refugee containment amply demonstrates, migration control policies and practices often bear down particularly heavily on refugees and would-be refugees. Many of the issues dealt with in the Migration Compact are of particular concern to these groups of people, in particular visa policies and smuggling prohibitions. Moreover, carrier sanctions are largely absent from the Compacts, a striking omission, given their central role in rendering refugees’ flight and mobility dangerous.

Finally, having problematized the bifurcation in the Compacts, this piece suggests a constructive way forward. The Compacts are replete with promise, and their loose and programmatic approach means that it will be in their implementation that change (if any) emerges. I offer a constructive reading, emphasizing harm reduction and the overarching concept of ‘international protection’.

II. WHO’S WHO IN THE NEW YORK DECLARATION AND THE GLOBAL COMPACTS

1. The risky approach to refugeehood

Many UN and international actors take a broad, encompassing view of ‘migrant’, with ‘refugees’ cast as a subset of that group. The Office of the High Commissioner for
Human Rights, for example, has defined ‘international migrant’ as ‘any person who is outside a State of which they are a citizen or national, or, in the case of a stateless person, their State of birth or habitual residence’. This approach has the value of analytical accuracy, but to some, risks undermining the specificities of refugees’ legal protection. In contrast, the Migration Compact (para 4) sets up the distinction between migrants and refugees as follows:

Refugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times. However, migrants and refugees are distinct groups governed by separate legal frameworks. Only refugees are entitled to the specific international protection as defined by international refugee law. This Global Compact refers to migrants and presents a cooperative framework addressing migration in all its dimensions.

This carve-out of refugees from migrants is perhaps defensible, to the extent that it preserves the distinctive concept of refugee protection and the mandate of the United Nations High Commissioner for Refugees (UNHCR). However, it has two risks. First, it risks obscuring the fact that many refugees and those who are similarly situated may never formally be recognized as refugees. Secondly, it may fail to engage with the manner in which migration control practices bear down particularly heavily on refugees and would-be refugees, who have to cross borders (often many) in search of protection.

As to the concept of ‘refugee’ endorsed, the New York Declaration accords pre-eminence to the 1951 Refugee Convention, merely noting wider regional refugee definitions (paras 65–66). Notably absent is any reference to complementary and subsidiary protection, and other customary practices of temporary refuge. While this approach does not necessarily undermine those other protections, it may suggest (wrongly, in my view) that the 1951 Refugee Convention definition captures most instances of refugeehood and displacement. Moreover, neither the New York Declaration nor the Compacts reflect the breadth of the notion of ‘refugee’ under UNHCR’s mandate. This is particularly pertinent if one considers the many refugees who fall within its scope who are in States that have not ratified the 1951 Refugee Convention (or do not apply it to the groups in question), but have forms of group-based protection.

To illustrate, the Migration Compact contains a commitment to ‘adapt options and pathways for regular migration’ (para 21). The range of potential actions specified in pursuit of this aim includes developing admissions practices ‘based on compassionate, humanitarian or other considerations for migrants compelled to leave their countries of origin, due to sudden-onset natural disasters and other precarious situations’ (para 21(g)). Acknowledging these practices is important. However, the manner of their inclusion gives the impression that there are no obligations at work in this context, where people flee ‘sudden-onset natural disasters and other precarious situations’. Moreover, ‘other precarious situations’ could overlap with the ‘events seriously disturbing public order’/‘other circumstances which have seriously disturbed public order’ element of the expanded refugee definitions in the OAU Convention and the Cartagena Declaration respectively. There are also evolving customary practices in this domain. The Global Compacts’ bifurcation deems many who flee in search of protection as...
‘migrants’, and wrongly gives the impression that there are no legal obligations at play in such situations. Admittedly, the New York Declaration and the Compacts repeatedly acknowledge the principle of *non-refoulement*, yet they do little to address one of the most pressing problems for many non-removable people – their lack of formal legal status and security of residence.

2. Mitigating the risks

The risks identified here may not materialize. A legally and politically informed reading of the New York Declaration and the Global Compacts would ensure respect for pre-existing legal obligations to refugees *latu sensu*, and that those who are similarly situated (whether they are recognized as beneficiaries of complementary or subsidiary protection, or under customary refuge practices) are accorded appropriate protection. Legal non-discrimination guarantees are particularly important in this endeavour.

Furthermore, a clarification of the breadth of international protection is vital. While the statement in paragraph 4 of the Migration Compact that ‘[o]nly refugees are entitled to the specific international protection as defined by international refugee law’ may be correct, there is also a wider sense of international protection, which protects many in refugee-like situations, and many others on the move whose situation entitles them to particular protections. This wider reading of ‘international protection’ was captured succinctly in UNHCR’s note on ‘Persons in Need of International Protection’ (June 2017). As well as including refugees *latu sensu*, it clarified that:

In addition, individuals who are outside their country of origin (typically because they have been forcibly displaced across international borders) but who may not qualify as refugees under international or regional law, may in certain circumstances also require international protection, on a temporary or longer-term basis. This may include, for example, persons who are displaced across an international border in the context of disasters or the adverse effects of climate change but who are not refugees. In such situations, a need for international protection would reflect the inability of the country of origin to protect against serious harm.1

III. REFUGEE MOBILITY AND MIGRATION CONTROL

The lack of legal access to asylum for refugees has been perhaps the single most prominent topic in refugee studies for the past three decades. In this section, I consider three common features of refugees’ flight, and how the Global Compacts address them. Ending dangerous journeys was a key motivation behind the New York Declaration. It states the determination of leaders to ‘save lives’, regarding the challenge as being ‘above all moral and humanitarian’ (para 10).

Evidently, the Migration Compact’s overarching aim is to foster ‘safe, orderly and regular migration’. Objective 5 – ‘Enhance availability and flexibility of pathways for regular migration’ – sets out a range of policy options that could be helpful to refugees

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in seeking either protection or solutions through migration. However, as mentioned above, on one reading the Migration Compact simply does not apply to refugees. An important step in the implementation process will be to integrate the consideration of refugees into work on developing more regular migration opportunities.

In the Refugee Compact, refugee access to ‘third country solutions’ appears as part of the four aspects of responsibility sharing, the others being to ease pressures on host countries, enhance refugee self-reliance, and support conditions in countries of origin for return in safety and dignity (para 7). At face value, there is nothing new here, save for the creation of an admittedly loose forum to try to establish better responsibility sharing. The emphasis on ‘third country solutions’ is potentially important, with resettlement appearing alongside other forms of onward mobility. However, the framing in the Refugee Compact leaves much of the undesirable status quo around resettlement unquestioned. It assumes a sharp distinction between flight (for protection) and onward movement (for a solution), and so is part of the problematic framing of onward mobility in the regime tainted by containment. At present, since refugee resettlement only benefits a miniscule proportion of refugees, it acts both practically and symbolically to bolster refugee containment. Practically, in some contexts, the vague prospect of resettlement incentivizes refugees to endure protracted encampment and other human rights violations. Symbolically, resettlement acts as the ‘queue’ which refugees who move in search of decent conditions are framed as skipping. Institutionally, resettlement denies refugee agency. Refugees may not usually even apply to be resettled, nor do they have any say in its workings.

So, here too, everything is to play for in the follow-up processes. If the Refugee Compact genuinely and significantly opens up greater resettlement opportunities, it could make an important contribution to fixing the global refugee regime. At the very least, its commitments could be used to develop better resettlement processes. However, the number of resettlement places remains in the gift of States, and there is a real risk that the Compacts process may serve to legitimate refugee containment, rather than open up greater mobility opportunities for refugees.

Refugees and those in search of protection often have no legal travel routes, and are barred from using regular means of travel due to carrier sanctions. It is carrier sanctions, more than any other policy measure, that render irregular migration dangerous – which is why it is striking that the Compacts do not refer to them at all. Were it not for carrier sanctions, those travelling without documentation could still board regular planes and ferries. Indeed, the deflective effect of carrier sanctions generates much of the demand for the services of smugglers. Carrier sanctions have privatized border controls, and in so doing, have created hurdles above and beyond the scope of the underlying immigration laws. In particular, they incentivize carriers to err on the side of caution, and refuse entry to anyone who may not have his or her documentation in order, thereby barring many would-be asylum seekers from travel, as Kritzman-Amir has explained.2

Carrier sanctions are a policy tool of relatively recent origin, yet they seem to have become normalized. In the first volume of this journal in 1989, Erika Feller wrote that

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while ‘States have a legitimate interest in controlling irregular migration and a right to do so through appropriate border measures, … they are in breach of international obligations towards refugees where such measures hinder access both to status determination procedures and to asylum from persecution’.

And yet, there is no explicit mention of carrier sanctions in either Compact, not even the Migrant Compact with its titular focus on ‘safe’ migration. There are some oblique references, however. Paragraph 27(b) of the Migration Compact on effective border management refers to ‘pre-reporting by carriers of passengers’, but this seems to bolster, rather than question, the role of carriers in migration control.

However, it is possible to ‘get at’ carrier sanctions given the breadth of the Migration Compact’s commitments. In particular, it espouses 10 principles, including the rule of law, due process, and a whole-of-government and whole-of-society approach (para 15). Private actors are engaged in the Compacts, and their role in enabling migration is clearly contemplated. In the context of carrier sanctions, we see the role of private actors in the generation of demand for smugglers and illicit journeys, undermining not only migration law, but the raft of legislation that governs safe travel on land, sea, and in the air.

In contrast to the silence on carrier sanctions, the New York Declaration and the Global Compacts foreground migrant and refugee exploitation, with a commitment to ‘vigorously combat human trafficking and migrant smuggling with a view to their elimination’ (New York Declaration, para 35). The Migration Compact has an entire section on smuggling, also based on the assumption that it is simply a wrong to be suppressed. However, there is growing recognition that smuggling prohibitions are often overbroad, and are used to suppress humanitarian assistance to those in search of protection. Moreover, there is a burgeoning empirical scholarship on the everyday role of ‘agents’ in migration processes (who often fall foul of smuggling prohibitions). In contrast, the Migration Compact seems to endorse a simplistic ‘supression’ view.

When it comes to implementing the Global Compacts, the appropriate response is to understand them (and the New York Declaration) holistically and purposively. The drafters sought to avoid the need for people to undertake dangerous journeys, and to avert refugee crises through international cooperation. The New York Declaration explicitly commits States to reviewing the negative consequences of their migration policies (para 45). The Migration Compact’s commitment to ‘safe, orderly and regular migration’ is an invitation to think comprehensively about harm reduction in migration control.

IV. CONCLUSION

Hannah Arendt’s 1943 essay, ‘We Refugees’, begins: ‘In the first place, we don’t like to be called “refugees”. We ourselves call each other “newcomers” or “immigrants”’. The essay demonstrates that for the refugees, of whom she was one, the label ‘immigrant’ was preferable. It reflected a desire to get on and integrate, rather than neediness. That impulse to avoid the ‘refugee’ label may still be common today, particularly from those

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keen to avoid rights restriction or stigmatization. However, the ‘refugee’ label today is also instrumentalized to downplay the protection needs of others – those who may not be recognized as refugees (even though they ought to be), and those who are not refugees in any sense, but nonetheless require international protection. The New York Declaration and the bifurcated Global Compacts risk endorsing an unduly narrow conception of refugeehood, and failing to root out the refugee containment that taints the global refugee regime. However, I also offer a more constructive reading, emphasizing the overarching concept of international protection, and obligations to avoid harm in migration governance.