The Normative Impact of the Global Compact on Refugees

Thomas Gammeltoft-Hansen*

INTRODUCTION

When Ban Ki-moon launched the idea of a Global Compact on Refugees (Refugee Compact) in his 2016 report In Safety and Dignity, it was with an ambition to secure new commitments in regard to the longstanding gap in international refugee law regarding international cooperation. To do so, he proposed that the Compact should develop a principle of responsibility sharing ‘through the application of standards that reflect the 1951 Convention and the 1967 Protocol thereto, regional refugee instruments and international human rights and humanitarian law’ (para 70). In the ensuing drafting process, several commentators expressed similar hopes for the Compact to address a range of normative issues, providing either substantively new commitments or pushing the interpretation of existing obligations under international refugee and human rights law. Others expressed the hope that, even though non-binding, the Refugee Compact might eventually pave the way for subsequent international legal developments, such as a new protocol to the 1951 Refugee Convention.1

To assess whether any of those possibilities is feasible, it is first necessary to understand what kind of animal the Refugee Compact is in the zoo of international law and diplomacy. This short article sets out a brief analysis of the term ‘compact’ as a political–legal instrument. On this basis, it asks how the Refugee Compact relates to existing international refugee law, and what, if any, normative implications are likely to follow from this new instrument. It does so by considering the Compact as a particular form of soft law instrument and examining the different roles such an instrument can play from an international law perspective.

* Professor in legal science with special responsibilities in the area of refugees and migration, University of Copenhagen. This commentary draws upon a paper originally prepared for a workshop on the Global Compact on Refugees convened by the Zolberg Institute on Migration and Mobility, New York (2–3 October 2017).

WHAT IS A ‘COMPACT’?

The term ‘compact’, or ‘pact’,\(^2\) has become an increasingly popular term of art in international diplomacy during the last decade and a half. The United Nations (UN) launched its Global Compact in 2000 as a set of principles on corporate social responsibility which businesses could endorse and report on. The Refugee Compact and the Global Compact for Safe, Orderly and Regular Migration (Migration Compact) follow on from a number of other regional ‘compacts’ within the refugee/migration field. In 2016, the European Union (EU), a number of other States, the World Bank, and select international donors adopted two compacts with two refugee-hosting countries – Jordan and Lebanon. Presented as ‘package deals’, both in terms of the actors and the mechanisms involved, each compact sought to secure refugee rights and livelihood opportunities in Jordan and Lebanon, based on a broader portfolio 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 auspices of the European Agenda for Migration. These compacts are seen as intervention mechanisms below existing international agreements, such as EU association agreements, which can be adopted more quickly and without the involvement of the European Parliament.

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 practice, and issue linkage as a means to ensure cooperation and accountability in areas where direct reciprocity and more formal institutionalization are difficult to achieve.\(^3\) The compact as a choice of instrument tends 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 but subsidiary to existing binding international agreements.

THE GLOBAL COMPACT ON REFUGEES AS A SOFT LAW INSTRUMENT

Non-binding status does not mean, however, that the Refugee Compact cannot play a role in the ongoing normative development of international refugee law. An increasing number of international rules and standards emerging over the last decades have taken the form of non-binding agreements and other instruments. This realm of soft law can be seen to shape and impact upon the content of hard 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 implementation of existing bodies of international law. Looking at these different developments, it is possible to

\(^2\) The English language version of the New York Declaration is the only one to use the term ‘compact’. In French and Spanish, the terms ‘pacte mondial’ and ‘pacto mundial’ are used.

make some qualified speculations about the potential normative impact of the Refugee Compact.\(^4\)

In some areas of human 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. In addition, the more flexible character of a soft law instrument, such as the Refugee Compact, may help to overcome the traditional boundaries associated with international law in terms of allocating accountability to a broader set of actors, including the private sector, international organizations, and non-governmental organizations. In this regard, the starting point for the two Global Compacts is very different. While the Migration Compact may potentially come to fulfil such a role with regard to the more fragmented and rudimentary area of international migration law, the Refugee Compact enters a far more well-established normative terrain. Nonetheless, it comes at a time when international refugee law is under significant pressure. The fact that the New York Declaration for Refugees and Migrants unequivocally reaffirmed the principle of non-refoulement and other core principles of international refugee law was not a foregone conclusion.

One may further consider the role of the Refugee Compact in relation to States which have not ratified the 1951 Refugee Convention. As other scholars have demonstrated, non-party States often have a complex relationship with international refugee law, actively engaging in ongoing normative interpretation and, in at least some cases, closely mirroring international norms as a matter of domestic law.\(^5\) Just as several non-party States are members of the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR), the Refugee Compact may similarly create a nodal point for linking important refugee-hosting States to the international refugee protection regime.

Beyond this, the normative impact of the Refugee Compact depends on the extent to which its contents set out sufficiently clear principles and rules that subsequently gain traction with States. Focusing on the first part, this can happen in one of two ways. First, the Compact may potentially play a norm-creating role, helping to formulate new principles or rules that 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

---

\(^4\) 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 by States 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. Thus, while the adoption of the Refugee 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. 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 University Press 2016).

obvious need 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’. More generally, the nature of a compact could involve the bundling of norms and principles pertaining to different bodies of international law, which would serve as a framework for the subsequent conclusion of a new treaty.

The closest thing to a substantively new commitment in the Refugee Compact is the stated ambition to develop a ‘predictable and equitable burden- and responsibility-sharing among all United Nations Member States’ (para 3), which moves beyond the general emphasis on ‘international cooperation’ set out in the preamble to the 1951 Refugee Convention. The formulation itself, however, presents an abstract principle with little, if any, normative specificity. In the remaining text, responsibility sharing is addressed through the establishment of a recurring pledging mechanism, the Global Refugee Forum, as well as country-specific or regional Support Platforms in cases of large-scale influx. The political value of such arrangements notwithstanding, neither entails any normative or predetermined commitments.

Looking at the text as a whole, it is difficult to see any 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 resettlement or financial burden sharing. As a result of political pressure from major refugee-hosting States, the text explicitly states that the Compact does not impose any additional burdens on host countries (para 50). Any normative impact in this regard is thus reserved for the more technical level. The Comprehensive Refugee Response Framework (CRRF) sets out a range of different standards, recommendations, best practices, and so forth addressed to both State and non-State actors. While again these are non-binding, other areas of international law highlight that such principles and standards may nonetheless play an important role in governing State behaviour.

The Refugee Compact may additionally come to serve a norm-filling role to the extent that it sets out specific understandings and interpretation of existing rules of international law. Given continued policy developments and consequent struggles over interpretation in regard to several key areas of refugee protection, how and to what extent the text references existing international refugee law and other instruments and principles of international law is important. The Refugee Compact represents a major opportunity not only to ensure continued State support for international law, but also to address interpretive gaps, clarify the interoperation between different international legal regimes, and integrate the large corpus of existing standards and principles developed in this area.

To the surprise of many, however, the Zero Draft presented in January 2018 lacked any reference to even the most basic principles of international refugee law. According to UNHCR officials, this reflected a conscious decision not to open discussions on the existing international legal framework. The ensuing drafting process, however, somewhat changed this approach. In the final text, international human rights and refugee

6 Türk and Garlick (n 1) 673.
7 The Secretary-General’s Special Representative for International Migration, Peter Sutherland, made this point in regard to the Migration Compact: ‘Report of the Special Representative of the Secretary-General on Migration’, UN doc A/71/728 (3 February 2017) para 87.
law appear as overall guiding principles for the Compact (para 5). Explicit reference is also made to core political rights, such as the principle of non-refoulement, and more attention is paid to socio-economic issues, such as food security (paras 80–81).

The final text, however, fails to offer any language pushing interpretation on more controversial issues of international refugee law, such as detention and non-penalization for illegal entry. Both are areas where States have applied restrictive interpretations in order to legitimate deterrence measures, and which were highlighted by the UN Secretary-General in his 2016 report. Similarly, the language of the Compact is surprisingly weak when it comes to core socio-economic issues, such as the right to work, avoiding any kind of rights-based formulations or reference to existing standards under international law.

**SOFT LAW IN DEFENCE OF THE STATUS QUO**

Within liberal human rights theory, there is often an implicit assumption that soft law plays a progressive role, raising protection standards and eventually solidifying or leading to ‘norm cascade’. 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. As documented elsewhere, however, this assumption does not always hold up. In some areas, soft law constitutes a primary reference point, and yet there seems to be no immediate prospect for its codification or crystallization into hard law. Soft law may be a preferred means by States to respond more quickly to situations, 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 often more indeterminate language of soft law instruments in order to retain room for political manoeuvring.

The Refugee Compact is perhaps a case in point. In both form and substance, it represents a step back from international law as the otherwise preferred language of international relations. This is first and foremost a reflection of States’ lack of political will to make further binding commitments with respect to refugee protection, but also a conscious choice by UNHCR to avoid discussion on the existing international legal framework at a time of repeated challenges to refugee rights in many parts of the world. As a result, despite the Compact’s general references to international refugee and human rights law, it remains a distinctly political agreement. The language is less legal and the emphasis is on political principles and processes linked to the Programme of Action. This is particularly evident when examining the underlying modalities for cooperation, which revolve around mutual incentive structures, issue linkages, and

---


10 Lagoutte, Gammeltoft-Hansen, and Cerone (eds) (n 4).

needs-based approaches, as opposed to the language of rights, obligations, and reciprocity common to international law.

However one measures the symbolic and real-life importance for refugee protection of achieving a global agreement at this particular time, the Refugee Compact’s design places significant limitations on its normative role vis-à-vis international refugee law. For those hoping that the Compact may serve as a stepping stone towards a new protocol or similar binding agreement on refugee responsibility sharing, the text provides little more than general references to build upon. In a similar vein, it shies away from engaging with any of the core interpretive struggles currently marring international refugee and human rights law. At a time when some States are actively seeking to backtrack or hedge against more progressive interpretations of the 1951 Refugee Convention, this is a significant missed opportunity.

From the perspective of international law, then, the main impact of the Refugee Compact is likely to be its norm-preserving role. In that respect, the inclusion of references to the core corpus of international and regional legal instruments to protect refugees – as guiding principles for the Compact – is a notable development. From a starting point of scarcely mentioning international law at all, the final text, at the very least, reaffirms the status quo. Provided it is endorsed with broad support by States, that inclusion further serves an important role by creating a stronger link between refugee-hosting States that are not parties to the key refugee instruments and the wider international refugee protection regime.