

The Global Refugee and Migration Compacts. Responsibilities and Policy Impact

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In recent years, the number of people who are forced to leave their home countries has risen to almost unprecedented levels. Millions seek to escape the killing in places like Syria, Afghanistan or South Sudan. Others suffer from situations of economic despair and hope to find a better future in more prosperous countries. In reality, though, the vast majority of both refugees and migrants end up being hosted in relatively poor countries in the Global South, stretching their capacities to the limit and beyond.

Recognition of the need for more international solidarity to provide durable solutions for refugees and opportunities for migrants opened the way for new UN initiatives in the field. Against the backdrop of the 2015/2016 refugee crisis, the UN convened a Summit for Refugees and Migrants in September 2016. As a result, the UN Declaration for Refugees and Migrants (New York Declaration) of 19 September 2016 called for the adoption of two compacts by the General Assembly, one on refugees, the other on migrants, by the end of 2018.

Both compacts are expected to be adopted in December 2018. While on the surface, they seem to pursue similar goals, a deeper look reveals substantial differences. In particular, they envisage very different notions of responsibility, as shown in the first part of this paper. Whereas parts of the Global Compact on Refugees (Refugee Compact) read as a confirmation of national sovereignty, the Global Compact for Safe, Orderly and Regular Migration (Migration Compact) puts much more emphasis on the

individual rights of migrants and envisages a shared responsibility among states for the protection of these rights. The implications of these differing notions of responsibility will be discussed in the second part of this paper with regard to the European Union's border management policies.

Negotiation processes

The responsibility for developing the Refugee Compact was assigned to the United Nations High Commissioner for Refugees (UNHCR). The process for the Migration Compact was led by two states, Switzerland and Mexico, with a substantial role for the UN Special Representative for International Migration (a post which was vacant following the serious illness and death of the incumbent, Peter Sutherland, for most of the initial part of the preparations until the UN Secretary-General appointed a new Representative, Louise Arbour, in March 2017). The negotiations on both Compacts were preceded by a year of stocktaking which ran in tandem for the two Compact processes. This was followed by a year of negotiations, resulting in the final versions. UNHCR ran the stocktaking and negotiation of the Refugee Compact with all the aplomb of a large international organisation specialised in the subject matter. With the Refugee Convention as the jewel in the UNHCR crown not to be touched, the focus was on international solidarity in the form of responsibility-sharing and resettlement. The negotiation of the Migration Compact was a more open-ended affair.

In the negotiations, the actors, which included states, UN organisations, non-governmental organisations and academics, needed to determine the scope of the two Compacts and their points of intersection. The difference in the two Compacts' structural arrangements can be seen in these discussions where UNHCR had a clear position which it promoted with all the efficiency of a large international organisation. The Migration Compact was somewhat disadvantaged by having two state facilitators (notwithstanding their excellence) and a UN Special Representative newly in place. Two issues stood out – responsibility for the core refugee principle of non-refoulement, and the meaning of 'migrant' (specifically those in a vulnerable situation). The first drafts of the Migration Compact included references to non-refoulement, i.e. the principle of not forcing refugees to return to a country where they could be persecuted or tortured. Yet by the end of the negotiating process and as a result of discussions about the relationship of the two Compacts, this reference had disappeared.

The Refugee Compact was included as an annex in UNHCR's annual report and distributed to UN General Assembly (UNGA) delegations in September 2018 (A/73/12 (Part II)). It will most likely be part of an UNGA resolution in December. The Migration Compact will be adopted at a special UNGA meeting in Marrakesh, Morocco, on 10/11 December 2018.

Responsibility as a key issue

Perhaps the most important aspect of both Compacts, from a policy perspective, is their engagement with state responsibilities within the international community. Responsibility of and to the international community regarding migration and refugee protection is a constant refrain in both of them. But their concepts of responsibility differ in at least two dimensions: responsibility to whom and responsibility for what. The first dimension refers to shared responsibility among states versus a focus on national sovereignty. With regard to the objective, the focus lies either on the refugees and migrants and their individual rights or on making borders impenetrable. The two dimensions are independent from another and possibly but not necessarily antagonistic. For example, states could share responsibility for border control or share responsibility for protecting migrants' rights. Sharing responsibility alone does not necessarily constitute progress from the perspective of migration and refugee rights.

The NY Declaration had already given an indication of what the international community was seeking in terms of responsibility. Members of the international community have a general and shared responsibility to one another and their international institutions. But there is also a responsibility to people who are moving from one state to another. Paragraph 11

states: "We acknowledge a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centred manner."

A truly "people-centred" responsibility must be one which is designed to take into account individuals themselves and their human rights. Indeed, the principle of responsibility usually also includes, in international law, the principle of liability for failure to take responsibility when it is clearly allocated. This approach as a shared responsibility was controversial as the negotiations of the Migration Compact went forward. But in the end states committed, in paragraph 24, to assume a "collective responsibility to preserve the lives of all migrants"; and in paragraph 14 they undertake "to address the challenges and opportunities of migration in all its dimensions through shared responsibility and innovative solutions".

The Refugee Compact is much more supportive of national sovereignty concepts. It also puts less emphasis on individual rights and instead prioritises state responsibilities for border protection and controls. In paragraph 11, GRC states that an objective is "effective arrangements for burden- and responsibility-sharing". Further on, paragraph 15 states that: "The following arrangements seek to achieve more equitable and predictable burden- and responsibility-sharing with host countries and communities, and to support the search for solutions, including, where appropriate, through assistance to countries of origin." This language does not leave any space for the individual refugee to claim rights. It is exclusively about the entitlement of states to treat refugees and persons in need of international protection like commodities whose sell-by date has expired and which are to be moved around the international community accordingly. This is not a human rights-based approach.

The political implications derived from the two ways of conceptualising responsibility differ markedly. The first opens up the possibility of shared liability for failure to protect the safety of migrants, a duty to consult with other states, and the need for clear rules and procedures to exclude the arbitrary and thus fulfil the shared responsibility. The second calls for states to figure out what they consider to be "equitable and practical" burden-sharing. There is no space here, for instance, for the refugee to claim that he or she is not a burden but an asset to the host state. The assumption is clear and unequivocal – refugees and persons in need of international protection are a problem to be managed. That management does not include rights for the people being managed to participate in decisions about their own futures. Instead, it is for states to determine, in accordance with unknown and unstated principles (let alone rules), what is equitable from their own – not the refugee's – perspective.

Implications for border management

Three states, the USA, Hungary and Austria, withdrew from the negotiations on the Migration Compact because they considered them incompatible with their understanding of state sovereignty. This doctrine, when applied to border management, eschews shared responsibility. At one end of the borders/migration management spectrum, there are those states which claim that state sovereignty entitles them to pursue their own policies as they please without interference by other states (implicitly irrespective of the consequences for other states sharing borders with them). The clearest example of this claim to state sovereignty in border controls is the decision by the current US administration to build a wall between the USA and its southern neighbour, Mexico. This campaign promise, made by the current president, was turned into policy on his election without regard to the position of the Mexican Government. The opposite approach to shared responsibility for border management is perhaps best exemplified by EU internal border controls, where the rules on the abolition of intra-Community border controls on persons is a profound recognition of the shared border management responsibility. Temporary tensions in border management, which have resulted in the re-introduction of intra-EU border controls at specific places and among a very limited number of Member States, do not undermine this principle.

Inconsistencies in current EU asylum and border policies

Notwithstanding the very clear Schengen principles, there is a certain incoherence in EU border and asylum policy which points Janus-like in two different directions. On the one hand, the common control of the EU external border through the application of common rules on the admission of third-country nationals is considered absolutely necessary for the Schengen project of no controls at Member States' borders. The common rules rely on fixed border crossing points and surveillance of all spaces in between to prevent irregular entry.

Yet EU asylum policy is based on the Refugee Convention and human rights obligations to provide international protection to everyone who needs it under international and EU law. The Schengen rules specifically exclude refugees from having to meet strict entry requirements, recognising that they are entitled to make asylum claims. However, between the time when someone applies for asylum (or indicates that he or she wants to apply for asylum) and the date of the formal decision, a long time can pass. During this period the person is supposed to be registered as an asylum-seeker and is entitled to receive certain benefits. A number of Member States and EU institutions are very anxious about 'abuse' of the

asylum system whereby those who are not entitled to international protection make spurious claims in order to get into the EU.

The consequence is the adoption of very restrictive border control procedures such as expensive, document-heavy visa requirements (which apply to most of the main countries of origin of refugees who make it to the EU) and carrier sanctions. The effect of the latter is that refugees who are unable to obtain travel documents and visas are refused carriage to the EU by travel company personnel. For these refugees, only the unregulated options are open: they turn to smugglers, who often operate with dangerously inadequate equipment and charge very high prices. To tackle the problem of people smuggling, the EU has adopted a wide range of measures aimed at destroying this "business model". This includes use of the EU's external border agency, FRONTEX, to patrol and prevent, if possible, even the departure of small boats in the Mediterranean (mainly through cooperation with border guards in the countries of departure). EU-sanctioned measures to criminalise non-governmental organisations seeking to rescue people at risk in the Mediterranean are also part of this arsenal. The EU's failure to reach agreement on humanitarian visas for such people demonstrates the unwillingness of at least some EU states to facilitate the arrival of those in need of international protection.

These policies are designed to prevent the arrival of undocumented third-country nationals, including refugees, even if that means trapping them in countries where there is neither safety nor durable solutions. The much-deployed term "externalisation" of EU border policy describes the carrot and stick policies which the EU uses to convince third countries to carry out border control procedures which are aimed not at achieving any specific border objective of that third country but to assist the EU with its border control objectives. The EU policies are aimed at motivating third countries to prevent people from leaving their shores for the EU, even though such measures may not be consistent with every individual's international and European human right to leave a country. Unfortunately, the Refugee Compact provides some succour to these EU policies, which have come under sustained criticism from academics and civil society. The argument presented by EU officials that refugees should stay in the first 'safe' country in which they arrive on fleeing persecution has been transformed in the Refugee Compact into a responsibility on states to prevent refugees from fleeing those states in the first place.

Shared liabilities for protecting individual rights

At first glance, the Migration Compact hardly offers a more critical perspective on EU border management. The shared responsibility discourse that is firmly

embedded in the Compact is quite popular among the EU institutions. As one official indicated (privately), this provides an open door for EU policies to expand programmes to fund and arm Libyan ‘coast guards’ – militias subject to very little if any state control and oversight – to prevent boats carrying would-be refugees to EU shores. The rise in violence and loss of life from September 2018 onwards among those crossing the sea in small boats in the central Mediterranean is also a result of these policies. If, however, the Migration Compact’s enunciation of a shared responsibility includes a shared liability for human rights failures, the buck does not stop with these unstable militias. In the Migration Compact, the international community, including 26 of the 28 Member States of the EU, commit to the principle of shared responsibility for border management in pursuit of the protection of every individual’s human rights. The corollary of state liability as an inherent part of state responsibility comes to life. The Migration Compact is a political-ly, although not legally binding undertaking, which states, including the EU, are expected to take into account in designing and implementing their border management policies. Comprehensive and systematic failure to ensure safe passage for those crossing the Mediterranean in small boats has human rights consequences – not least a failure to protect life and several other rights contained in the European Convention on Human Rights (Article 3 prohibiting subjecting people to torture, inhuman and degrading treatment or punishment; Article 13 on the right to an effective remedy).

Conclusion

Summing up, while the Refugee Compact is something of a disappointment from the perspective of the the human rights of refugees and those in need of international protection, the Migration Compact provides a glimmer of light. The Refugee Compact provides some validation of EU coercive policies

about refugee resettlement, in particular a refusal to take seriously the entitlement, within reason, of individuals to choose where they want to live and where they consider they have the best chances of making a successful contribution to society. The Migration Compact, however, presents a different approach to shared responsibility of border management. This shared responsibility includes safeguarding the human rights of those crossing borders. Insofar as responsibility incurs liability, this approach may assist the EU to rethink its programmes of funding and arming – for the purpose of preventing people from exercising their right to leave a country – militias which are not integrated into any state’s formal institutions and are suspected of gross human rights violations. It will be the responsibility of the incoming Commission and Council to remedy the shortcomings of the EU border control system to ensure that refugees are not among its victims.

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