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3. THE NEW PACT ON MIGRATION AND ASYLUM AND THE GLOBAL COMPACT ON REFUGEES AND SOLUTIONS

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The United Nations Global Compact on Refugees (GCR) of 2018 is a document that tries to embrace all aspects of forcible displacement across international borders in the 21st century. This Chapter's review of the new EU Pact will focus principally on how it might facilitate solutions for displacement in relation to the GCR, but necessarily there first has to be some more general analysis.

3.1. The GCR as framing the argument

The GCR may not be binding in international law (paragraph 4), but it still gives rise to commitments for the international community as a whole. Its two principal elements pertinent to this discussion relate to burden- and responsibility-sharing and its focus on solutions.

The 1951 Convention relating to the Status of Refugees (1951 Convention) and its 1967 Protocol, and the 1950 Statute of the United Nations High Commissioner for Refugees (UNHCR) are directed towards protection of refugees in the country of asylum, not so much on the inevitable burden that providing protection entails, nor the ultimate protection, a durable and sustainable solution to their displacement. Paragraph 4 of the Preamble to the 1951 Convention did call for international co-operation:

CONSIDERING that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.

Nevertheless, it took until the GCR in 2018 to put “flesh” on those bare bones. As UNHCR figures show, there are 79.5 million displaced persons of concern to UNHCR, of whom 20.4 million are refugees and 4.2 million are asylum seekers; 73% live in neighbouring countries to those that they have fled, often alongside the 45.7 million internally displaced persons (IDPs) who are also of concern to the organisation.¹ Of the top five hosting states, only Germany is in the global north: 80% of displaced persons of concern to UNHCR live in states where there is acute food insecurity and malnutrition.

In these circumstances, where the modal average length of a situation of displacement is around eighteen years, it is little wonder that the development actors play such an important role in the GCR, while UNHCR maintains its unique protection mandate for all refugees, including asylum seekers and returnees without a durable and sustainable solution.

¹ This year's figures include 3.6 million Venezuelans displaced abroad, alongside the 93,300 refugees and 794,500 asylum seekers – 4.5 million Venezuelans in total.

Some aspects of the new EU Pact have a direct impact on how the GCR's guiding principles and objectives (paragraphs 5 and 7) are to be achieved – as the new Communication on the new Pact (EU Pact, p.18) states, the EU is the “the world's major development donor”.

As regards durable and sustainable solutions, the traditional three are voluntary repatriation, resettlement or local integration. The GCR recognised a fourth means for responding to displacement, complementary pathways for admission to third countries (paragraphs 94-96). There is, however, language in those paragraphs that indicates that complementary pathways are not durable and sustainable, with references to student scholarships and labour mobility. If the objective is to provide the refugee with the sustainable international protection of a state rather than that upheld by UNHCR under its mandate, then studentships and labour mobility schemes do not offer that guarantee, at least in the first instance, although they may facilitate one of the traditional durable solutions and provide the refugee with the capacity to resolve their own situation.

3.2. The new EU Pact and the GCR

It is always worth mentioning that the EU's approach of joining asylum with migration is fundamentally flawed, regardless of how long they have persisted with it. Asylum is about protection and immigration is about controlling borders (Gilbert 2004; Carrera 2020).

The idea that the new EU Pact's focus should be “a common framework for asylum and migration management at EU level as a key contribution to the comprehensive approach and *seeks to promote mutual trust between the Member States*” does undermine the primacy of refugee protection as set out in the EU Proposal for a Regulation (p.2).

Nevertheless, in the context of solutions, some aspects of the new Pact may be facilitative (see, Commission Recommendation on legal Pathways to Protection (Preamble paragraphs 3 and 6). Equally, those elements relating to prevention, development aid and migration as a way to end refugee status and protect the dignity of refugees could be helpful (see EU Pact, §§6.2, 6.3, 6.5).

3.2.1. Prevention

The cynical view within the 1990s was that there was no such thing as post-conflict, just a pause before it was pre-conflict again. Nevertheless, the link between development assistance and prevention is well established and is even built into the Responsibility to Protect (R2P, paragraph 139; Gilbert 1998).

139 ... We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

The new EU Pact takes this further and should be read with paragraphs 8 and 9 of the GCR:

8 ... In the first instance, addressing root causes is the responsibility of countries at the origin of refugee movements. However, averting and resolving large refugee situations are also matters of

serious concern to the international community as a whole, requiring early efforts to address their drivers and triggers, as well as improved cooperation among political, humanitarian, development and peace actors.

In line with the Sustainable Development Goals (SDGs), the international community, including the EU, should provide development assistance. The new EU Pact takes a similar line in §6.3 when it asserts that,

Conflict prevention and resolution, as well as peace, security and governance, are often the cornerstone of these efforts. Trade and investment policies already contribute to addressing root causes by creating jobs and perspectives for millions of workers and farmers worldwide. Boosting investment through vehicles such as the External Investment Plan can make a significant contribution to economic development, growth and employment.

On the other hand, while the new Pact has some useful language regarding long-term prevention through addressing root causes, there are other references that indicate an EU-centric attitude that will not affect global fairness and reduced displacement. In EU Pact §2.4 of the document talks about how “[the] new Asylum and Migration Management Regulation will ... improve planning, preparedness and monitoring at both national and EU level”, rather than solidarity with the states in low- or middle-income countries who host 83% of the world’s refugees according to UNHCR (2019, p.25); as such, the focus once again seems to be on averting another 2015 European asylum crisis that never was a crisis given the wealth of EU member states and the very limited numbers they were dealing with by comparison with many other low- or middle-income countries (UNHCR 2019, p.25, Fig.2).

3.2.2. Burden- and responsibility-sharing and local integration

Predictable and equitable burden- and responsibility-sharing is fundamental to all of the GCR (paragraph 3). In this particular context, given the protracted nature of most displacement crises and that most displaced persons only cross one border according to the World Bank (2017) (p. 23), supporting the low- or middle-income countries who host most refugees is part of the solution to the crisis. Solutions start from the moment of protection, as human rights and the rule of law protect refugees in the country of asylum.

The traditional durable and sustainable solutions are the endpoint of an international protection framework that is based on resolving the issues to which displacement gives rise: denial of access to education, employment and healthcare, interference with the guarantees the rule of law should offer, and the upholding of human rights. Some of the new Pact targets these problems refugees face during their situations of displacement. The new EU Pact states at §6.2 that

... [The] EU is determined to maintain its strong commitment to providing life-saving support to millions of refugees and displaced people, as well as fostering sustainable development-oriented solutions.

Nevertheless, this is a perfect example of why the new Pact might be evidence of hope triumphing over expectation. Niger has provided incredible support to forcibly displaced persons for years,²

² For further discussion, see Gilbert & Rüschi, ‘Rule of Law and UN Interoperability’, 30 *IJRL* 31 at 35 and fn.136, (2018)

but according to the UNDP Human Development Index for 2020 (UNDP 2020), Niger came 189th out of 189 countries. The EU should not be ‘solving’ forced displacement and providing protection through transfer to one of the poorest countries on the planet.

What is also true, however, is that whether formally or not, lots of forcibly displaced persons remain for protracted periods in the country of asylum and settle there. As will be seen, where voluntary repatriation is not possible, refugees have few options other than to make a new life in the country giving protection. The generosity of many countries of asylum in this regard, though, cannot be abused by the international community and, thus, EU initiatives with respect to development, also indicated in the new Pact, will inevitably play a large part in solutions. According to the new EU Pact §6.3:

The EU is the world’s largest provider of development assistance. This will continue to be a key feature in EU engagement with countries, including on migration issues. Work to build stable and cohesive societies, to reduce poverty and inequality and promote human development, jobs and economic opportunity, to promote democracy, good governance, peace and security, and to address the challenges of climate change can all help people feel that their future lies at home.

It may not be what low- or middle-income countries hoped for during the Formal Consultations on the GCR, but without robust engagement with the source states, which have predominantly remained the same since the 1990s (World Bank 2017, p.23), voluntary repatriation will not resolve displacement crises.

3.2.3. Resettlement and complementary pathways

Resettlement is one of the classic durable and sustainable solutions, but it is less and less available, such that only for the most vulnerable will it provide a means of ending refugeehood. The Commission Recommendation on legal pathways to protection in the EU supports the expansion of resettlement programmes within the EU. But even so its impact on low- or middle-income countries that host so many refugees would still be minimal because the base figure is so low – 107,800 in a mere 26 countries worldwide in 2019 according to UNHCR figures.

The proposed Commission Recommendation on legal pathways to protection in the EU is a positive move by the EU, although the role of the European Asylum Support Office (EASO) alongside UNHCR needs to be further developed. Complementary Pathways are an additional solution listed in the GCR (paragraphs 94-96), but whether they will always be durable and sustainable like the traditional ones is open to question. The EU Pact deals with one very specific aspect of this in §6.6, the migration control effected through visa requirements for short-term mobility.

The remaining aspects of the proposed Commission Recommendation on legal pathways to protection in the EU apply equally to resettlement and complementary pathways. The aim of trying to ensure that forcibly displaced persons do not have to resort to irregular migration or even people smugglers is to be commended (§6.6, EU Pact), but unless that reflects effective access rather than simply top slicing particular refugees based on limited skill sets that only suit EU member states (see paragraphs 19 and 21 of the Commission Recommendation on legal pathways to protection in the EU), then no noticeable change will take place. It will also reduce the skill-base in the country of nationality for when transition towards peace and stability can commence.

To start, resettlement is a humanitarian response that benefits refugees and the countries of first asylum, usually low- or middle-income countries, it is not a means by which to “match people, skills and labour market needs through legal migration” (§6.6, EU Pact). That might be applicable to complementary pathways, but not resettlement as is clear from the Pact’s own description of the Union Resettlement and Humanitarian Admission Framework Regulation. The Pact also encourages broader community engagement with resettlement programmes that again reflects positive aspects of the GCR (see paragraph 91 read in the light of paragraphs 33-44).

3.2.4. Voluntary repatriation

Often spoken of as the most desired solution by refugees and countries of asylum, voluntary repatriation relies on restoration of human rights and rule of law in the country of nationality, along with substantial development initiatives. UNHCR can ensure that voluntary repatriation does lead to durable and sustainable solutions for returning refugees through monitoring, but the international community as a whole will provide the framework.

The EU has a major role to play in peace building and conflict resolution, not only as regards addressing the root causes, not just *vis-à-vis* prevention, but also to encourage voluntary repatriation (EU Pact §6.3). While there is much in the new Pact on the economic initiatives and on return programmes where people do not require protection, more on restoring human rights, rule of law and good governance would have been welcome.

3.3. Conclusion

The Pact on Migration and Asylum has once again missed the opportunity to put the EU at the forefront of resolving the global displacement crisis. It focuses on internal EU concerns and aims at pushing the problem away, often with a cynical reference to how that will protect so many from the dangers they might face in trying to reach Europe. When only 17% of persons of concern to UNHCR were in high-income countries in 2019, the need to support low- or middle-income countries and to offer enhanced protection and assistance to refugees should have been the outward-looking drivers for this review. International protection standards have been sacrificed in the (vain?) hope of achieving a compromise within the EU.

References

1950 Statute - 1950 Statute of the United Nations High Commissioner for Refugees, UNGA res.428 (V).

1951 Convention - 1951 Convention relating to the Status of Refugees, 189 UNTS 137.

1967 Protocol - 1967 Protocol to the 1951 Convention, 606 UNTS 265.

Carrera 2020 – Carrera, S. ‘Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum’, Policy Insight Kick-off Contribution to the ASILE Forum.

EU Commission Recommendation on legal Pathways to Protection – C(2020) 6467 final

Commission Recommendation of 23.9.2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, 23 September 2020.

EU Pact – Commission Communication on a New Pact on Migration and Asylum, COM(2020) 609 final, 23 September 2020.

EU Proposal for a Regulation - Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 (COM(2020) 610 final), 23 September 2020.

GCR - Global Compact on Refugees, UNGA res 73/151, Part II (2018).

Gilbert 1998 – Gilbert, G. ‘Rights, Legitimate Expectations, Needs and Responsibilities: UNHCR and the New World Order’, 10 *International Journal of Refugee Law* 349 (1998), fn.1.

Gilbert 2004 – Gilbert, G. ‘Is Europe Living Up to Its Obligations to Refugees?’ 15 *European Journal of International Law* 963 at 968 (2004)

R2P – UN World Summit, Responsibility to Protect, UNGA res. 60/1 (2005).

SDGs - Transforming our world: the 2030 Agenda for Sustainable Development, UNGA res. 70/1 (2015).

UNDP 2020 – UNDP Human Development Index (<http://hdr.undp.org/en/content/table-1-human-development-index-and-its-components-1>).

UNHCR 2019 - *UNHCR Global Trends 2019* (www.unhcr.org/globaltrends2019/)

UNHCR figures – Figures at a Glance, (www.unhcr.org/uk/figures-at-a-glance.html).

World Bank 2017 – World Bank, *Forcibly Displaced*, 2017, (<https://openknowledge.worldbank.org/handle/10986/25016>).