

Regarding Draft 1: Squaring the Circle – A Non-Binding Document with Commitments

As recognised by nearly every state at the second Formal Consultation on Draft 1 of the Global Compact on Refugees (GCR),¹ this version is a very great improvement on the Zero Draft,² particularly the increase in references to international refugee law and international human rights law.³ Nevertheless, the GCR is to be,

6. ... not legally binding, it provides a framework for cooperation to ensure that the international community engages more robustly and predictably in support of refugees, their host countries and communities, as well as in countries of origin where appropriate. It will be operationalized through **voluntary but mutually reinforcing and dedicated contributions** towards the achievement of the goals of the global compact set out in para 5. These contributions will be determined by each State and stakeholder **according to their respective resources, capacity and expertise**.

The competing interests of states not wanting to create another set of international obligations, yet ensure that the developing countries who host 84% of the world's refugees will not be left to shoulder the costs that such generosity imposes without the international community as a whole assuming its responsibility for "the predicament of refugees ... , an important [matter of] international concern",⁴ produces drafting dilemmas for UNHCR during this consultative process.

One means by which to square this circle, between imposing no legally binding international obligations but yet establishing commitments to ensure responsibility sharing, would be to recognise that international law is but one framework by which to hold states to account. The GCR will give rise to political commitments and, given that it is still rare for states to resort to judicial or quasi-judicial processes in order to hold other states accountable even where they exist, acknowledge that very often politically binding obligations are seen as just as authoritative by the relevant governments. The United Nations has established Agenda 2030 under the Sustainable Development Goals with no legal obligations,⁵ the Organization for Security and Co-operation in Europe (OSCE) works mainly on consensus and has achieved much over several decades in practical terms with respect to minority rights and displacement.⁶

However, neither example is wholly apposite to the GCR. The OSCE was established to work on consensus and participating states operate on that expectation. The Sustainable Development Goals establish targets for each state in moving towards improvements in their own societies with no-one left behind. The GCR is seeking to address an issue that should never have arisen, the failure by the international community as a whole to respond to refugee movements: from the very outset in 1951, the United Nations set out that refugees were owed rights and that protection required international co-operation.

¹ <http://www.unhcr.org/uk/events/conferences/5aa2b3287/official-version-draft-1-global-compact-refugees-9-march-2018.html>.

² <http://www.unhcr.org/Zero-Draft.pdf>.

³ In the final text of the GCR, an annexe setting out the specific articles in the international refugee and human rights conventions as they pertain to particular paragraphs in the GCR would enhance their implementation for the protection of refugees.

⁴ Draft 1, above note 1, paragraph 1.

⁵ Transforming our World: The 2030 Agenda for Sustainable Development' UNGA res 70/1 (25 September 2015).

⁶ <<https://www.osce.org>>.

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

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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,⁷

Therefore, while the GCR is not legally binding, it refers to international refugee law and international human rights law, both treaty-based and customary, and it must establish a series of inter-state commitments so that there is fairer responsibility- and burden-sharing, otherwise it does no more than reiterate oft-stated avowals of support that do not address huge humanitarian crises or the protracted refuge provided by host states over decades with ever-reducing levels of support from the rest of the international community.⁸

A further approach to facilitate the success of the GCR, therefore, would be to draw on a different UN framework that would also promote partnerships within and outside the organization, especially with UNDP and the World Bank. While there are many more references to international human rights law and human rights instruments in Draft 1 by comparison with the Zero Draft, the latter did contain two references to rule of law as opposed to the single reference in Draft 1 talking of 'rule of law actors' (fn33). Paragraph 67 of the Zero Draft was directly relevant to several of the objectives desired for the GCR:⁹

67. Particular attention will be paid to supporting conditions and opportunities favourable to voluntary and sustainable repatriation, including safety and security, *rule of law*, access to essential services and documentation, economic recovery, and reconciliation. Access to economic opportunities in the country of origin, along with the prospect of recovering lost assets - such as housing, land, and property - are also important factors that influence successful return. Such endeavours would build on the United Nations Secretary-General's reform agenda, notably in the areas of peace, security, and development. (emphasis added)

However, rule of law is pertinent to the entire GCR framework of approach, from protecting refugees in the country of asylum, enhancing the capacity of the latter, facilitating voluntary repatriation to the country of nationality, promoting co-operation within the international community and operationalizing interoperability within and beyond the UN amongst humanitarian and development actors. Rule of law is a vast topic,¹⁰ even broader when good governance is read with it as is common throughout the UN.¹¹ Rule of law and good governance may not be set out in an international instrument, but the concepts are understood

⁷ 1951 Convention relating to the Status of Refugees, Preamble, paragraphs 2 and 4, 189 UNTS 150.

⁸ See World Food Programme on ever increasing demands that current donations do not satisfy (<http://www1.wfp.org>); see also, UNHCR *re* DRC emergency:

Despite the enormous needs, UNHCR has received less than a quarter of the US\$236.2 million required to provide life-saving assistance and protection to refugees, IDPs and other vulnerable people in the DRC.

<<http://www.unhcr.org/uk/dr-congo-emergency.html>>.

⁹ Above, note 2.

¹⁰ For an overview of rule of law in the context of displacement, see Geoff Gilbert and Anna Magdalena Rüsçh, 'Rule of Law and United Nations Interoperability'. 30 *International Journal of Refugee Law* (forthcoming, 2018).

¹¹ <<https://www.un.org/ruleoflaw/thematic-areas/governance/good-governance/>>.

globally, and member states of the United Nations have agreed that a ‘thick’ rule of law that encompasses good governance is binding on all international actors.¹²

Rule of law operates at both the domestic and international levels, where there is, in addition, a discrete understanding for its application to international organizations. At the international level, rule of law draws on both the Anglo-American judicialised model, which sees it as a means to constrain the state through the application of, *inter alia*, international human rights law for the benefit of individuals, and the continental European model, *l’Etat de Droit/ Rechtsstaat*, which sees rule of law as the mode of regulating the state or international organization so as to create a constitutional structure that fosters support from those affected by the exercise of power – this represents a better framework for the rule of law in the context of the UN’s humanitarian and development operations.¹³

At its most minimal, rule of law simply establishes whether something qualifies as law, but even in this regard it has something to add to the GCR. Draft 1 makes reference to international refugee law and international human rights law and the obligations they impose on states, particularly those hosting refugee populations. Draft 1, though, also refers to the SDGs,¹⁴ the Sendai Framework,¹⁵ the Nansen Initiative¹⁶ and other documents that reflect various degrees of obligation. Referencing rule of law at the outset of Draft 1 would allow states to understand how to apply the GCR, itself non-binding, and the range of international instruments to which it refers in a way that upholds the legally binding commitments set out in the 1951 Convention and 1967 Protocol, for instance, alongside those other documents.

Within the UN, there is more than one approach to applying rule of law principles, sometimes focusing on policing, justice and corrections,¹⁷ whereas in other contexts it embraces a ‘thick’ interpretation¹⁸ that encompasses international human rights standards, good governance and

¹² See Report of the Secretary-General, S/2004/616 (23 August 2004) and UNGA res 67/1 (24 September 2012) para 2:

2. We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.

There have been a series of GA Resolutions since 2005 – the latest can be found at UNGA res 72/119 (18 December 2017), which calls for: ‘23. ... strengthening [of] the rule of law through access to justice, including with regard to the provision of birth registration for all, appropriate registration and documentation of refugees, migrants, asylum seekers and stateless persons’. See Key Documents at <www.un.org/ruleoflaw/keydocuments>.

¹³ See Gilbert and Rüscher, above note 10, §2.1.

¹⁴ Above, note 1, at fn7.

¹⁵ Above, note 1, at fn31.

¹⁶ Above, note 1, at fn45.

¹⁷ See http://www.undp.org/content/undp/en/home/ourwork/crisispreventionandrecovery/focus_areas/rule-of-law/global-focal-point-for-police--justice-and-corrections-/.

¹⁸ See Report of the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence to the General Assembly, UN doc A/67/368 (13 September 2012) para 12:

the United Nations system, throughout all its organs, has clearly opted for a rich understanding of the notion [of the rule of law] that refers to human rights, including a wide catalogue of political rights and, among them, democratic rights, the promotion of development and good governance.

The Special Rapporteur goes on to refer to the Human Rights Council emphasising ‘the relevance of rule of law to peace, development and social cohesion (premised on gender equality and the elimination of all forms of discrimination)’, para 13.

resilience.¹⁹ As such, rule of law facilitates three aspects of the GCR as highlighted during the discussions on Draft 1: scope of commitments; state obligations; and interoperability with UN and other partners. Rule of law in all its manifestations reflects a compact by members of the relevant society as to how that society shall be governed. As regards the international community, international rule of law helps to establish equity between states: as the UN Charter makes clear, all states are equal (Article 2.1), but Article 1.4 sets out that the United Nations is to be “a centre for harmonizing the actions of nations in the attainment of these common ends”, including:

Article 1.3: To achieve *international cooperation in solving international problems of an economic, social, cultural, or humanitarian character*, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. (emphasis added)

Thus, the GCR in operationalizing a framework for international co-operation through “voluntary but mutually reinforcing and dedicated contributions” reflects the rule of law commitments already assumed and undertaken by all states in relation to their own dealings as between themselves.²⁰

Rule of law may not be defined in any single instrument, but it is applicable without ratification by states. As such, it provides a framework for application of the standards in the GCR across all refugee operations. Those states parties to international refugee law and international human rights law instruments, as part of meeting rule of law at the domestic level, should implement those obligations for everyone on their territory and subject to their jurisdiction. Where states are not party to such instruments, then non-discrimination is a fundamental principle of rule of law that means, when read with the SDGs, that those displaced should not be left behind as the state implements Agenda 2030. This has especial relevance for empowering all displaced persons, particularly women and the girl-child, and obtaining access to education, health care and justice. The SDGs already incorporate displaced persons, but the rule of law framework complements and supports those commitments.²¹

The final area where a thick interpretation of the rule of law supports the GCR as well as the omnibus General Assembly resolution on UNHCR²² is in regard to how it facilitates the operationalization of interoperability within and beyond the United Nations.²³ Reference has already been made to good governance and resilience with respect to UNDP and the World Bank,²⁴ but since 2004,²⁵ UN actors have adopted rule of law frameworks for operations into which UNHCR could programme humanitarian and development activities for the protection of refugees, either directly or through country of asylum capacity building. The GCR requires, by its very nature, that UNHCR, in exercising its unique mandate for the

¹⁹ On UNDP and resilience, see <http://www.undp.org/content/undp/en/home/librarypage/climate-and-disaster-resilience-/resilient.html>; on the World Bank, see <http://www.worldbank.org/en/country/switzerland/publication/building-resilience-world-bank-group-experience-in-climate-and-disaster-resilient?cid=EXT_WBEmailShare_EXT>.

²⁰ See 2012 High Level Meeting of the General Assembly, above note 12, paragraph 2.

²¹ See SDG 16.9, above note 5, and Draft 1, above note 1, paragraph 45, Bullet 3, and paragraph 70 (*re* registration of births).

²² UNGA res 72/150 (19 December 2017).

²³ See Gilbert and Rüschi, above note 10.

²⁴ Above, note 19. NB. The World Bank tends to use good governance in ways that other actors use rule of law: <<http://www.worldbank.org/en/topic/governance/overview>>.

²⁵ Above, note 12.

international protection of refugees and seeking permanent solutions for them by assisting governments,²⁶ operates alongside partners.²⁷

18. *Takes note with appreciation* of the elements set out in the comprehensive refugee response framework contained in annex I to the New York Declaration for Refugees and Migrants, and recalls the request to the Office of the High Commissioner to develop and initiate a comprehensive refugee response based on the principles of international cooperation and on burden- and responsibility-sharing, in close coordination with relevant States, including host countries, and involving other relevant United Nations entities as laid out in annex I to the New York Declaration. The focus on voluntary repatriation in Draft 1 of the GCR,²⁸ will require capacity building in the country of nationality, along with development actors facilitating its restoration. During the displacement, similar considerations arise with respect to the country of asylum. As such, rule of law is a framework of operationalizing the goals set out in the GCR and the partnerships it envisages.²⁹ It also enhances the ability of the UN to Deliver as One.³⁰ Finally, the interaction of the GCR with the Global Compact on Safe Orderly and Regular Migration (GCM) could equally be promoted given the International Organization for Migration's use of rule of law, too.

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²⁶ Statute of the Office of UNHCR, UNGA res 428 (V) (14 December 1950) paragraphs 1 and 8a.

²⁷ See Draft 1, above note 1, paragraph 28, Bullet 2. See also, UNGA res 72/150, above note 22, paragraphs 15-16, 18, 42-44, 49 and 54.

²⁸ Above, note 1, at paragraphs 75-76.

²⁹ And see the Written Submission by UNDP to Draft 1, pp.2, 4 and 6 -

<<http://www.unhcr.org/events/conferences/5aba3ee77/undps-written-submission-first-draft-global-compact-refugees.html>>.

³⁰ See UNGA res 72/150, above note 22, paragraph 22.