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Reforming Refugee Protection:
What role can a 'Compact' play in the development of future
International Refugee Law?

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

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Term: Spring 2018

Contents

SUMMARY	1
ABBREVIATIONS	2
1 INTRODUCTION	3
1.1 Background	3
1.2 Purpose and research question	4
1.3 Delimitations	4
1.4 Methodology and material	5
1.5 Research status and academic contribution	6
1.6 Structure	7
2 THE GLOBAL COMPACT ON REFUGEES	8
2.1 The Compact process	8
2.1.1 <i>The initiative</i>	8
2.1.2 <i>The New York Summit and Declaration</i>	9
2.1.3 <i>The Comprehensive Refugee Response Framework</i>	10
2.1.3.1 CRRF application	11
2.2 The Compact	12
2.2.1 <i>The development process</i>	12
2.2.2 <i>The Programme of Action</i>	13
3 WHAT IS A COMPACT?	15
3.1 Why a 'compact'?	15
3.1.1 <i>The informalisation of international law</i>	17
3.2 What is a compact? The GCR in relation to international law	18
3.2.1 <i>The status of UNGA resolutions</i>	19
3.3 Then what? The Compact as an instrument of soft law	20
4 RESPONSIBILITY SHARING	25
4.1 The current state of affairs	25
4.1.1 <i>Paradoxes in the international refugee regime</i>	26
4.1.2 <i>Current practices and past arrangements</i>	27
4.2 Responsibility sharing as a matter of international refugee law	29
4.3 Responsibility sharing as envisioned in the GCR	32
4.4 The GCR in light of earlier proposals and scholarly debates	36
4.5 Potential future impact	40

5	HUMAN RIGHTS OF REFUGEES	41
5.1	Human rights approach in the GCR	41
5.2	Human rights of refugees	43
5.3	Access to asylum and non-refoulement	44
5.4	Non-penalisation and detention	47
5.4.1	<i>Non-penalisation of irregular entry</i>	50
5.4.2	<i>Detention as 'migration control'</i>	52
5.4.3	<i>Detention of refugee children</i>	54
5.5	Access to work	56
5.5.1	<i>Legal framework</i>	58
5.5.2	<i>The role of the GCR</i>	61
6	CONCLUSION	65
	BIBLIOGRAPHY	71
	TABLE OF CASES	77
	TABLE OF LEGISLATION	78

Summary

The Global Compact on Refugees, which is to be adopted in the autumn of 2018, represents an aspiration on the part of the international community towards strengthened solidarity with refugees and affected host countries and is the most ambitious instrument of its kind to date. Indeed, the creation of the Refugee Compact is timely, although perhaps also somewhat surprising in an era of rising populism, increasingly xenophobic electorates and growing security concerns. Precisely because of these reasons, however, an international initiative to cooperate in providing refugee protection becomes all the more important. Can the Refugee Compact reform global refugee protection? This thesis examines what, if any, impact the Global Compact on Refugees is likely to have on the continued development of international refugee law. The analysis consists of three main parts. First, it examines what status may be accorded to the Refugee Compact in relation to international law. As a non-binding instrument concluded between all the 193 UN Member States, it occupies a peculiar space in the international legal arena. It will be argued that the Refugee Compact is forming part of a larger development of international law which is partly moving away from traditional law-making and into a more informal arena, as a result of increased importance of new actors in international policy making. It then goes on to examine what impact the Compact is likely to have on responsibility sharing in international refugee law. It does so by analysing the Compact in the light of current practices and international law, earlier arrangements and scholarly proposals for reform. Third, it examines how the Compact is likely to affect human rights protection of refugees by drawing on three different rights complexes relevant to the Compact, namely: the right of access to asylum, non-penalisation of irregular entry, and the right of access to work. The thesis then concludes by noticing how the Compact, largely due to its rather technical character, is likely to have *norm-creating* and *norm-filling* effects on current international refugee law – although not necessarily in a progressive manner.

Abbreviations

CCS	UN Global Compact on Corporate Sustainability
CEAS	Common European Asylum System
CESCR	UN Committee on Economic, Social and Cultural Rights
CPA	Comprehensive Plan of Action for Indochinese Refugees
CRPSF	Comprehensive Regional Protection and Solutions Framework
CRRF	Comprehensive Refugee Response Framework
EASO	European Asylum Support Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ExCom	Executive Committee of the UNHCR
FRA	European Union Agency for Fundamental Rights
GCR	Global Compact on Refugees
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IOM	International Organization for Migration
NYD	New York Declaration for Refugees and Migrants
SG	Secretary-General of the UN
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	General Assembly of the United Nations
UNHCR	Office of the United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank

1 Introduction

1.1 Background

On 19 September 2016 world leaders met at the General Assembly of the United Nations (UNGA) to discuss large scale movements of refugees and migrants. It was a historic moment – issues of this kind had never been on the agenda of the UNGA before, as it always was considered an issue of national sovereignty.¹ The outcome document, the New York Declaration² (NYD, the Declaration) vowed to improve the lives of migrants and refugees. To that end, it set out that two so-called ‘Compacts’ were to be developed: one on safe, orderly and regulated migration and another on refugees. The Refugee Compact (GCR, the Compact), which is the subject of study of this research, is to be adopted in the autumn of 2018 and is at the time of writing under negotiation between all 193 Member States of the United Nations (UN).

The creation of the Refugee Compact is timely. Indeed, the moment is not a coincidence, but an aware choice to make the most out of the attention turned towards such issues in connection with the European refugee ‘crisis’ of 2015.³ At the same time, the Compact is born in times of all the more restrictive policy choices and populist rhetoric, increasingly xenophobic electorates, and States that are constantly seeking ‘legally creative’ ways to avoid responsibilities to protect refugees.

The GCR seeks to reshape international refugee protection. The most pertinent question in that regard has been the issue of responsibility sharing of refugee protection. The lack of a primary obligation to share responsibility has since long been considered the major flaw of the regime under the 1951 Refugee Convention⁴ and its Protocol,⁵ which imposes an obligation on states to protect refugees within their jurisdiction, but does not impose an obligation on states to collaborate in providing such protection.⁶ As the overwhelming majority of refugees are located in low- and middle income states in the Global South,⁷ the lack of an obligation to share responsibility also affects the quality of refugee protection, as the provision of such is financially costly. States in the Global South are therefore largely

¹ The Overseas Development Institute, ‘The global response to refugees and vulnerable migrants’ Public lecture by Karen AbuZayd (1 December 2016) [website]

<www.odi.org/events/4443-global-response-refugees-and-vulnerable-migrants> accessed 7 May 2018.

² UNGA Res 71/1 ‘New York Declaration for Refugees and Migrants’ (19 September 2016) UN Doc A/RES/71/1.

³ The Overseas Development Institute (supra).

⁴ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

⁵ Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267. The Protocol removed the geographical limitation contained in Article 1(A)2 of the 1951 Convention. Henceforth when referring to the ‘Refugee Convention’ this shall be understood to refer also to the 1967 Protocol, unless explicitly stated otherwise.

⁶ See e.g. Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Ithaca: Cornell University Press, 2009) 12. See also infra at 4.1.1.

⁷ In 2016, developing countries were hosting 84 % of the world’s refugees under UNHCR’s mandate, and the least developed countries in the world hosted 28 % of the global total. See UNHCR ‘Global Trends: Forced displacement in 2016’ (UNHCR 19 June 2017) 1 <www.unhcr.org/5943e8a34.pdf> accessed 5 April 2018.

dependent on the voluntariness of States in the Global North. However, both financial and material responsibility sharing has traditionally been temporary and ad hoc in nature. Therefore, if indeed the Refugee Compact would provide for a system of responsibility sharing in refugee protection as aimed for, it would considerably reform the whole refugee protection regime.

The strength, but also the main weakness of the Refugee Compact is the requirement of consensus for adoption. Although consensus implies a strong commitment from all parties, it also risks watering down any commitments, and makes less probable any real change that it potentially could achieve. For these reasons, the Refugee Compact has been called both “*a minor miracle*”⁸ and “*a child of political compromise*”.⁹ Which one of these assertions is closer to the truth? What impact, if any, can we expect the GCR to have on future refugee protection? Does the Compact indeed have prospects of solving the major flaw of the current international refugee regime? This thesis seeks to address those issues.

1.2 Purpose and research question

The purpose of this thesis is to assess and critically analyse the potential normative impact of the so-called Refugee Compact. More specifically, it aims to assess what effect the Compact may have on two separate but interrelated areas of international refugee law: firstly, in terms of responsibility sharing for refugee protection among states and secondly, in terms of substantive human rights protection of refugees. To be able to carry out that endeavour, it is also necessary to examine what status may be accorded to the Refugee Compact in relation to international law. With this in mind the research question has been formulated as follows:

>> *What impact, if any, is the Global Compact on Refugees likely to have on the continued development of international refugee law?*

To answer this overarching question, I have relied on a set of sub-questions, namely: What type of agreement is the Refugee Compact, and what status does it have in relation to international law? How is responsibility sharing currently operationalised, and how may that change with the adoption of the Refugee Compact? and What protection standards does the international refugee regime currently accord to refugees? How is that likely to be affected by the adoption of the Compact?

1.3 Delimitations

Due to spatial and temporal restrictions, the scope of this thesis is limited in several aspects.

⁸ Volker Türk, ‘A Minor Miracle: A New Global Compact on Refugees’ (UNHCR, 18 November 2016) [website] <www.unhcr.org/admin/dipstatements/583404887/minor-miracle-new-global-compact-refugees.html> accessed 13 May 2018.

⁹ Alexander Betts, ‘U.N Refugee Summit: Abstract Discussions in the Face of a Deadly Crisis’ (*Refugees Deeply*, 12 September 2016) [website] <www.newsdeeply.com/refugees/community/2016/09/12/u-n-refugee-summit-abstract-discussions-in-the-face-of-a-deadly-crisis> accessed 13 May 2018.

First and foremost, as the final version of the Refugee Compact at the time of writing has not yet been reached, the main challenge of this research is that its results can necessarily only stretch to what has been suggested so far in the process. However, this does not mean that its results are speculative in nature; it merely means that the results are premised on the situation as it is at the time of writing. Secondly, I have found myself obliged to limit the material scope of the thesis. The GCR has been a depot for a wide range of proposals from a wide range of actors whom all want to have their suggestions included in the document, why I have had to limit the material of research substantively. For example, it would arguably have added additional value to study individual states' positions in the negotiation process through a more thorough study of their individual statements during the negotiations. Due to the abovementioned restrictions, and the competing aim of maintaining a broader, global perspective, I have chosen to eliminate such a study in favour of a more thorough study of the *results* of those negotiations so far. I have chosen to focus on a set of core issues, being responsibility sharing of refugee protection and human rights of refugees, more specifically access to asylum, non-penalisation for irregular entry and the right to work. There are of course other important issues relevant to the subject, in particular those relating to the personal scope of the Compact, which has been criticised by many for being too restrictive in that it disregards the majority of displaced persons in the world.¹⁰ For the abovementioned reasons, however, I have chosen to limit the subject of research to focus only on so-called 'Convention refugees'.¹¹ Thus, internally displaced persons (IDPs) and other displaced persons whom do not qualify for refugee status under the Refugee Convention, will not be dealt with in any length in this thesis.¹²

1.4 Methodology and material

This research is grounded primarily in the tracing and analysing of an international negotiation process with the aim of assessing how it has developed and to what extent this relates to existing interpretations of international refugee law. To this end I have studied the different drafts of the Compact and other official documents relating to its development, as well as surrounding discussions.

To answer the abovementioned research question I have primarily relied on legal dogmatic method, a method that despite some academic dissension generally is considered an analytical tool used to systematise and interpret relevant legal sources of the legal regime concerned, aiming at reaching an accurate understanding of the law.¹³ Such an approach to international law entails the study of primarily, international conventions, customary law and general

¹⁰ In particular see Susan F Martin, 'New Models of International Agreement for Refugee Protection' (2016) *J. on Migration & Hum. Sec.* 4(3) 60. See also Norwegian Refugee Council, 'Operationalising Returns in the Global Compact on Refugees' (December 2017) <www.nrc.no/resources/briefing-notes/operationalising-returns-in-the-global-compact-on-refugees/> accessed 22 May 2018, on the risk of refugees becoming IDPs upon return to their country of origin if adequate safeguards are not in place. See also Manisha Thomas, 'Turning the Comprehensive Refugee Response Framework into reality' (2017) *Forced Migration Review* 56; 69. The Secretary-General in his report prepared for the New York High-level meeting also highlighted the protection and assistance needs of IDPs and made a vague suggestion for those issues to be addressed at the New York summit, see Report of the Secretary-General, 'In Safety and Dignity: Addressing large movements of Refugees and Migrants' (2016) UN Doc A/70/59 paras 20-21.

¹¹ This term refers to persons who qualify for protection under the Refugee Convention in accordance with Article 1.

¹² With the exception of shortly in section 4.4.

¹³ Claes Sandgren, 'Är rättsdogmatiken dogmatisk?' (2005) *Tidsskrift for Rettsvitenskap* 118(4-5) 648.

principles and secondarily, of judicial decisions and doctrine.¹⁴ More specifically, I have relied on theory of sources of international law, in particular UNGA resolutions and soft law. In analysing the potential normative impact of the Compact, I have also relied on academic literature. Due to the novelty of the subject of research, the body of literature commenting on the Refugee Compact is still rather thin, why sources of more informal character have been helpful in carrying out the analysis.¹⁵

International refugee law, which forms a central part of the subject of study, has at its core the 1951 Refugee Convention and its 1967 Protocol,¹⁶ as well as regional instruments for the protection of refugees, most notably the Convention Governing the Specific Aspects of Refugee Problems in Africa, the Cartagena Declaration on Refugees and the Common European Asylum System.¹⁷ In a wider sense, however, refugee protection is also largely regulated by standards of international human rights law and, to a lesser extent, by international humanitarian law, and the fields are in a constant process of cross-fertilizing.¹⁸

1.5 Research status and academic contribution

The subject of international refugee law in general, and human rights of refugees and responsibility sharing in refugee protection in particular, have received major scholarly attention throughout the years. However, due to the novelty of the subject of research, the Refugee Compact as such has not received the same academic interest. To wit, so far no major research has been conducted as to the normative impact of the Refugee Compact, but the major body of existing academic literature consists of articles and, as mentioned supra, more informal sources.¹⁹ My contribution in this regard hence represents an early intervention in the form of a thorough study and systematic analysis of the *process and results* of the development of the Compact so far. This research may thus serve the role of a first step towards more extensive scholarly literature on the GCR from an international law perspective. More generally, the research can contribute by complementing existing literature on

¹⁴ Statute of the International Court of Justice, (adopted 24 October 1945, entered into force 18 April 1946) Annexed to the Certified True Copy of the Charter of the United Nations Art 38(1). Henceforth ICJ Statute.

¹⁵ See inter alia Gammeltoft-Hansen T, 'Commitments and compromises: will the world be able to secure a better deal for refugees?' (*OpenDemocracy*, 7 December, 2017) <www.opendemocracy.net/thomas-gammeltoft-hansen/commitments-and-compromises-will-world-be-able-to-secure-better-deal-for-re> accessed 28 March 2018; Alfred C, 'Expert views: How Promising is the Global Refugee Compact Zero Draft' (*Refugees Deeply*, 9 February 2018) <www.newsdeeply.com/refugees/articles/2018/02/09/expert-views-how-promising-is-the-global-refugee-compact-zero-draft> accessed 17 May 2018; Jennifer Gordon, 'For Refugee Compact to Talk jobs, it Must Listen to Migration Compact' (*Refugees Deeply*, 5 March 2018) [website] <www.newsdeeply.com/refugees/community/2018/03/05/for-refugee-compact-to-talk-jobs-it-must-listen-to-migration-compact> accessed 18 May 2018.

¹⁶ See supra at 1.1.

¹⁷ Convention Governing the Specific Aspects of Refugee Problems in Africa, (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45; Cartagena Declaration on Refugees (adopted on 22 November) 1984 1001 UNTS 14691; Common European Asylum System, based on the Treaty on the Functioning of the European Union (13 December 2007) 2008/C 115/01 Art 78 and the Charter of Fundamental Rights of the European Union (26 October 2012) 2012/C 326/02 Art 18.

¹⁸ On cross-fertilization between IHL and refugee law, see further Stephane Jaquetmet, 'The cross-fertilization of International Humanitarian Law and International Refugee Law' (2001) *International Review of the Red Cross* 83(843) 651 <www.icrc.org/ara/assets/files/other/651-674jaquetmet.pdf> accessed 22 May 2018.

¹⁹ Earlier scholarly work on the Refugee Compact include: Kevin Appleby, 'Strengthening the Global Refugee Protection System: Recommendations for the Global Compact on Refugees' (2017) *Journal On Migration And Human Security* 5(4) [serial online] 780 <<http://heinonline.org/HOL/P?h=hein.journals/jmighs5&i=779>> accessed 30 January 2018; Volker Türk, 'Prospects for Responsibility Sharing in the Refugee Context' (2016) *Journal on Migration and Human Security* 4(3) 45; Manisha Thomas (2017) (supra); Patrick Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?' (2017) *International Journal of Refugee Law* 29(2) 201.

international responsibility sharing and human rights of refugees through a thorough compilation and analysis of existing views of applicable law and contemporary challenges.

1.6 Structure

The *second chapter* of the thesis provides the context surrounding the development of the Global Compact on Refugees and the process leading up to its final adoption. The *third chapter* answers the question ‘What type of instrument is the Compact and what does that mean?’. It describes the nature of the document as well as the motivations for this choice of instrument. To analyse the normative relevance of the GCR the chapter also seeks to assess its position in regard to international law. The fourth and fifth chapter then go on to assess the substantive content of the Compact and its plausible normative effects. *Chapter four* deals with the perhaps most pertinent question of the Compact as well as the functioning of the international refugee regime in general: responsibility sharing for refugee protection. It describes the current state of affairs, examines what basis there is for responsibility sharing as a matter of international law, and then goes on to assess responsibility sharing as envisioned in the Compact in the light of current arrangements and earlier proposals. *Chapter five* aims at assessing what impact on substantive human rights of refugees that the Refugee Compact is likely to have, through an assessment of language and development throughout the negotiation process. It does so by drawing on three widely different but equally important rights, namely the right to access to asylum, the right not to be penalised for illegal entry and the right to access work. *Chapter six* summarises the findings of each chapter and seeks to answer the abovementioned research question.

2 The Global Compact on Refugees

2.1 The Compact process

2.1.1 The initiative

After a proposal by General-Secretary²⁰ Ban Ki-Moon, and a series of meetings held as a response to the refugee “crisis”, in mid-December 2015 the General Assembly decided to endorse the Secretary-Generals suggestion and convene a High-level Plenary meeting on addressing large movements of refugees and migrants in September the next year.²¹ This was the first time in history that the UN General Assembly took up migration, as it up until then always had been resisted on the basis of it being an issue of national sovereignty.²² As the basis for the up-coming High-Level meeting, the General Assembly requested the Secretary-General to prepare a comprehensive report setting out recommendations on ways to addressing such large movements.²³ The SG in his turn appointed Karen AbuZayd²⁴ as a Special Adviser to work with United Nations agencies as well as the International Organization for Migration (IOM) to prepare the report, and to consult with Member States and other relevant stakeholders leading up to the Summit.²⁵ The drafting of the report was a controversial and laborious task, and the drafters received a vast amount of documents containing track changes on several occasions.²⁶ They also met with numerous state representatives, NGOs, representatives from civil society and academics to gain further input on the report. Finally, on 9 May 2016 the Secretary-General issued his report *'In Safety and Dignity: Addressing large movements of Refugees and Migrants'* providing background information and recommendations, as part of the preparation for the high-level plenary meeting to be held in September.²⁷ The report contained a global overview of trends of people on the move, an analysis of the reasons for large refugee and migrant movements, it highlighted the precarious situation of many migrants and refugees involving dangerous journeys and uncertain reception conditions, and acknowledged their particular needs. The report also contained recommendations for the upcoming summit, calling for a more predictable and equitable way of responding to such large movements through the adoption of a Global Compact on Responsibility-Sharing for Refugees, as well as a second Compact for Safe, Regular and Orderly Migration. In June the same year, a multi-stakeholder hearing was held, aiming at collecting input from different stakeholders to the final project, involving panels with representatives from civil society and the private sector, among others. Through

²⁰ Henceforth referred to as the Secretary-General or SG.

²¹ UNGA 'Draft Decision submitted by the President of the General Assembly' (22 December 2015) 70/539 UN Doc A/70/L.34 para 1.

²² The Overseas Development Institute (supra).

²³ UNGA 'Draft Decision' (22 December 2015) para 2.

²⁴ Karen AbuZayd is an American Diplomat and former Commissioner-General for the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

²⁵ UN Refugees and Migrants, 'UN Summit 2016: Background' <<http://refugeesmigrants.un.org/background-0>> accessed 28 March 2018.

²⁶ AbuZayd self says they recieved about 500 pages of track changes for each of the five drafts released from different UN agencies that hade to be taken into account, The Overseas Development Institute (supra).

²⁷ Report of the Secretary-General 'In Safety and Dignity' (supra).

late June to the end of July, intergovernmental negotiations to produce an outcome document were held, co-facilitated by the ambassadors of Ireland (David Donoghue) and Jordan (Dina Kavar). Essentially every little detailed was an issue of contestation during the negotiations, yet states expressed a strong will to ‘do something’ which would change the lives and migrants and to address current challenges.²⁸ On 31 July the draft Declaration was approved by acclamation. The disappointment after the closure of the intergovernmental negotiations to the draft declaration were quite strong, particularly among those whom had been working with the report and was hoping for an ambitious document, as many of the proposals were weakened, diluted or simply removed from the New York Declaration.²⁹ Although hopes originally were that the proposal for the Refugee Compact would be adopted at the meeting on 19 September, this turned out to be impossible. This was so partly due to fears that migrant issues would fall out of the spotlight if the Refugee Compact were to be adopted before its sister, the Migrant Compact, and partly due to that the Refugee Compact was used as negotiation leverage by states whom refused to adopt the existing GCR unless their views were implemented in the Migration Compact.³⁰ Consequently, the adoption of the both compacts was decided to take place in the autumn of 2018.³¹

2.1.2 The New York Summit and Declaration

On 19 September 2016 Peter Thomson, then President of the General Assembly, opened the conference by referring to the multiple hardships and human rights violations people on the move suffer around the world today and urged the Member States to “*swiftly implement their commitments under the [New York] Declaration*”.³² Subsequently, the General Assembly – consisting of all the 193 Member States of the UN – unanimously adopted the New York Declaration for Refugees and Migrants.³³ The document is a political declaration, directed at setting out commitments of the international community applying both to refugees and migrants. Although many had been disappointed with the result of the draft negotiations, the final document also contained some relatively far-reaching commitments, if they were to be fully implemented by Member States. For example, the Declaration proclaims that States will fully protect the human rights of all refugees and migrants *regardless of status*.³⁴ Furthermore, the Declaration sets out that Member States will aim to close the gap between the needs of refugees and the available resources.³⁵ According to the Special Advisor AbuZayd this should be interpreted as a commitment to fully fund all global humanitarian appeals, which at the moment are financially covered to about 49 %. Thus, if implemented that commitment would

²⁸ The Overseas Development Institute.

²⁹ *Ibid.*

³⁰ Sarnata Reynolds, ‘Interview: Making the Global Compact on migrants and refugees worthwhile’, (*OpenDemocracy*, 20 February 2017) <https://www.opendemocracy.net/beyondslavery/safepassages/sarnata-reynolds/interview-making-global-compacts-on-migrants-and-refugees-worthwhile> accessed 16 March 2017.

³¹ The Overseas Development Institute.

³² Opening remarks by H.E. Mr. Peter Thomson, President of the 71st General Assembly, at the High-level plenary meeting on addressing large movements of refugees and migrants, 19 September 2016 [video] at 1.34 <<http://webtv.un.org/search/peter-thomson-pga-71-opening-of-the-un-summit-for-refugees-and-migrants/5131770149001?term=refugees%20and%20migrants&languages=&sort=date>> accessed 28 March 2018.

³³ UNGA Res 71/1 (19 September 2016) UN Doc A/RES/71/1 (New York Declaration for Refugees and Migrants) Henceforth NYD.

³⁴ NYD para 5.

³⁵ NYD para 86.

more than double humanitarian funding.³⁶ Furthermore, the Declaration acknowledges that neighbouring states and transit countries are disproportionately affected by large movements of refugees and migrants,³⁷ and that the responsibility to manage large movements of refugees and migrants is shared.³⁸ The New York Declaration is divided into three sections with commitments which apply to both refugees and migrants, commitments that apply to refugees only, and commitments that apply to migrants only. Most importantly, it sets out that two ‘Compacts’ are to be developed. In addition, the Declaration contains two annexes, the first which is entitled the “*Comprehensive Refugee Response Framework*” (CRRF)³⁹ which forms part of what eventually will be the Refugee Compact and the second “*Towards a global compact for safe, orderly and regular migration*”⁴⁰, setting out that Member States are to cooperate in managing humane migration and develop a second compact to that end.

The day after the adoption of the NYD the Secretary-General, together with seven Member States, hosted a Leaders’ Summit on Refugees aiming at strengthening the international community’s capacity to address mass displacement through increasing global responsibility-sharing for refugees. At the Summit forty-seven states made pledges to, inter alia, increase humanitarian funding, enact policy changes and grant admission to third countries – all intended to step up efforts to provide international protection for refugees.⁴¹

2.1.3 The Comprehensive Refugee Response Framework

Contained in the first annex to the NYD is the so called Comprehensive Refugee Response Framework which sets out a blueprint for how to deal with future refugee movements, and which forms part of what is termed the Global Compact on Refugees. In the CRRF, Member States invited The Office of the United Nations High Commissioner for Refugees (UNHCR) to develop and initiate the Refugee Compact, in coordination with relevant States and other United Nations entities.⁴² With the aim to adopt a multi-stakeholder, or “all of society” approach, the process of developing the Compact also entails the inclusion of national and local authorities, international organisations, international financial institutions, regional organisations, regional coordination and partnership mechanisms, civil society partners such as faith-based organisations, the academia and refugee and migrant organisations, the private sector and media. Importantly, the framework also calls for inclusion of refugees themselves.⁴³

The express objectives of the CRRF are to ease pressure on host countries, enhance refugee self-reliance, expand access to third country solutions, and support conditions in countries of origin for return in safety and dignity.⁴⁴ To this end, the elements set out in the

³⁶ The Overseas Development Institute.

³⁷ NYD para 7.

³⁸ NYD para 11.

³⁹ See further *infra* at 2.1.3.

⁴⁰ NYD Annex 2 at 21-24.

⁴¹ See UNHCR ‘Summary Overview Document: Leader’s Summit on Refugees’ (10 November 2016) <www.unhcr.org/58526bb24> accessed 17 April 2018.

⁴² NYD Annex 1 (CRRF) para 19.

⁴³ CRRF para 2.

⁴⁴ CRRF para 18.

Comprehensive Refugee Response are split into four main focus areas: 1) Reception and admission, 2) Support for immediate and ongoing needs, 3) Support for host countries and communities, and 4) Durable solutions. The framework was determined to be implemented throughout the two-year period in a number of refugee situations. The practical experience gained is then to be evaluated, refined and further developed, to inform the process leading up to the final Compact.⁴⁵

2.1.3.1 CRRF application

Soon after the adoption of the New York Declaration the application of the CRRF was initiated and has since been implemented in a line of different countries and refugee situations. To facilitate the process, the UNHCR established a Task Team on Comprehensive Responses, which in consultation with the countries concerned identified to which situations the CRRF was to be applied. The application of the CRRF has throughout this process been analysed by the Task Team, together with other relevant stakeholders and UN Member States and used to identify best practices as well as challenges and gaps.⁴⁶ This information has then informed the process of the development of the Refugee Compact. The application of the CRRF, as highlighted in the New York Declaration, takes a "whole-of-society" approach seeking to strengthen the cooperation between States and different stakeholders. The pledges made at the 20 September Summit⁴⁷ serve as a basis for the CRRF application in the countries taking part in the roll-out of the framework. The CRRF is currently being applied in Djibouti, Ethiopia, Kenya, Rwanda, Uganda and Zambia. In addition, two regional CRRF approaches are applied - one to the Somali situation, involving the government of Somalia and some of its neighbouring countries under the leadership of the Intergovernmental Authority on Development (IGAD), and another in Central America, including Belize, Costa Rica, Guatemala, Honduras, Mexico and Panama.⁴⁸

The implementation of the CRRF has not been as successful as hoped for, however. Several countries that are taking part in the CRRF roll-out have been disappointed by the contributions from non-receiving countries. Despite the commitments in the New York Declaration, and promises of financial support, such has been severely lacking. For example, UNHCR's Operating Plan for 2017 estimated a cost of US\$ 307.5 million for the CRRF implementation in Ethiopia, which at the time of writing has been funded only by 20%.⁴⁹ Moreover, Uganda appealed for 2 billion USD in June 2017 to implement the CRRF, but only received 352 million USD in donor pledges.⁵⁰ The lack of funding has already resulted in drawbacks to the success of the CRRF roll-out. Tanzania pulled out of the project prematurely already in January 2018, allegedly due to the lack of international contributions. When

⁴⁵ CRRF para. 18.

⁴⁶ Ibid.

⁴⁷ See supra at 2.1.2.

⁴⁸ The latter is called the Comprehensive Regional Protection and Solutions Framework (CRPSF, or MIRPS in Spanish) UNHCR, 'Comprehensive Refugee Response Framework' <www.unhcr.org/comprehensive-refugee-response-framework-crrf.html> accessed 18 April 2018.

⁴⁹ Ibid (Ethiopia).

⁵⁰ Melanie Gouby, 'What Uganda's Struggling Policy Means for Future of Refugee Response' (*Refugees Deeply*, 22 November 2017) <www.newsdeeply.com/refugees/articles/2017/11/22/what-ugandas-struggling-policy-means-for-future-of-refugee-response> accessed 27 March 2018.

announcing the withdrawal, the President of Tanzania John Magufuli said the CRRF was no longer favourable, too costly and came to threaten national security. The decision was motivated mainly by Tanzania's experience with giving citizenship to 150,000 Burundian refugees as part of the CRRF, being promised funds from the international community to facilitate housing and other things for those persons. Allegedly, at the time of the withdrawal they had received none of the promised funds.⁵¹

2.2 The Compact

2.2.1 The development process

The development of the Refugee Compact is a long and complex process, which at the time of writing has come to its final leg. The Compact, which will consist of the CRRF as set out in the NYD and a 'Programme of Action' which draws upon experiences gained from the early application of the CRRF and five thematic discussions held in the second half of 2017.⁵² The outcome of these processes was then compiled in a first draft Compact,⁵³ which will be discussed and altered in a total of six formal consultations between Member States and non-Member Observer States in Geneva between February and July 2018.⁵⁴ Specialised agencies and inter-governmental organisations which have established a working relationship with the Secretary-General are invited as observers. Other stakeholders, such as NGOs that have consultative status with the United Nations Economic and Social Council (ECOSOC) or which are members of the International Council of Voluntary Agencies (ICVA), may also be invited as observers. In addition, all interested stakeholders are invited to send in written contributions reflecting their views of the Compact content to the UNHCR through a specially established platform. The results of these discussions and contributions are then intended to be channelled into the formal consultations.⁵⁵ The preparations to the consultation were led by Volker Türk, Assistant High Commissioner for Protection, who is also co-chairing the formal consultations together with UNHCR's Executive Bureau.⁵⁶ In parallel with the formal consultations between States, discussions are held with other relevant stakeholders such as refugees, academics, other experts and the private sector. After each formal consultation, a new revised draft version of the first draft compact is released, which contains the outcome of and suggestions received during and in between each consultation. The revised draft will then serve as the basis for the following formal consultation, aiming at having reached consensus after the sixth and last consultation.⁵⁷ The final product of the formal consultations will be a

⁵¹ CGTN Africa, published 3 February, 2018, reporter Daniel Kijo. Available: <https://www.youtube.com/watch?v=9v365ccc7k> (Last accessed: 2018-03-27).

⁵² The thematic discussions of the Global Compact on refugees were held on July 10 (1), October 17 and 18 (2 and 3), and November 14 and 15 (4 and 5) in Geneva. The themes were: 1. "Past and current burden- and responsibility-sharing arrangements", 2. "Measures to be taken at the onset of a large movement of refugees", 3. "Meeting needs and supporting communities", 4. "Measures to be taken in pursuit of durable solutions" and 5. "Issues that cut across all four substantive sections of the framework, and overarching issues".

⁵³ UNHCR 'The Global Compact on Refugees – Zero Draft' (as at 31 January 2018) <www.unhcr.org/Zero-Draft.pdf> accessed 28 March 2018.

⁵⁴ The formal consultations are taking place on the following dates: 13 and 14 February, 20 and 21 March, 10 and 11 April, 8 and 9 May, 12 and 13 June and 3 and 4 July, 2018.

⁵⁵ UNHCR 'Towards a global compact on refugees: Roadmap on the formal consultations process' (23 January 2018) <<http://www.unhcr.org/5a60b9409>> accessed 28 March 2018.

⁵⁶ Ibid.

⁵⁷ The last formal consultation will be held on 4 July 2018. Ibid.

non-binding document, but which reflects consensus among all the UN Member States. The Compact will then be presented in the annual report of the UN High Commissioner for Refugees to the General Assembly at its seventy-third session in the end of 2018, where it will be considered in conjunction with the annual resolution on the work of the UNHCR.⁵⁸

2.2.2 The Programme of Action

As mentioned above, the draft Compact includes the CRRF contained in Annex 1 of the NYD, as well as a Plan of Action, which purpose is to translate policy into practice. The overall objective of the Compact is identified as an intent to transform the international community's approach to providing protection, assistance and solutions for refugees and supporting host countries and communities.⁵⁹ At the time of writing, three draft compacts have been released, throughout which its content has changed drastically. The first draft of the Compact – named the Zero Draft on Refugees – was released by the UNHCR on 31 January 2018.

So far, each draft has differed considerably from its predecessor. The Zero Draft was distinctive for its very vague and avoiding language, and the fact that the Compact is not to create any new commitments or legally binding obligations for States permeated the semantics throughout the document. The language used was clearly avoiding any potential obligations for specific states, with very vague provisions and consistent use of language shaped like proposals of measures that could be taken by Member States rather than a blueprint for action. It did not speak of commitments but was phrased in terms such as that the Compact “*invites engagement by States and other stakeholders*”⁶⁰, of actions that “*interested states*” and relevant stakeholders will take⁶¹, that “*States could*” take a proposed measure⁶² and that “*specific actions by States and other relevant stakeholders could include (...)*”⁶³. The only time when ‘will’ was used in relation to States, was when it came to making mere efforts to try: “*States and stakeholders will seek to*”⁶⁴ or “*States [...] will consider (establishing or increasing the scope, size and quality of, resettlement programmes/the timely establishment or expansion of pathways)*”.⁶⁵ The lack of legal language further manifested the reluctance to any plausible commitments. Already the Zero Draft did, however, set out new commitments for the UNHCR and expressed that the agency will do its utmost to mobilise support for the application of the Global Compact. To this end, UNHCR committed to realise a line of measures, inter alia to develop a set of measurable key indicators connected to relevant goals

⁵⁸ Arianne Rummery, ‘UNHCR releases draft outlining a new global refugee deal’, (UNHCR News, 31 January 2018) < www.unhcr.org/news/latest/2018/1/5a71f6914/unhcr-releases-draft-outlining-new-global-refugee-deal.html > accessed 6 February 2018.

See also CRRF paras 18-19.

⁵⁹ GCR Zero Draft para 3.

⁶⁰ Idem para 10.

⁶¹ Idem e.g. paras 22, 57.

⁶² Idem e.g. paras 14-15.

⁶³ Idem para 34.

⁶⁴ Idem para 36.

⁶⁵ See paras 69 and 72, respectively.

of the sustainable development agenda, and to monitor and evaluate progress of the application of the Compact in relation to its overall objectives.⁶⁶

After the first formal consultation, the Compact changed rather drastically. Most of the abovementioned vague language of “interested states” was replaced with a call on the international community to contribute to achieving the goals of the Compact “*according to their respective resources, capacity and expertise*” although without committing to any special actions by particular Member States or stakeholders.⁶⁷ It also included more specific mechanisms for how to operationalise responsibility sharing, which had been sorely lacking in the Zero Draft. Most prominent was the introduction of a Global Refugee Summit – regular meetings at ministerial level to make pledges towards refugee protection and review and take stock of the Compact implementation.⁶⁸ It also developed on regional mechanisms for how to achieve responsibility sharing. Another alteration was a stronger acknowledgement of the Compact being grounded in the international legal refugee framework, as well as an explicit mentioning of the centrality of non-refoulement, which up until then had been left out.⁶⁹

At the time of writing, the third of six drafts has been released.⁷⁰ The third draft develops on and slightly alters the mechanisms introduced in former. Still, it does not carry very strong language in many regards, and was called “a compromise text” by the Assistant High Commissioner for Protection, Volker Türk.⁷¹ It does contain a line of improvements in regards to refugee protection, however. Among other things, it included separate sections on children and social cohesion⁷² as well as references to those with disabilities.⁷³ It also included more specific references to existing international human rights instruments and humanitarian principles,⁷⁴ and clarified that stocktaking and review will be important components at the Global Refugee Forums.⁷⁵

⁶⁶ As mentioned above, the overall objective is a more equitable and predictable responsibility- and burden sharing among States in relation to refugee protection. To achieve this, four areas are detected as crucial: strengthened international cooperation to ease pressure on host states; enhancement of refugee self-reliance; expansion of access to third-country solutions; and support of conditions in countries of origin for return in safety in dignity – all based on the existing framework of international refugee law. See GCR Zero Draft paras 1-2.

⁶⁷ UNHCR ‘The Global Compact on Refugees – DRAFT 1 (as at 9 March 2018) <www.unhcr.org/5aa2b3287> accessed 28 March 2018 para 6.

⁶⁸ GCR Draft 1 paras 16-18.

⁶⁹ GCR Draft 1 para 4.

⁷⁰ UNHCR ‘The Global Compact on Refugees – DRAFT 2 (as at 30 April 2018) <www.unhcr.org/5ae758d07> accessed 4 May 2018.

⁷¹ Volker Türk, ‘Opening Remarks to the Fourth Formal Consultation on the Global Compact on Refugees’ (UNHCR 8 May 2018) [website] <www.unhcr.org/admin/dipstatements/5af18c8e7/opening-remarks-fourth-formal-consultation-global-compact-refugees.html> accessed 22 May 2018.

⁷² GCR Draft 2 paras 78-79, 87.

⁷³ Idem paras 7, 13, 51, 64, 73, 75 and 78.

⁷⁴ Idem para 5.

⁷⁵ Idem para 20. Draft 1 had set out that the Global Refugee Forums were to be convened every 3 years, which in draft 2 was altered to every 4 years.

3 What is a Compact?

3.1 Why a 'compact'?

Why was it decided to address these issues in a 'Compact'? What is a Compact? And what does it mean for any plausible normative impact on future international refugee law?

Etymologically the term 'compact' infers "the coming together of pacts",⁷⁶ indicating issue-linkage and the coming together of different actors.⁷⁷ While in English the agreement is termed "Global Compact", other language versions have slightly different meanings. In French, the agreement is titled 'pacte mondiale' and in Spanish 'pacto mundial'. In German it is named 'Globalen Paktes', inferring that the Compact could also be understood as a "pact".⁷⁸ The title seems to suggest the coming together of actors, or a bundling of agreements. To title an agreement a 'Compact' is not new in international politics and law. A recent example of the usage of the term is the so-called Jordan Compact, an agreement between Jordan and the international community which is a novelty in terms of that it involves new actors and a "mix" of policies.⁷⁹ The Jordan Compact in short consists of that Jordan has committed to create work opportunities for Syrian refugees and to maintain the refugees in the region, in exchange for highly concessional loans from the World Bank (WB), additional funding raised in support of the Compact and a 10 year tariff free access to the European market.⁸⁰ But never before have all the 193 UN Member States come together to agree on a Global Compact. What were the motivations for choosing a Compact to address refugee movements? Why not a Convention? Or an international Protocol? One can identify at least four plausible explanations to this.

Firstly, a Compact enables political flexibility - perhaps precisely because their legal status is rather unclear. It has been suggested that the term 'Compact' was chosen just because of this uncertainty of what it actually is, to avoid any preconceived notions as to what it might entail.⁸¹ The Compact is by far the UN's most ambitious response to the growing refugee "crisis" which requires an as broad as possible agreement among states. At the same time, the global political situation with increasing security concerns, xenophobia and populism on the rise, states are very reluctant to committing to any obligations that may affect their sovereignty or be politically unpopular. Thus, while there is a growing realisation that the

⁷⁶ See Isobel Roele, 'What are the forms of UN International Agreements/Understandings and What is Their Legal Effect?' in Gammeltoft-Hansen T et al, 'What is a Compact? : Migrant's Rights and Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration' (*Raoul Wallenberg Institute*, 11 October 2017) <<https://dx.doi.org/10.2139/ssrn.3051027>> accessed 7 May 2018 15.

⁷⁷ Compare Marion Panizzon, 'The Global Migration Compact and the Limits of 'Package Deals' for Migration Law and Policy' in Gammeltoft-Hansen T et al, 'What is a Compact?' 17-19.

⁷⁸ *Idem* 12.

⁷⁹ Panizzon (*supra*) 23.

⁸⁰ See further Howden D, Patchett H and Alfred C, 'The Compact Experiment: Push for Refugee Jobs confronts reality of Jordan and Lebanon' (*Refugees Deeply Quarterly*, December 2017) <<http://issues.newsdeeply.com/the-compact-experiment?>> accessed 18 May 2018.

⁸¹ See Isobel Roele, 'What are the forms of UN International Agreements/Understandings and What is Their Legal Effect?' in Gammeltoft-Hansen T et al, 'What is a Compact?'.

current situation is unsustainable, that human rights are not upheld and that there is a need for a reform of the current refugee regime, there is little political will to compromise with one's own state interests.⁸² In this context, a non-binding Compact of unclear normative status may thus provide the political manoeuvring room that states require. Secondly, the instrument involves not only states but also a wide range of other stakeholders from different sectors of society, which requires a different approach than that of traditional international law-making, in which only states have law-making powers.⁸³ The usage of 'compacts' for the purpose of engaging non-state actors is not new. Most famous is perhaps the UN Global Compact on Corporate Sustainability (CCS) launched in 1999.⁸⁴ In similarity with the Refugee Compact it was launched by the Secretary-General and is a principle based initiative disseminating good practices and which involves a multitude of stakeholders. It is a voluntary initiative with no regulatory mechanisms to enforce compliance, and bundles together a multitude of initiatives, much like the Refugee Compact. The CCS is generally considered a success and now has an established Office with permanent staff, an ambitious mandate and specific functions to support the Compact.⁸⁵ However, participants in the CCS are exclusively business, not states, and it is therefore widely different from the Refugee Compact. The experiences from the CCS are therefore not necessarily directly comparable to the GCR. Thirdly, compacts have typically been used to achieve political agreement and cooperation rather than legal commitments.⁸⁶ The Compact falls into this trend and is more technical than legally principled in character. Although the Refugee Compact is to be based on the existing legal framework⁸⁷ it is short on legal principles and legally binding commitments. Rather than seeking to establish any new principles of international law, it sets out measures that can facilitate implementation of already existing ones. As such, there is no need for legal 'bindingness' but voluntariness may actually be beneficial as it encourages implementation without infringing on States sovereignty, closely connected to what was mentioned above. Fourthly, the Compact may be said to reflect a larger trend within international law which is moving away from traditional law-making and seeks other avenues to cooperate, illustrated by the fact that non-binding agreements seem to be increasingly preferred by States. This may be attributed to all of the above reasons, in particular the fact that such instruments are more flexible, do not require complete consensus on all issues and can be developed faster than traditional instruments of international law.⁸⁸ As a legally non-binding document between all UN Member States the Compact can thus be said to play a part in this larger process of

⁸² Compare Thomas Gammeltoft-Hansen, 'Commitments and compromises: will the world be able to secure a better deal for refugees?' (*OpenDemocracy*, 7 December, 2017) <www.opendemocracy.net/thomas-gammeltoft-hansen/commitments-and-compromises-will-world-be-able-to-secure-better-deal-for-re> accessed 28 March 2018.

⁸³ See e.g. NYD para 69.

⁸⁴ Its purpose is to promote ten principles on responsible corporate citizenship covering four areas of action: human rights, labour, environment and anti-corruption. An Office with permanent staff has been established to support the Compact, which has an ambitious mandate, specific functions and is funded by contributions from a number of States, primarily in Europe, as well as significant contributions from businesses: Papa Louis Fall and Mouhamed Mounir Zahran, 'United Nations corporate partnerships: The role and functioning of the Global Compact' (Joint Inspection Unit, Geneva 2010) JIU/REP/2010/9 para 12 at 4.

⁸⁵ Deepa Aravind and Jorge A. Arevalo, 'Multi-stakeholder CSR Initiatives: The case of Engagement in Global Compact Local Networks' (2015) *the Journal of Corporate Citizenship* 59; 57; 57-8.

⁸⁶ Thomas Gammeltoft-Hansen, 'Commitments and compromises: will the world be able to secure a better deal for refugees?' (*OpenDemocracy*, 7 December, 2017) <www.opendemocracy.net/thomas-gammeltoft-hansen/commitments-and-compromises-will-world-be-able-to-secure-better-deal-for-re> accessed 28 March 2018.

⁸⁷ GCR Draft 2 para 5.

⁸⁸ Thomas Gammeltoft-Hansen, 'Commitments and compromises'.

‘informalisation’⁸⁹ and/or ‘softification’⁹⁰ of international law and governance, which will be further developed on below.

3.1.1 The informalisation of international law

Global law-making has been facing a downward trend for quite some time now. From a constantly increasing amount of treaties, the tide has turned and considerably less legally binding international agreements are concluded than two decades ago. The stagnation of treaty conclusion has not left the international legal arena empty, however, but states are seeking other ways to cooperate: through non-binding international agreements and other forms of international instruments that do not, and which do not intend to, reach the level of being positive law. This is particularly so in the field of international human rights law, where the UN has been very active in adopting declarations, conclusions, resolutions and principles, as opposed to binding treaties on the subject which have been relatively few.⁹¹ The new forms of non- or quasi legal instruments are growing exponentially and also involve a whole new range of different stakeholders: s

tates are no longer the only ones involved in global politics and law. Rather than concluding new treaties, states are involved in the creation of legally non-binding Guiding Principles, Schemes, Global Strategies, Initiatives, Accords – and Compacts. A large part of these could, depending on what definition of the term that you adopt, qualify as soft law.⁹²

Many scholars have engaged in the question of why this development has come. Some attribute this trend to the increasing importance of international organisations,⁹³ or the increasing importance of non-state actors in international lawmaking,⁹⁴ but most likely it is a multifactorial change. Pauwelyn, Wessel and Wouters have termed this phenomenon informal international law-making, or IN-LAW. They suggest that the ‘informalisation’ of international law can in part be traced to an ‘overload’ of existing treaties regulating most major policy issues, resulting in a kind of treaty fatigue. States are therefore changing policy preferences, looking at using other means of cooperation rather than agreements binding under

⁸⁹ See e.g. Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2013).

⁹⁰ See e.g. Gammeltoft-Hansen et al, ‘What is a Compact?’ 9.

⁹¹ Of the core international Human Rights Treaties only 6 have been concluded after the year 2000, of which 4 are Optional Protocols to already concluded Conventions. They are (in the order of adoption) Optional Protocol to the ICESCR (adopted by GA resolution 63/117 of 10 December 2008, entered into force 5 May 2013) UN Doc A/63/435, Optional Protocol to the CRC on the Communications Procedure (adopted by GA resolution 66/138 of 19 December 2011, entered into force 14 April 2014), Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by GA resolution 57/199 of 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 Convention on the Rights of Persons with Disabilities (adopted 24 January 2007, open for signature 20 March 2007, entered into force 3 May 2008) Res 61/106 (CRPD), Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted by GA resolution 61/106 of 13 December 2006, entered into force 3 May 2008) 2518 UNTS 283, UN Doc A/61/611 and the International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, open for signature 6 February 2007, entered into force 23 December 2010) 2716 UNTS 3. See also Stephanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds) *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press, 2017) 1.

⁹² Compare John Cerone, ‘A Taxonomy of Soft Law: Stipulating a Definition’ in Lagoutte, Gammeltoft-Hansen, and Cerone (eds) 16ff.

⁹³ Alvarez claims that, due to the increasing importance of international organisations and other non-state actors, the distinction between *lex lata* and *lex ferenda* has become an unreliable quality of international law, and argues that bindingness, rather than being either existing or non-existent, is more likely to be placed on a spectrum of hard/soft law. José E. Alvarez, *The Impact of International Organisations on International Law* (Brill Nijhoff, 2017) 359f.

⁹⁴ E.g. Joost Pauwelyn, Ramses A. Wessel and Jan Wouters in ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’ (2014) Published by Oxford University Press on behalf of EJIL 25(3) <<https://doi-org.ludwig.lub.lu.se/10.1093/ejil/chu051>> accessed 29 March 2018.

international law. This is so partly due to that many existing treaties have created their own governance regimes within which non- or semi-binding norm-making between the parties is enabled, and partly due to general reluctance of states to any further impact of international obligations on national legislation. The financial crisis of 2007 is also said to have had some impact on states will to subject themselves to expensive international obligations.⁹⁵ However, according to Pauwelyn et. al. the main cause to which we can attribute this trend is said to be deep societal changes of an increasingly diverse network society and an increasingly complex knowledge society. Those phenomena have resulted in a much broader and more complex array of stakeholders in the international cooperation processes, such as transnational corporations, NGO's and different types of international coalitions. States are still the main lawmakers but other stakeholders, which all have their own interests but no capacity to formulate binding law, are pushing states to engage in new, informal means of policy making.⁹⁶ New stakeholders also hold expertise and knowledge, leading to that authority now flows not only from the public, but also the private sphere. This is so not because non-state actors prefer non-binding state obligations, but because they lack capacity to engage in formal international law-making. The same may be said to be true about the Compact Process, which applies a "whole-of-society" approach, largely relies on input from non-State actors, and counts with their cooperation.⁹⁷ What characterises this new trend in international law making is that it stands completely outside the traditional scope of international law. According to Pauwelyn et al., what makes an instrument or provision informal is that it ignores formalities traditionally connected to international law and cooperation, either because of its output, process or what actors are involved in its making.⁹⁸ The Global Compact on Refugees is informal both in its outcome as it is explicitly non-binding, as well as in its process, as it involves non-traditional stakeholders. However, non-bindingness does not necessarily mean non-compliance: informal law-making is often highly regulated and based on consensus, with higher compliance rates than for traditional treaties.⁹⁹

3.2 What is a compact? The GCR in relation to international law

Then, what is a Compact? And where does it stand in relation to international law? Is it conceptually possible for a Compact to be legally binding? There is nothing inherent in the term 'compact' which prevents this. Indeed, the labelling of the agreement as a 'Compact' does not say much about its character as a legal instrument at all. We do know, however, that the Refugee Compact

"(...) is not legally binding, yet it represents a strong aspiration on the part of the international community towards strengthened solidarity with refugees and affected host countries. It will be operationalized through voluntary but dedicated contributions towards

⁹⁵ Pauwelyn, Wessel and Wouters (2014) 739f.

⁹⁶ Pauwelyn, Wessel and Wouters (2014) 738ff.

⁹⁷ Compare e.g. GCR Draft 2 para 3.

⁹⁸ Pauwelyn, Wessel and Wouters (2013) 3, 15-17.

⁹⁹ Pauwelyn, Wessel and Wouters (2014) 743. See also the same authors (2013) 137.

the achievement of its objectives(...). These contributions will be determined by each State and stakeholder, taking into account their national realities, capacities and levels of development.”¹⁰⁰

Thus, although the Compact will be agreed upon by states, it is not a consent to be *bound* by the agreement, and can therefore not be considered a treaty.¹⁰¹ Nor is it custom or a general principle as will be further explained below, and as such it is not a source of positive international law, traditionally limited to the sources set out in Article 38 of the ICJ Statute. Nevertheless, the long and complex negotiations, and the fact that the New York Declaration calls for ‘commitments’¹⁰² indicates that states either perceive it as having, or intend it to have, plausibly far-reaching authority and/or effects.

3.2.1 The status of UNGA resolutions

The New York Declaration, including the Comprehensive Refugee Response Framework which forms part of the Refugee Compact, is a General Assembly Resolution. The Compact too, when finalised, is to be adopted by the General Assembly in the autumn of 2018. As such, they are non-binding. The formal powers of the General Assembly as awarded by the UN Charter are very limited, and only reaches to the internal realm of the UN. The Assembly can, for example, on its own initiative establish a subsidiary organ,¹⁰³ or take legally binding decisions by a majority vote deciding what is an “important question” which requires a two-thirds vote.¹⁰⁴ Furthermore, the General Assembly holds the power to decide on matters of tax, flowing from their capacity to consider and approve the expenses of the UN under Article 17.¹⁰⁵ Generally, from the Charter it is clear that whereas the Security Council has the powers to make decisions that Member States shall abide by,¹⁰⁶ the powers afforded to the General Assembly are mainly framed as a possibility to make “recommendations”.¹⁰⁷ The powers afforded to the General Assembly in the UN Charter hence clearly indicates that the General Assembly has no real law-making capacity, other than such regulations considered internal to the organisation. However, such an ultra positivistic reading of the law does not quite cover the whole picture. Notwithstanding the formally lacking legal effect of General Assembly Resolutions as a category of traditional, black-letter law as a source of international law under article 38 ICJ Statute, the General Assembly has and still does play an important role in international law as a policy maker and treaty initiator, interpreter and enforcer, and is a progressive developer and codifier of customary law.¹⁰⁸ UNGA Resolutions have many times been used by governments, national courts, international tribunals, UN human rights committees and other quasi-judicial bodies and may therefore be said to have, if not legal authority, so at least *legal effects*. Legal positivists have tried to explain this un-planned for,

¹⁰⁰ GCR Draft 2 para 4.

¹⁰¹ Compare Jan Klabbers, *International Law* (Cambridge University Press, 2013) 25.

¹⁰² See GCR Draft 2 e.g. para 15.

¹⁰³ Charter of the United Nations (published 24 October 1945) 1 UNTS XVI Art 22.

¹⁰⁴ This follows from UN Charter Art 18(3).

¹⁰⁵ ‘Certain expenses of the United Nations’ (Article 17, para 2 of the Charter) Advisory Opinion (20 July 1962) ICJ Reports 1962, 151.

¹⁰⁶ See for instance Arts 25, 39, 41 and 48.

¹⁰⁷ See Arts 10-14

¹⁰⁸ Alvarez 150f.

yet very real, legal effect of UN General Assembly Resolutions, by trying to fit them into traditional categories of sources of international law as established by ICJ Statue Article 38, in the form of treaty, customary obligations or evidence of general principles of law. This has been done e.g. by characterising the resolution in question as “subsequent practice” between UN’s treaty parties, following the Vienna Convention on the Law of Treaties (VCLT) Article 31(3)(b), or as an actual “subsequent agreement” among the Parties, following VCLT Article 31(3)(a).¹⁰⁹ It may also be argued that some Assembly resolutions, or parts thereof, over time have come to gain the status of customary law, as they reflect state practice and/or opinio juris. A practical example of this is the relatively accepted notion that the Universal Declaration of Human Rights (UDHR) constitute customary law.¹¹⁰ However, this is but one example of the authoritative value of UNGA resolutions. The fact that the General Assembly lacks power to enact legally binding documents remain and their actions do not necessarily bring about state compliance. Even highly regarded resolutions, such as the Friendly Relations Declaration and the Definition of Aggression Resolution¹¹¹, cannot be considered binding international law, while still influencing state discourse and behaviour.¹¹² In theory, some UNGA Resolutions could serve as an indicator of what constitutes opinio juris, particularly those adopted by consensus – like the Compact. However, although tempting for the human rights lawyer, GA Resolutions can hardly be regarded as evidence of opinio juris in isolation. Resolutions – even if adopted by consensus by all UN Member States – do not necessarily reflect a duly considered opinion of the highest representatives and other officials of the respective states of that state’s view of customary law or what the correct interpretation of a treaty is. Generally, resolutions are aspirational efforts, and their legal effect may be largely said to be dependent on whether they constitute a persuasive interpretation of the law.¹¹³ The context of the adoption of resolutions also matter – particularly when those involved in its adoption consider the document as a political statement with no intended effect on international law.¹¹⁴ In the case of the Compact for example, the ‘potential’ opinio juris does not relate only to its *content*, but also the fact that it is *not legally binding*. Evidently, claiming any legal effect of General Assembly Resolutions is a controversial endeavour, and we must turn elsewhere to search for legal authority.

3.3 Then what? The Compact as an instrument of soft law

If not a positivist source of law, may the Refugee Compact be interpreted as a soft law instrument? On one level, the non-bindingness of the Compact may not necessarily be so significant – as already mentioned, many scholars have shown how non-binding instruments often produce as much, if not higher, compliance rates than traditional international law.¹¹⁵ Soft law is commonly used for developing human rights standards. Either as an inspiration for

¹⁰⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

¹¹⁰ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Idem 143ff.

¹¹¹ UNGA Res 3314 (XXIX) Definition of Aggression (adopted 14 December 1974) UN Doc A/RES/29/3314.

¹¹² Alvarez 160.

¹¹³ Alvarez 176.

¹¹⁴ Alvarez 169.

¹¹⁵ Alvarez 351.

future, binding agreements, or as an ‘ultimate or intermediate expression of international consensus’, passing through a soft law declarative stage before solidifying into ‘hard’ law through gaining status as customary international law.¹¹⁶ As such, soft law instruments serve important functions as *norm-filling* in areas of international law characterised by interpretative gaps, and a *norm-creating* role in areas where international norms are lacking. This has particularly been of importance in the field of international human rights law.¹¹⁷ Such effects may arguably have an even greater impact on the international refugee regime, which generally lacks enforcement mechanisms.¹¹⁸ In this regard, one can distinguish between ‘primary’ and ‘secondary’ soft law, which have different characteristics and may vary in compliance rates.¹¹⁹ ‘Primary’ soft law are those normative texts addressing either the whole international community, or all members of the adopting institution, but which are not treaties. This type of soft law has the ability to set forth new standards, reaffirm already existing standards, and elaborate on existing but vague standards or general principles, contained either in binding- or nonbinding instruments.¹²⁰ ‘Secondary’ soft law is such that emanates mainly from institutions, often established by a treaty, e.g. international human rights supervisory organs, courts and commissions, special rapporteurs and other ad hoc bodies and political organs of international organisations. As such it includes, inter alia, general recommendations, judicial decisions and reports. Such instruments can make general comments or interpretive declarations and issue recommendations to states, either particular ones or as part of periodic reporting. The body of secondary soft law is hence vast, and their normativity depends largely on what they are termed, their content and context of adoption.¹²¹ As they are not written by international law-makers i.e. states, their normative value is generally “lower” than that of primary norms of soft law, which often is authored by states or state-led organisations. What secondary norms can do, however, is to exercise influence on states and other actors and may thus play an important role in the development of both primary soft law as well as traditional positive law.

For example, the Compact may have prospects of serving a *norm-creating* role in the area of responsibility sharing for refugee protection, due to the current lack of operationalisation of such a norm.¹²² Intrinsic in the idea of soft-law as a norm-creator is the idea that eventually, the norm will ‘harden’ as states gradually comply with it, thus laying out the path for binding obligations.¹²³ As the Compact contains a large number of technical provisions and mechanisms for cooperation and responsibility sharing, it has great potential to guide state behaviour in that regard and fill out the ‘empty spaces’ in the international refugee regime in the area of responsibility sharing. Soft law may also have the effect of strengthening existing standards of international human rights law, e.g. through defining what a particular right or obligation entail. The Refugee Compact, which reaffirms existing human rights obligations of

¹¹⁶ Dinah Shelton (ed.), *Commitment and compliance the role of non-binding norms in the international legal system* (Oxford University Press, 2003) 461.

¹¹⁷ Lagoutte, Gammeltoft-Hansen, Cerone 6-7.

¹¹⁸ As opposed to most Human Rights treaties, the Refugee Convention has no Committee or other supervisory body which can enforce compliance.

¹¹⁹ Dinah Shelton, ‘Compliance with International Human Rights Soft Law’ (1997) 29 *Stud. Transnat'l Legal Pol'y* 29; 119.

¹²⁰ Shelton (1997) 120-122.

¹²¹ Shelton (1997) 122-127.

¹²² See further on responsibility sharing as a matter of international law, *infra* at 4.2.

¹²³ Shelton (2003) 462.

states towards refugees¹²⁴ and sets out specific measures for how to improve protection and socio-economic standards for refugees, may thus entail a progressive development of refugee protection in several areas, as will be shown below. However, soft law may also have the opposite, undesirable effect of deteriorating existing standards and watering down human rights protection, particularly in areas where interpretation of a right is not quite coherent. States seem to have realised this quality of soft law in the last few years and have on occasion used it to react to interpretative developments produced by the judiciary or international human rights institutions which are perceived as too political, unrealistic or far-reaching. An example of this, which has been mentioned elsewhere,¹²⁵ is the Committee of Ministers of the Council of Europe whom in 2012 adopted the Brighton Declaration, which reaffirms the importance of subsidiarity and emphasizes that the European Court of Human Rights (ECtHR) is to have due regard to States' 'margin of appreciation' in reviewing whether national authorities' decisions are compatible with the ECHR.¹²⁶ Another example of this can also be detected in the New York Declaration as regards the detention of migrant children, which will be further developed in *chapter 5*.¹²⁷ The choice of concluding a non-binding agreement outside the traditional sphere of international law, may thus have both advantages and drawbacks in terms of human rights protection, but seem to represent an option which is increasingly preferred by states, for a variety of reasons.

May we then say that the Compact is a soft law instrument? The Compacts have been suggested to be 'hybrid' instruments, occupying a space somewhere between 'hard' international law in the form of a treaty and 'soft' law in form of recommendations, guidelines and the like.¹²⁸ There is wide disagreement in terms of what constitutes soft law. Often it is not considered 'law' at all, but many of those holding this view still consider it important for the development of law.¹²⁹ Others have been considerably more negative to its existence and find it redundant and even undesirable.¹³⁰ Although this study does not allow for a complete reiteration of all the positions in relation to what soft law is and can do, what can be said generally is that there is a divide between those who consider that whether a norm has the character of soft law is determined by its *content* or its *form*. Those focusing on content may attribute 'softness' to a norm inter alia due to its (vague) language, the fact that it is not enforceable or justiciable, the fact that the subject of obligation has a possibility to itself interpret the meaning of the obligation, or other traits of the right/obligation/instrument in question. Within this position one can further distinguish between a more positivistic approach and a more flexible approach. The positivist stance takes a binary view: only traditional sources of law, traditionally those expressed in article 38 a) – c) of the ICJ Statute, may be soft-law. Hence, in the positivist binary approach there are no "soft law instruments", because it is not the character of the instrument which creates the "softness", but rather the

¹²⁴ See e.g. GCR Draft 2 para 5.

¹²⁵ Lagoutte, Gammeltoft-Hansen, Cerone 7.

¹²⁶ Council of Europe Committee of Ministers, 'High Level Conference on the Future of the European Court of Human Rights – the Brighton Declaration' 19-20 April 2012 <www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 22 May 2018, in particular paras 11-12.

¹²⁷ See further infra at 5.4.3.

¹²⁸ See, e.g. Isobel Roele (supra) 14-15.

¹²⁹ See e.g. Cerone in Lagoutte, Gammeltoft-Hansen, Cerone 16f.

¹³⁰ See Jan Klabbers, 'The Redundancy of Soft Law' (1996) *Nordic Journal Of International Law* 65(2) 167 and the same author, 'The Undesirability of Soft Law' (1998) *Nordic Journal Of International Law* 67(4) 381.

legal meaning or weight that may be given to a particular provision in an established source of international law. The positivist approach thus only distinguishes between law and “non-law”, and soft law exclusively exist within the former but is, due to the nature of its vagueness or non-justiciability, to be considered ‘soft’ rather than ‘hard’ law.¹³¹ Those adhering to a more flexible approach to soft law as concept determined by content, perceive ‘law’ (in general) as placed on a spectrum, rather than as a binary of law/non-law. Those holding this view, do not consider the establishment of a traditional source of international law necessary to classify something as soft law. What may give a provision this character is its normativity and capacity to influence behaviour. This approach thus also refers to the status of a rule, rather than any categorisation of it as such. Under this approach instruments which are formulated as rules and/or are intended to guide behaviour, although not technically legally binding, are considered ‘soft law’. Others consider soft law as determined by its form, rather than its content. Those adhering to this view mean that soft law is not to be considered law at all – an approach held by e.g. Cerone.¹³² This positivist stance also takes a binary view: there is law and non-law, but there is no such thing as positivist “soft law” – it is simply non-law.¹³³ This view does not deny the plausible importance in terms of normative and behavioural effects on states of soft law, however. Soft law may very well, according to this ‘hard-core positivist’ approach, influence international law or achieve effects similar to that which positive law is intended to achieve.¹³⁴

No matter what stance one takes, however, to be considered soft law a normative statement must have gained some traction in the sense of acceptance by states, and as such, be in a process of incubation. Not just any normative statement may be considered to have that quality.¹³⁵ Inherent to the concept of all soft law is also its aspiration to become law; one may hence place it within the wider framework of *lex ferenda*, and the two can be said to almost entirely coincide within the field of international law.¹³⁶ Neither is the mere fact that a set of norms influence state behaviour enough to qualify it as soft law, but who the author and addressees of the norm are, the way it is formulated and State acceptance are all equally important factors. Although opinions vary as to how and what constitutes the necessary traction, many scholars place the main importance on that the author of the normative statement must have some law-making power, which in international law means it must be written by states.¹³⁷

From this can be drawn that whether the Refugee Compact is a soft law instrument or not, depends on what approach you take to soft law. The content of the Compact can be said to have many ‘soft law’ characteristics, but is not a traditional source of law and therefore by some will not be considered soft law. Applying the ‘flexible’ approach the Compact, or parts thereof, may very well be considered soft law, as the authors are states with law-making

¹³¹ Cerone 16.

¹³² Ibid.

¹³³ As such, it is the opposite of the abovementioned positivist/binary view, which only accepts soft law within the realm of traditional law.

¹³⁴ Cerone 24.

¹³⁵ Idem 19ff.

¹³⁶ Idem 18f.

¹³⁷ Cerone 23.

powers and it thus arguably already has gained some traction in the form of state acceptance. The same goes for those who consider *form* the main determinant as for what constitutes soft law, although it remains to be seen what traction can be attributed to it after its adoption. Although the latter would deny that it can ever be a type of ‘law’ they would still admit the potential of such norms, either to achieve similar goals and effects as law, or to influence the law itself. Applying Shelton’s typology, the Compact would be categorised as primary soft law, and can therefore be attributed capacity to set forth, reaffirm and clarify standards of international law.

Hence, we find that the Refugee Compact cannot be categorised as a traditional source of law as defined in ICJ Statute Article 38. Instead, the Compact may arguably be classified as a type of soft law, depending on what conceptual definition you adhere to. As such, in continuation it may with time have the ability to ‘harden’ into a binding instrument of international law, or influence already established norms and therefore impact the existing international refugee regime. What is clear is that the Refugee Compact is forming a part of a larger process of international law, which is moving away from the conclusion of traditional legal tools and towards other means of normative instruments which are more flexible in nature.

Perhaps it is not that interesting whether UNGA resolutions have legal authority or whether the Compact is soft law or not, other than as a conceptual debate – because pragmatically speaking, what is of importance is its potential effects in governing state behaviour. Irrespective of where you stand in the theoretical debate of what constitutes soft law or informal law and whether that is law or not, in the present authors opinion the normative capacity of the Refugee Compact should not be underestimated. It is written by states in an established organisational setting, building on the existing legal framework and thought to steer state behaviour, and is thus likely to do so. There is an important difference between *being law* and having legal *effects*. In that sense, normativity stretches beyond what is law.¹³⁸ Furthermore, whether that normativity is enforceable or not may perhaps not be of great importance, considering that many international legal obligations suffer from a similar lack of enforcement mechanisms.¹³⁹ In the following chapters we will examine what normative and practical impact the GCR is likely to have on particular issues of the international refugee regime.

¹³⁸ Pauwelyn, Wessel, Wouters (2013) 130.

¹³⁹ Alvarez 351.

4 Responsibility Sharing

Responsibility sharing is one of, if not the, most central element of the Global Compact on Refugees which “*addresses a perennial gap in the international system for the protection of refugees: the need for more predictable and equitable burden- and responsibility sharing among States, together with other stakeholders*”.¹⁴⁰ The area of responsibility sharing has developed considerably throughout the process, from vague principles and half-hearted suggestions for action to a more comprehensive plan with specific mechanisms and more defined roles. Although not much can be said about the specifics of the Compact due to the evolving nature of a document under negotiation, this section intends to identify the general traits of responsibility sharing as envisioned in the draft versions which have been released up to date, in order to evaluate any potential normative impact in the area.

4.1 The current state of affairs

By the end of 2016 global numbers of refugees stood higher than ever before with a total of 22.5 million refugees around the world.¹⁴¹ More than half of those refugees came from only three countries with Syria being the single largest country of origin, totalling 5.5 million refugees, of which 87 % were hosted in neighbouring countries.¹⁴² Two thirds of the worlds refugees find themselves in a protracted refugee situation, and 4.1 million of those have spent 20 years or more in such a situation.¹⁴³ The large majority of refugees flee from low-income states to other low- or middle income states. With Syria as the only exception, the ten major countries of origin of refugees were all among the least developed countries in the world.¹⁴⁴ At the same time, 84 % of all refugees globally were hosted in developing countries, including 28 % in the least developed countries in the world.¹⁴⁵ Of all refugee hosting countries in the world, Turkey is the largest with a total of 2.9 refugees, almost exclusively consisting of Syrians.¹⁴⁶ Pakistan is the second largest refugee hosting country with 1.6 million refugees, of which the majority are of Afghan origin. Lebanon is the third largest host, with around 1.2 million refugees, of whom the majority are also Syrian.¹⁴⁷ In 2016, eight of the ten countries hosting the largest number of refugees in relation to their national economy were situated in Africa.¹⁴⁸ Despite a relatively drastic rise in 2015 with an influx of 1 million people, European countries by the end of 2016 hosted only 2.3 million refugees in total, i.e. approximately 10 % of the global total of refugees.¹⁴⁹ The numbers show how the majority of refugees flee from poor countries to neighbouring, also poor countries. This dynamic can be

¹⁴⁰ GCR Zero Draft para 1.

¹⁴¹ UNHCR ‘Global Trends: 2016’ (supra) 2, 13. Refugees only constitute around a third of the global total of forcibly displaced persons around the world, which at the same time was estimated to around 65,6 million people.

¹⁴² The total of forcibly displaced persons from Syria at the same time stood at about 12 million people, idem 6.

¹⁴³ A protracted refugee situation is here defined as a situation with 25.000 or more refugees of the same nationality, whom have been in that situation for 5 years or more. See UNHCR ‘Global Trends: 2016’ 22.

¹⁴⁴ UNHCR ‘Global Trends: 2016’ 16.

¹⁴⁵ Such as Cameroon, Chad, the Democratic Republic of the Congo, Ethiopia, Kenya, Sudan, and Uganda, see ‘Global Trends: 2016’ 20.

¹⁴⁶ 2.8 million of those refugees were from Syria. Idem 14.

¹⁴⁷ Idem 14-15.

¹⁴⁸ Idem 21.

¹⁴⁹ These statistics exclude Turkey. Idem 14.

explained by the fact that refugees, as opposed to other migrants whom often move *to* somewhere seeking better economic conditions in richer countries, are moving *away* from persecution. As many of them lack financial means to move any longer distances, and due to cultural and language similarities, they often move into neighbouring countries, leading to that *proximity* more than anything shapes distribution¹⁵⁰ The result is that the overwhelming majority of refugees are hosted in the Global South, and that low- and middle income countries are disproportionately affected by refugee flows. While the “burden” of hosting refugees in purely financial terms can be measured in many ways, statistics are clear in that the poorest State’s on earth carry the heaviest burden of numbers of refugees in relation to their national economy, while richer states in the Global North receive relatively few refugees overall and in particular in relation to national economy.¹⁵¹

4.1.1 Paradoxes in the international refugee regime

This geographical reality is, paradoxically enough, exacerbated by the functioning of the international refugee regime. One of the major flaws of the Refugee Convention is that it does not provide an obligation to share responsibility for refugee protection among states. This lacuna is exacerbated by the fact that on the one hand, international obligations on allowing refugees into your territory and to provide protection are relatively strong, owing largely to the customary principle of non-refoulement,¹⁵² while on the other there is no corresponding obligation of states to support refugees once they entered another states territory. Thus, countries neighbouring conflict and other refugee producing situations are obliged to provide protection and are subjected to strong international pressure to do so, while more distant states can hide behind walls, water, bilateral agreements and a discretionary choice to offer support in the form of financial contribution or resettlement places.¹⁵³ As refugee protection is a global good, this construction creates distorted incentives. The disjuncture between collective benefits and individual costs incentivises free-rider behaviour from those states who do not face large influxes of refugees. What more is, it implicitly creates incentives for Northern states to contain refugees within the country of origin or neighbouring countries, in order to avoid incurring obligations under international law to provide protection.¹⁵⁴ Rather than providing material or financial assistance to host countries, states in the Global North thus invest enormous amounts in deterrence mechanisms in order to avoid international obligations. Hence, a State that wishes to reduce costs of refugee protection will either depend on the voluntary involvement by other states, or the enforcement of deterrence measures to avoid giving rise to any such obligations. Alexander Betts has termed this phenomena the North-South impasse, based on that Northern states have very low incentives to cooperate, while Southern states have very little ability to influence the North.¹⁵⁵ Without a binding predetermined agreement on responsibility sharing, international refugee law is therefore quite toothless in a sense, and can even be said to indirectly lead to deterrence and reduced

¹⁵⁰ Alexander Betts and Paul Collier, *Refuge: Transforming a Broken Refugee System* (Allen Lane, 2017) 31.

¹⁵¹ UNHCR ‘Global Trends: 2016’ 21.

¹⁵² The principle of non-refoulement will be further dealt with infra at 5.3.

¹⁵³ Betts, Collier 47-48.

¹⁵⁴ Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Ithaca: Cornell University Press, 2009) 12-13.

¹⁵⁵ *Idem* 3.

state action to protect refugees.¹⁵⁶ As refugee protection is costly, this also means that refugees' access to protection is dependent on cooperation between states.¹⁵⁷ While in theory there exists a collective incentive to collaborate as that would create the largest possible 'amount' of refugee protection globally to the smallest individual cost possible, when states are acting individually the rational choice is to free-ride on others. This dilemma has led several scholars to think of collaboration in the refugee regime in game-theoretical terms.¹⁵⁸

4.1.2 Current practices and past arrangements

Responsibility sharing for refugee protection has generally been described as consisting of two main elements: one financial and one material, the latter referring to persons. The traditional approach to responsibility sharing when spoken of in international law and politics, is the sharing of "burdens" in the form of financial costs, as well as a fair distribution of refugees amongst states.¹⁵⁹ Fiscal responsibility-sharing - the reallocation of funds – is reparative in nature, in that financial transactions are used to level out inequalities in costs. However, such sharing mechanisms are grounded in the presumption that costs of protection are always quantifiable. Although that is true for some costs, far from all are.¹⁶⁰ What is the actual price of integration into the host society, for example? Material responsibility sharing, i.e. the reallocation of refugees from the host country to a third state, is therefore often highly desired by receiving states. It may not always be so for refugees, however. Redistribution may mean that you have to move and start over again in an entirely new context and/or the uprooting from your family.¹⁶¹ Some theorists also speak of other, less direct elements of responsibility sharing, such as sharing of norms in the form of harmonisation of refugee and asylum legislation. In that sense, committing to international law prescribing the prohibition of non-refoulement is a way of responsibility sharing, as states agree not to apply the harshest of treatment to refugees, which in turn also leads to costs (fiscal, social) and limits states' opportunities to decrease their risks as described above.¹⁶² But we may also talk about a fourth dimension of responsibility sharing, namely of the sharing of *expertise and technical assistance*. This is particularly prominent within the European Union, based on the principle of solidarity and fair sharing of responsibility emanating from article 80 TFEU.¹⁶³ This will be further dealt with in the following section.

It is, however not always that simple. Responsibility sharing is grounded in international cooperation. It can therefore be difficult to distinguish between responsibility sharing for refugee protection and security cooperation, and they intertwine in complex ways.

¹⁵⁶ Gregor Noll, 'Risky Games - A Theoretical Approach to Burden-Sharing in the Asylum Field' (2003) *Journal Of Refugee Studies* 16(3) 236, 238-9.

¹⁵⁷ Betts (2009) 7.

¹⁵⁸ See inter alia Noll (2003) 236 and Betts (2009).

¹⁵⁹ The use of the term 'burden-sharing' has been criticised by many scholars as it represents refugees in an unfavourable manner, and responsibility sharing is therefore preferred by many. For a more comprehensive account of this critique, see e.g. Madeline Garlick and Volker Türk, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees' (2016) *International Journal of Refugee Law* 28(4) 656. In this thesis, I will use responsibility sharing as the preferred term, except for when referencing others whom use the term burden-sharing.

¹⁶⁰ Noll (2003) 244.

¹⁶¹ Ibid.

¹⁶² Noll (2003) 243.

¹⁶³ Consolidated version of the Treaty on the Functioning of the European Union (13 December 2007) 2008/C 115/01.

Cooperation based strategies are also used to uphold a *non-entrée* regime through which states, particularly in the Global North, engage in far-reaching deterrence mechanisms while at the same time avoiding liability.¹⁶⁴ A well-known example of this is Frontex, where EU Member States through voluntary financial and material contributions cooperate to guard the Unions external borders. This shows that motivations for interstate responsibility sharing are not solely based on humanitarian considerations or feelings of solidarity towards host states or refugees, but are largely driven by states' self-interest, as touched upon supra.¹⁶⁵ Interstate sharing of responsibility thus does not always aim at state-refugee responsibility, but rather looks to accommodate states' wish to avoid commitment. There is thus arguably also a *fifth* dimension to responsibility sharing: operational cooperation in the externalisation of borders, in a sense also an interstate solidarity mechanism, which disregards and distorts focus on criteria for actual distribution of refugees and observance of refugees' human rights.¹⁶⁶ In this regard it is quite telling that the budget for Frontex, financed largely by voluntary EU Member State contributions, is many times higher than the budget allocated for operational measures of the European Asylum Support Office (EASO).¹⁶⁷

Traditionally, responsibility sharing arrangements for refugee protection have been of temporary and ad hoc nature. UNHCR, which oversees the implementation of the Refugee Convention, has no permanent funding and therefore relies on voluntary financial contributions, often earmarked to satisfy states' own interests and the agency is constantly underfunded.¹⁶⁸ Nor does the UNHCR have any power to compel states to resettle refugees.¹⁶⁹ Due to this, UNHCR has largely had to respond to refugee situations in an ad hoc fashion, appealing for financial support and resettlement places to facilitate international cooperation for a particular situation.¹⁷⁰ Examples of famous such initiatives are the International Conferences on Assistance to Refugees in Africa in 1981 and 1984, and the International Conference on Central-American Refugees (Conferencia Internacional sobre los Refugiados Centroamericanos) which ran between 1987 and 1995 and was part of a larger, political process on achieving peace, security and development in the region. Other UNHCR led responsibility-sharing initiatives include the Comprehensive Plan of Action (CPA) for Indochinese Refugees running between 1988 and 1996, and the Convention Plus initiative, centred around five conferences held in Geneva between 2003 and 2005. These initiatives were all attempts to achieve increased responsibility sharing to overcome specific protracted regional refugee situations in the Global South, through financial and/or material assistance from the Global North.¹⁷¹ The Convention Plus initiative is of perhaps greatest interest for the purposes of evaluating the Refugee Compact, as it was somewhat similar in character. The

¹⁶⁴ See Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) Colum. J. Transnat'l L. 53 235. The term "*non-entrée*" was initially coined by James C. Hathaway in an article from 1992.

¹⁶⁵ See further Eleni Karageorgiou, 'Solidarity and sharing in the Common European Asylum System: the case of Syrian refugees' (2016) European Politics & Society 17(2) 196, 199f.

¹⁶⁶ Idem 205.

¹⁶⁷ This has been pointed out by for example Eleni Karageorgiou, see idem 204. EASO was established through European Parliament and Council of Europe, Regulation No. 439/2010 establishing a European Asylum Support Office (9 May 2010).

¹⁶⁸ Betts (2009) 16. In 2016, the gap between UNHCR budget and available funds stood at 41% or \$3.099 billion, UNHCR 'Global Report 2016' (UNHCR 2017) <http://reporting.unhcr.org/sites/default/files/gr2016/pdf/Book_GR_2016_ENGLISH_complete.pdf> accessed 19 May 2018, 24-25.

¹⁶⁹ See further infra section 4.2.

¹⁷⁰ Betts (2009) 16f.

¹⁷¹ Betts (2009) 18.

Convention Plus was a UNHCR led global initiative seeking to establish an interstate agreement on a normative framework for responsibility sharing which would consist of three soft law documents in the areas of resettlement, targeted development assistance and irregular secondary movement, which could be applied to different regional situations. However, the negotiations for such an agreement did not lead anywhere, largely due to North-South polarisation.¹⁷² The CPA, however, is generally considered a successful responsibility sharing mechanism. The CPA was initiated to address the situation of people fleeing by boat from (mainly) Vietnam and seeking protection in Southeast Asian states and Hong Kong. Many of them drowned. The international answer was a three-way political agreement between the countries of origin (mainly Vietnam), the first countries of asylum in the region and third countries of resettlement, primarily the US. Vietnam and others committed to reintegrate persons not recognised as refugees, the countries of first asylum committed to admit all asylum seekers into their territory and process their claims, and third states committed to resettle everyone who was determined to have refugee status. All commitments made were conditioned on the fulfilment of the obligation by the other parties. Although the initiative was not free from human rights violations and other problems, it is largely considered to have contributed to the overcoming of a large refugee crisis.¹⁷³

4.2 Responsibility sharing as a matter of international refugee law

Responsibility sharing of refugee protection has since long been a widely-debated topic, including the existence or not of any legal obligation to do so.¹⁷⁴ That there is a theoretical principle of international law on inter-state cooperation is relatively established, but what that obligation entails in the refugee regime is not all clear. Is it a legally binding obligation of international refugee law? Or merely a moral obligation? Towards whom: refugees or other states? As for a legal basis for such an obligation there is not much to hinge on. What can be said generally is that cooperation between states is one of the defining principles of contemporary international relations'.¹⁷⁵ States have a duty to cooperate with one another in accordance with the Charter of the United Nations, as interpreted by the Friendly Relations Declaration.¹⁷⁶ This general duty to cooperate in social and economic relations is the broader basis for the principle of solidarity and responsibility sharing for refugee protection.¹⁷⁷ The perhaps most famous reference to a commitment to a shared responsibility for refugees is the fourth preambular paragraph of the 1951 Refugee Convention itself, stating that

¹⁷² Betts (2009) 143-4, 151-4.

¹⁷³ Betts (2009) 112-14.

¹⁷⁴ See for example Patrick Wall, 'A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?' (2017) *International Journal of Refugee Law* 29(2) 201 <<https://doi-org.ludwig.lub.lu.se/10.1093/ijrl/eex025>> accessed 28 March 2018.

¹⁷⁵ Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, 2009) 138.

¹⁷⁶ UNGA Res 2625 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' (adopted on a Report from the Sixth Committee (A/8082) on 24 October 1970).

¹⁷⁷ Hurwitz 138. Note that Hurwitz uses the term burden sharing, here interpreted to have the same meaning as responsibility sharing.

*“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”.*¹⁷⁸

As a preambular paragraph its legal value is somewhat unclear. Although little attention has been paid as to the legal status of preambles of treaties, they are generally viewed as not being part of the binding text of a treaty.¹⁷⁹ The prevailing view is that preambles serve as evidence of a treaty’s ‘object and purpose’ and as such is a primary means of treaty interpretation.¹⁸⁰ Hence, no direct legal obligation on states to cooperate with each other and share responsibility can be extracted from the Refugee Convention itself, although it does carry some legal weight when interpreting other, *primary* provisions of the Convention. Noteworthy is that while the Convention does not set out an express obligation of State cooperation, it does oblige State Parties to cooperate with the UNHCR in the exercise of its functions, and to assist the Commissioner in its task to supervise the application of the Convention.¹⁸¹ The Commissioner does not, however, have any power to compel states to cooperate.¹⁸² Despite the lack of an explicit provision on responsibility sharing in the Convention itself, it was not an absent topic during the drafting of the instrument. An urge to international cooperation was made by the conference that drafted the Refugee Convention in the Final Act¹⁸³, stating that *“The conference [...] RECOMMENDS that [...] Governments act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement.”*¹⁸⁴ In 2003, again the State Parties to the Refugee Convention in the *UNHCR Agenda for Protection*, unanimously referred to *“the framework of international solidarity and burden-sharing”* when committing themselves to providing better refugee protection.¹⁸⁵

Since the adoption of the Refugee Convention a responsibility-sharing principle has been articulated in varying forms in a number of international instruments, such as the UN Declaration on Territorial Asylum in 1967,¹⁸⁶ innumerable resolutions of the UN General Assembly¹⁸⁷, several regional instruments such as the Convention Governing the Specific

¹⁷⁸ 4th preambular paragraph.

¹⁷⁹ See for example Max Hulme, ‘Preambles in Treaty Interpretation’ (2016) University Of Pennsylvania Law Review 164(5) 1281, 1300f.

¹⁸⁰ Article 31 of the Vienna Convention on the Law of Treaties, which is considered customary law, sets out that: *“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:[...]”* Even before the ILC wrote the VCLT, treaty preambles were used to examine the object and purpose of treaties, see further Hulme (supra) 1302f.

¹⁸¹ Refugee Convention Art 35. The exact same provision is found in the 1967 Protocol Art 2.

¹⁸² Satvinder Singh Juss, *International Migration and Global Justice* (Ashgate Publishing Limited, 2006) 241. See also e contrario UNGA Res 428 (V) Annex 1: Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR) (adopted on the 14 December 1950).

¹⁸³ UNGA, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (Geneva, 25 July 1951) A/CONF.2/108/Rev.1.

¹⁸⁴ Idem IV(D).

¹⁸⁵ UNHCR ‘Agenda for Protection’ (3rd edn, UNCHR October 2003) 28.

<<http://www.unhcr.org/protection/globalconsult/3e637b194/agenda-protection-third-edition.html>> accessed 28 March 2018.

¹⁸⁶ UNGA Res 2312 Declaration on Territorial Asylum (14 December 1967) article 2.2: *“Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.”*

¹⁸⁷ For a list of resolutions adopted by the General Assembly relating to burden sharing and international cooperation see UNHCR ‘Thematic Compilation of General Assembly & Economic and Social Council Resolutions’ (Division of International Protection, 5 ed, Geneva, December 2015) Burden Sharing 36f, Aid to host countries 223ff.

Aspects of Refugee Problems in Africa¹⁸⁸ and the Council of Europe Resolution on Asylum to Persons in Danger of Persecution¹⁸⁹. Furthermore, the principle has been stressed in several of the Conclusions on International Protection adopted by the Executive Committee of the UNHCR (ExCom), which expresses what consensus has been reached at their annual discussions on international protection.¹⁹⁰ There have also been numerous attempts to construct a norm of responsibility sharing from more abstract principles or as an indirect corollary of other obligations. As identified by Goodwin-Gill and McAdam, the provision of refugee protection as a matter of law is not contingent on responsibility sharing *per se*.¹⁹¹ It has, however, been acknowledged that to a certain extent, actions that alleviate the pressure for countries of first asylum may be necessary to ensure that fundamental principle of non-refoulement is not violated. That is, one may arguably interpret the prohibition of non-refoulement as an indirect obligation to assist countries of first asylum in the form of financial and technical assistance and capacity building.¹⁹² That interpretation has, however, not gained any official acceptance among states.

We may thus speak of a principle of cooperation and responsibility sharing, but as the content of such a principle is not defined, it is of little guidance. What is explicit under the current legal framework is instead that states have obligations only towards refugees within their jurisdiction, but not towards those who are in another State's territory, nor towards the other State in question. Some scholars have argued that there is a norm of responsibility sharing of protection *inherent* in the international refugee regime.¹⁹³ However, many more are sceptical, claiming that any norm of responsibility sharing among states is weak at best, or an illusion at worst.¹⁹⁴ There simply is no strong norm of international law prescribing responsibility sharing for refugees.¹⁹⁵ Even if accepted as a *principle* of international law to which most states have expressed adherence, there is a further lack of consensus on how to achieve responsibility sharing for refugee protection among states - the principle has not yet been 'operationalised'.¹⁹⁶ What is more, there is no central enforcement institution to enforce cooperation in the asylum regime.¹⁹⁷

To conclude, no enforceable obligation of responsibility sharing for refugee protection is established on a global level. Most scholars, although many intents to establish such a norm has been made, therefore agree that as a *lex lata* norm it is weak, if not outright

¹⁸⁸ Convention Governing the Specific Aspects of Refugee Problems in Africa, (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 preamble recital 3 and Art 2(4). Note the use of the word "shall".

¹⁸⁹ Resolution 67(14) Asylum to Persons in Danger of Persecution (adopted 29 June 1967) para 4. Note the softer form of commitment emanating from the words "should" and "consider".

¹⁹⁰ For a comprehensive account of expressions of a responsibility sharing-norm, see Wall 206ff. See also Hurwitz 140-144.

¹⁹¹ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd Edn, Oxford University Press, 2007) 339.

¹⁹² *Ibid.*

¹⁹³ See inter alia Hurwitz 139ff.

¹⁹⁴ See inter alia Noll (2003) 236. See also Betts (2009) 3, 12: ("*The principle of burden-sharing is by far the weakest aspect of the refugee regime.*") And Peter Schuck, 'Refugee Burden-Sharing: A Modest Proposal' (1997) Yale J. Int'l L. 22(2) 243, 272 <<http://digitalcommons.law.yale.edu/yjil/vol22/iss2/2>> accessed 29 March 2018.

¹⁹⁵ Noll explained described it as follows in 2003: "*Attractively void of precise meaning, the notions of 'solidarity' or 'burden-sharing' continue to linger in the debate on asylum and migration in Europe.*" and "[...] *burden-sharing continues to be a desideratum at best, a deceptive rhetorical veil at worst*" in Noll (2003) 236.

¹⁹⁶ Wall 208. See also Türk (2016) (supra) 45, 48.

¹⁹⁷ Noll (2003) 238.

questionable.¹⁹⁸ It is in this regard that the Refugee Compact could play a norm-creating role, through setting out specific mechanisms to guide state action, and as such crystallise a primary norm of soft law which eventually could ‘harden’. Through creating a normative and institutional framework upon which a future norm of responsibility could hinge, the Compact could also serve as inspiration for future, binding instruments on responsibility sharing which would remove the need to create a whole new framework.

4.3 Responsibility sharing as envisioned in the GCR

As already mentioned, one of the main aims of the Refugee Compact is to enable responsibility sharing among states through creating a more equitable and predictable basis for cooperation.¹⁹⁹ To this end, the Programme of Action sets out a line of measures to facilitate cooperation.

At the time of writing, responsibility sharing as envisioned in the Refugee Compact has primarily two dimensions: one global and one region/situation specific. On the global level, the main mechanism is the Global Refugee Forum: a forum to be convened regularly (as it currently stands every four years) at ministerial level, co-hosted by states and the UNHCR. All Member States and other stakeholders will there be invited to make concrete pledges and contributions towards the achievement of the objectives of the Compact, that reflects what each state consider to be their fair share.²⁰⁰ The pledges made at the Conference can relate to any area of the Compact and could be, for example: commitments of financial or technical assistance, pledges to amend national legislation or policy, or to provide a certain number of resettlement places. The pledges are then to be used mainly for situation specific responses.²⁰¹ The Global Forums will also serve as a stocktaking and review mechanism of earlier state pledges and contributions, of progress towards the achievement of the objectives of the Compact as well as of ongoing challenges and opportunities.²⁰²

On a sub-global level, responsibility sharing would spring from so called ‘Support Platforms’ developed for a specific situation. The support Platforms aim at ‘context-specific, predictable and broadened support for refugees’ and seek to, inter alia, mobilise financial, material and technical assistance to the particular refugee situation. After a host country’s request to activate such a platform, and if there are indicators of insufficient capacity to deal with a refugee situation of the host state alone, the UNHCR can activate a context-specific Support Platform. UNHCR are also to assist the Platform, and report regularly to the ExCom and the General Assembly, but will not have a leading role. The Platform would be led by a group of states, and stakeholders from other sectors could also participate. The Platform would typically include the affected host state, regional neighbours and other states whom would like to contribute financially, materially, technically or in any other way. In circumstances

¹⁹⁸ See the discussion above, and Schuck (Refugee Burden-Sharing) 272. See also Gregor Noll, *Negotiating asylum: the EU acquis, extraterritorial protection and the common market of deflection* (Martinus Nijhoff, 2000) 277.

¹⁹⁹ See e.g. GCR Draft 2 para 3.

²⁰⁰ GCR Draft 2 para 18.

²⁰¹ GCR Draft 2 para 24 subpara 2.

²⁰² *Idem* paras 19-20.

where repatriation is on the agenda, also countries of origin could be invited. Importantly, the Platforms are not to be a fixed body or undertake any operational activities. So-called Solidarity Conferences are proposed to be organised as a viable measure for the Support Platform where states could make additional pledges for the particular situation to gain increased international support to the host state.²⁰³ Regional and sub-regional bodies are envisioned to play a key role in the Support Platforms, and future responses are to build on existing regional and sub-regional arrangements for refugee protection.²⁰⁴

In general, the Compact takes a rather traditional approach to responsibility sharing, with its main focus on financial and material sharing. The Secretary-General in his report called on Member states to set *defined* contributions both in terms of financial contributions to cover humanitarian needs,²⁰⁵ and materially in terms of resettlement.²⁰⁶ The Compact however, as it currently stands, is not as ambitious in its goal-setting as the Secretary-General called for and avoids any defined economic or material commitments. Financial cooperation is envisioned to go beyond the involvement of traditional donors, and include humanitarian funding, development action and the involvement of the private sector, to satisfy emergency response as well as more protracted needs. Wherever possible, it is envisioned to be flexible, un-earmarked and multi-year.²⁰⁷ That financing shall be more long-term, and not only focus on acute humanitarian needs, indicates a more stable approach than the current ad hoc, temporary responsibility sharing mechanisms used up to date. However, there is no firm system for how financing is going to take place, but it will be dependent on voluntary pledges at the Global Refugee Forum every four years and the situation-specific Solidarity Conferences if and when such are organised. Furthermore, as no commitment has been made as to obligatory participation in any of the initiatives, even less to obligatory financial contribution, the success of this arrangement becomes a matter of implementation.

As regards material responsibility sharing, the durable solutions envisioned in the Compact follow the traditional approach of solutions, which seeks reintegration of the refugee in the first place in the country of origin (repatriation) and secondly, into the interim host state (local integration) or into a third State (resettlement), rather than eternal stay in country without permanent residency or nationality.²⁰⁸ Regarding resettlement, the Member States expressed already in the NYD that they “*intend to expand the number and range of legal pathways available for refugees to be admitted to or resettled in third countries.*”²⁰⁹ Although this statement is followed by an urge to establish new, and increase the size of already existing resettlement programmes, the lack of an explicit and specific commitment to do so is glaring. In this regard, Member States so far have shown substantively lower levels of ambition than called for by the Secretary-General, whom anticipated the Compact to contain an actual commitment in terms of resettlement quotas. He set out that

²⁰³ Idem paras 23-28.

²⁰⁴ Idem para 30.

²⁰⁵ Idem para 103(c).

²⁰⁶ Paras 83 and 103(d)(ii).

²⁰⁷ Idem para 33.

²⁰⁸ NYD para 10. Compare Betts (2009) 6.

²⁰⁹ NYD para 77.

*“Responsibility-sharing (...) extends to relieving some of the pressures on host countries by expanding means of admission of refugees in other countries sufficient to meet the annual resettlement needs identified by the UNHCR, or at least 10 % of the total refugee population.”*²¹⁰

In numerical terms, that would mean a commitment to almost 1.2 million refugees in 2018,²¹¹ alternatively 2.25 million if applying the 10% suggestion.²¹² To date, that aim has not been reached, by far.²¹³ To fulfil UNHCRs annual resettlement estimates was in the CRRF phrased in terms of an aim, rather than a commitment,²¹⁴ and what in the CRRF is expressed as an aim, in the first draft Programme of Action turned into a ‘consideration’²¹⁵, only to be removed completely from the draft Compact as at 30 April 2018. As it is included in the CRRF, however, the ‘aim’ in principle remains. The improbability of this aim being met in the near future could be noticed already in the pledges made at the September 2016 Summit, where a clear North-South divide in relation to their view on material sharing responsibility prevailed. States from the Global North pledged to contribute mainly with financial assistance, but were cautious to commit to resettling any large numbers of refugees. Resettlement pledges were numerically low and various northern states pledged only to contribute financially, or to maintain their already established resettlement quotas.²¹⁶ The Compact does, however, also emphasise a variance of third country admission – that of complementary pathways for admission. The Compact sets out that states will consider the establishment and expansion of, for example: humanitarian visas and other admission programmes, temporary evacuation programmes, flexible arrangements to assist family reunification, private sponsorship and opportunities for labour mobility, including through private sector partnerships and education such as scholarship and student visas.²¹⁷ To support state action directed at expanding and enhancing resettlement and alternative admission pathways, UNHCR will formulate a 3-year strategy together with states and other stakeholders.²¹⁸

A distinctive dimension of the responsibility sharing envisioned in the Compact, which differs from the traditional financial/material binary, is the centrality of technical cooperation and that of sharing of expertise. The Compact invites states to support host states as well as

²¹⁰ Report of the Secretary-General ‘In Safety and Dignity’ (supra) para 83.

²¹¹ The estimate was very similar for 2017, when the estimates amounted to approximately 1.19 millions of persons. Syrian refugees represent about 40 % of the total of persons in need of resettlement. See UNHCR ‘UNHCR Projected Global Resettlement Needs 2018’ (2017) <<http://www.unhcr.org/593a88f27.pdf>> accessed 2 April 2018 10.

²¹² The total amount of refugees worldwide by the end of 2016 was 22.5 million persons. See UNHCR ‘Global Trends: 2016’ (supra) 2.

²¹³ Although resettlement submissions reached a peak in 2016 when the NYD was adopted, state quotas fluctuated again in 2017 as a result of national security concerns and politicisation of migration and refugee flows leading to increased State scrutiny of resettlement, and a total reduction of resettlement places globally.²¹³ UNHCR forebodes a drop in 2018, too. See UNHCR ‘UNHCR Projected Global Resettlement Needs 2018’ (supra) 17.

²¹⁴ NYD para 78, CRRF para 16.

²¹⁵ See GCR Zero Draft para 69: “States, with the support of relevant stakeholders, will consider establishing, or increasing the scope, size and quality of, resettlement programmes to meet the annual global resettlement needs identified by UNHCR.”

²¹⁶ For example, Germany, Greece, Ireland, Rumania and Slovakia did not offer any additional resettlement places at all, Denmark offered a total of 85 resettlement places through UNHCR in 2016, and remaining northern countries offered only small material contributions. See UNHCR ‘Summary Overview Document: Leader’s Summit on Refugees’ (10 November 2016) <www.unhcr.org/58526bb24> accessed 17 April 2018, and supra at 2.1.2.

²¹⁷ GCR Zero Draft para 72 and its references. See also e.g. GCR Draft 2 paras 100-102.

²¹⁸ GCR Draft 2 para 101.

countries of origin with technical assistance and expertise in a range of areas.²¹⁹ Technical assistance and expertise as a dimension of responsibility sharing is not new in the refugee regime, but has primarily been a focus area in regional responsibility sharing mechanisms within the EU, as mentioned supra. Responsibility sharing in the European Union is based on the principle of solidarity and fair sharing of responsibility emanating from Article 80 TFEU. The main actor for responsibility sharing is EASO²²⁰ which supports the implementation of the Common European Asylum System (CEAS) through mechanisms of fair sharing of financial resources, norms and expertise. EASO is an independent body of the EU and was established to strengthen and develop cooperation measures to increase convergence and ensure quality of EU Member States asylum decision-making procedures.²²¹ The Office provides scientific and technical assistance to Member States experiencing particular refugee pressures and provides support in different areas such as identification and registration procedures, supporting the asylum decision procedure, providing country-of-origin information, providing core-training for staff and expertise as to how to make use of emergency financial support to countries from EU funds, much like the Refugee Compact.²²² As such, EASO, and technical and expertise sharing, forms an important part of cooperation in the refugee protection area in the European Union.²²³ It seems the GRC has sought inspiration from these arrangements.

To ‘operationalise’ responsibility sharing, the Compact aims at maximising funding to host countries,²²⁴ involve relevant stakeholders other than states to a larger extent as part of the whole-of-society approach²²⁵ and improve the use of data and evidence to design measures as efficiently as possible to reach the objectives of the Compact.²²⁶ Despite the many calls for the need to operationalise responsibility sharing²²⁷ and its explicit inclusion in the Programme of Action²²⁸, the measures proposed are formulated in general terms. Rather than specific commitments and set measures it takes the form of general guidelines from which future arrangements can emanate - if there is political will and/or incitements for private actors to develop them.

²¹⁹ For example to bolster national capacity to address accommodation or environmental challenges (GCR Zero Draft para 58), develop digital systems for individual registration, documentation and biometrics, collect quality registration data, establish protocols for the sharing of personal and biometric data (para 41), identify and address international protection needs (paras 44-46) and specific needs of particular groups of refugees (para 42) and strengthen the capacity of civil registries (para 61). Expertise is to be provided to host countries to support local services in managing large-scale arrivals (para 37). Technical support is also to be provided to interested countries of origin to address root causes of displacement, build institutional readiness and capacity in order to enable more voluntary repatriation (para 66).

²²⁰ EU Reg No 439/2010. See supra at 4.1.2.

²²¹ *Idem* paras 5-6.

²²² See for example EASO, ‘EASO to provide support to Bulgaria’ (press release, 17 October 2013) PR 09/2013. More generally see EASO, ‘About Us: What We Do’ <<https://www.easo.europa.eu/about-us/what-we-do>> accessed 29 March 2018. Compare also supra in this section at 219.

²²³ Karageorgiou (supra) 197f.

²²⁴ GCR Draft 2 para 33.

²²⁵ *Idem* para 34.

²²⁶ *Idem* para 45.

²²⁷ See e.g. Türk (2016) (supra) 48.

²²⁸ GCR Draft 2 para 32.

4.4 The GCR in light of earlier proposals and scholarly debates

How much of the responsibility sharing envisioned in the Refugee Compact is new? In what ways does it resemble earlier proposals put forward to organise cooperation for refugee protection? This section will compare the responsibility mechanisms envisioned in the Compact to earlier scholarly proposals and their critics, to shed light on how the GRC may affect international responsibility sharing and protection.

The lack of operationalisation of responsibility sharing in the refugee regime has led many scholars to propose solutions for how to achieve shared responsibility. Perhaps most well-known is James C. Hathaway and R. Alexander Neve's proposal in 1997, which is based on a system of collectivised responsibility to provide refugee protection in so-called "interest-convergence groups" of states in a collectivised model of temporary protection.²²⁹ Allocation of responsibility would be based on the theory of "common but differentiated responsibility", emanating from international environmental law. The overarching idea is that the model would contribute to that funds could be redirected from expensive deterrence mechanisms to substantive protection. Southern countries, where most refugees are situated, would thus not face the same unbearable pressures as they currently do, as the collectivized system would guarantee pre-commitments to financial and other support from the other states in the interest-convergence group, and the host state would only have to contribute as much as they could reasonably afford.²³⁰ The main incentive to take part in a this responsibility sharing mechanism would be the perceived cost of *not* responding and the potentially unlimited cost connected of the arrival of refugees if not participating in the model, not unlike an insurance scheme. The interest convergence group, preferably organised in a regional manner, would consist of one inner, and one outer, "core" of states. The inner core states would be those that are particularly vulnerable to large migration flows, and therefore have a greater natural interest in sharing responsibility. It would also be those who provided refugee protection. Within that group of states, intra-group cooperation based on security concerns would take place. States could, for example, re-direct flows of refugees perceived to be a threat to internal security in one country, or agree to disperse refugee communities for the same internal security concerns. The outer core would constitute of those states that are not as likely to be subject to large influxes of refugees, whom would contribute with fiscal support, and limited resettlement. The model is not intended to redistribute any large amounts of refugees but would still be more equitable, the authors argue, as northern states would agree permanently and in advance to share the fiscal responsibility, as opposed to current temporary and ad hoc sharing arrangements. The authors are clear in their objective of providing a pragmatic solution that would accommodate the reluctance of Northern States to a more generous refugee protection system.²³¹

²²⁹ James C Hathaway, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (2007) R Alexander Neve, co-author. Harv. Hum. Rts. J. 10 115, 143-5. Hathaway made a first proposal in 1991, which he developed together with Neve in this later article.

²³⁰ *Idem* 145-7.

²³¹ *Idem* 206f.

Peter H. Schuck in the same year (1997) came with a similar proposal, largely based on the burden-sharing norm applied in the Comprehensive Plan of Action for Indochinese Refugees mentioned above.²³² Schuck also proposed the voluntary coming together of a sub-global group of states, which would collectively be assigned a quota of refugees, which then could be traded with.²³³ Also Schuck's system resembles that of an insurance scheme; based on that the incentive for states to assume some responsibility is that *not* doing so bears the risk of leading to even more burdensome costs. Schuck's main focus is a proportional burden-sharing norm that would function as the basis for assigning the quotas. The proportionality principle would be based on a 'protection criterion' - that is, the respective State's capacity to provide minimal refugee protection, primarily based on national wealth.²³⁴ States could then transfer their assigned quota of refugees to another State, either within or outside the sub-global group, in exchange for money, credit, commodities, development assistance, technical advice, weapons, political support or other assets.²³⁵ The main motivations for refugee quotas as Schuck sees it would be its *economic efficiency* as a market system would keep the costs for providing protection as low as possible, through moving large parts of refugees from states with high costs of providing protection, to those with lower costs and stimulate temporary protection rather than permanent resettlement.²³⁶ What would become of great importance under this market system is the identity of the refugee population in question. Demographic variables such as social class, education, ethnicity, religion and so forth, would be decisive in trading with the quotas. That these considerations potentially would lead to discrimination, Schuck sees as a necessary. He claims that it would not be any different from the current situation, and even believes such factors to be beneficial to the system, as it would affect the quota prices and lead to that more states would be incentivised to join the responsibility sharing system.²³⁷

In many ways, the Refugee Compact resembles Hathaway/Neve and Schuck's proposals. The Compact also builds on the existing legal framework. Furthermore, it envisions sub-global cooperation between host- and other states, and that financial assistance is to be transferred from the Global North to the South. What differs in that regard, is that the Compact is lacking a pre-commitment to contribute financially, but is instead based on voluntary pledges made at the Global Refugee Forum or at the ad hoc Solidarity Conferences. This also means that the participation of what Hathaway/Neve term the 'outer' core states – which largely would coincide with the Global North – is not guaranteed in a particular refugee situation. While the distribution of responsibility in the Compact is not as explicit as Schuck's 'protection criterion' and assigned quotas – the closest the Compact gets to formulate a responsibility allocation formula is to take into account "*different national realities, capacities and levels of*

²³² Peter H Schuck, 'Refugee Burden-Sharing: A Modest Proposal' (1997) Yale J. Int'l L. 22(2) 243, 254ff <http://digitalcommons.law.yale.edu/yjil/vol22/iss2/2> accessed 29 March 2018. For the CPA see supra at 4.1.2.

²³³ A specifically instituted international agency would administer the system, e.g. through assigning States their initial refugee quotas, adjust them as refugee flows change and, to a certain extent, supervise enforcement of the quotas, as well as of State's compliance with international legal principles of standard of protection. Schuck (1997) 277, 288.

²³⁴ States that systematically violates human rights, or fall below a set minimum level of capacity to provide sustenance for their own population, should be exempted from the quota system.

²³⁵ Schuck (1997) 282-4.

²³⁶ Idem 285.

²³⁷ Idem 287.

*development*²³⁸ – it will likely have similar effects in terms of material responsibility sharing. Neither the Compact nor any of the above models is intended to redistribute any large amounts of refugees to the North but maintain refugees in the first country of asylum, typically in the same region as the country of origin, and stimulate temporary protection rather than permanent resettlement or naturalisation.²³⁹ The above authors all acknowledge this, but mean that it would still be more equitable as Northern states would agree permanently and in advance to share the fiscal responsibility, as opposed to current temporary sharing arrangements.²⁴⁰ The Compact lacks the ‘insurance scheme’ character of predetermined contributions, and the same argument thus cannot be put forward to motivate these effects in the same way. However, what the Compact has but the other models lack, is the global dimension that the Global Refugee Forum represents and which may contribute to a higher degree of predictability and accountability, as it enables more large-scale cooperation and regular stock-taking.

Hathaway and Neve’s and Schuck’s proposals have received various and harsh critiques. In an article titled ‘*Crisis and Cure: A Reply to Hathaway/Neve and Schuck*’, Deborah Anker, Joan Fitzpatrick and Andrew Shacknove argue that the two proposals are based on exaggerated perceptions of the non-functioning of the current individualized systems and therefore prescribes an inadequate cure to the problem. Among other things, they criticise the failure to acknowledge the importance of international organisations and other actors in refugee protection. The overarching fear of the authors if the reforms were to materialise, is that refugees would “*largely be removed from the realm of law and consigned to the realm of political bargaining*”²⁴¹ and unless all parts of the proposed reforms would be honoured, the overall level of refugee protection would be diminished. Furthermore, the authors believe the incentives for states to join to be insufficient - particularly for northern states who have the possibility, and already are, “self-insuring” themselves from large refugee flows through the implementation non-entrée policies. They also see little prospects of northern states dismantling these mechanisms, as refugees would still seek to reach their territories, and their obligations under international refugee law to provide protection for refugees would persist.²⁴² They conclude by calling on a more idealistic approach, albeit without proposing any specific solution. Their critiques may be said to carry some weight also in regards to the Refugee Compact, which largely relies on northern states altruism towards refugees as well as host states. As will be explored further in the next chapter, the Compact does little to dismantle the current deterrence regime, and therefore continued “self-insuring” is not an unlikely prediction of the future. This is so with or without the Compact, although its existence may motivate global cooperation and thus in the long-run, perhaps increased rate of responsibility taking.

²³⁸ This standard originates from the 2030 Development Agenda. GCR Draft 2 para 4 (compare paras 17, 50) and NYD para 21. See also a similar formulation in para 68. Compare also GCR Draft 1 para 6.

²³⁹ Repatriation is the preferred solution in the Compact design, see GCR Draft 2 para 91.

²⁴⁰ Compare Hathaway/Neve 206f and Schuck (1997) 285.

²⁴¹ Deborah Anker; Joan Fitzpatrick; Andrew Shacknove, ‘Crisis and Cure: A Reply to Hathaway/Neve and Schuck’ (1998) Harvard Human Rights Journal 11 295, 305.

²⁴² Anker et al. 300ff.

In 2006, Satvinder Singh Juss spent a full chapter in his book 'International Migration and Global Justice' to criticise Hathaway and Neve's proposal. Also he disapproves of the realist approach of seeking to accommodate Northern states self-interests as a solution to responsibility sharing. As opposed to the abovementioned authors, Singh Juss argues that the current Refugee Convention is conceptually and practically obsolete and therefore that the solution lies in legislative change.²⁴³ Singh mainly criticises Hathaway/Neve on two grounds. Firstly, he finds the proposal discriminatory – towards states as well as refugees. To states in the Global South as Northern states could choose to negate to accept all victims of human rights abuses, and racially and ethnically discriminatory towards refugees allowing racial and ethnical favouritism. His second critique is that it is too limited in that it denies what he terms the *immigration/migration* element of refugee law, which causes large groups of refugees to fall between the chairs. This is so because the reform only concerns those persons considered refugees under the Convention but excludes, for example, so called economic migrants who may have been forced to flee their homes due to e.g. environmental disasters but who are not “persecuted” under the Convention and therefore considered “illegal” migrants. The migration/refugee distinction is therefore arbitrary.²⁴⁴ His view is that resource allocation is not ‘real’ responsibility sharing, but merely richer states payment to avoid any responsibility. Singh's conviction is therefore that unless general migration policies of states change, neither will refugee protection. Without such a reform of international refugee law, the “*approach [of Hathaway and Neve] is bound to founder in the realpolitik of international State Practice*”.²⁴⁵ The Compact could be criticised on the same grounds as Singh's second critique towards Hathaway, Neve and Schuck. Several academics and NGOs have already highlighted how the Refugee Compact is too limited in that it only covers Convention refugees, and as such excludes the majority of the displaced persons around the world.²⁴⁶ While the Secretary-General in his report modestly suggested that “*perhaps it is time to review major operations for internally displaced persons and implement lessons on how to improve the response*”,²⁴⁷ IDPs have not been an issue for the Refugee Compact nor the Migration Compact. This is problematic as IDPs are also excluded from the Refugee Convention²⁴⁸ and therefore have to rely solely on human rights law obligations of their country which, as showed above, often are among the poorest in the world with little possibility to fulfil economic and social rights.

Another scholar who considers the current legal framework insufficient is Patrick Wall. Wall, however, does not deem the current framework obsolete, but instead argues that it should be accompanied by a third instrument – a Framework Convention on refugee responsibility sharing.²⁴⁹ The Framework Convention would draw inspiration from similar instruments developed within the realm of international environmental law, which many times has been

²⁴³ Singh Juss (supra) 219.

²⁴⁴ Idem 225.

²⁴⁵ Ibid.

²⁴⁶ See Susan F Martin, 'New Models of International Agreement for Refugee Protection' (2016) *J. on Migration & Hum. Sec.* 4(3) 60. See also Protection Gateway, 'Bringing the Internally Displaced into the Global Refugee Compact (*modified version of a talk given by Phil Orchard at the Kaldor Centre for International Refugee Law's Annual Conference on 24 November 2017*) (11 December 2017)) [website] <<https://protectiongateway.com/2017/12/11/bringing-the-internally-displaced-into-the-global-refugee-compact/>> accessed 20 May 2018.

²⁴⁷ SG Report para 21.

²⁴⁸ This follows e contrario from Art 1.

²⁴⁹ Wall (supra) 201.

proposed as a potential inspiration for reform in the refugee regime.²⁵⁰ It would contain few firm commitments but rather set out the nature of the problem, general principles directing how to shape action to combat it and set out an institutional structure from which further action would take place.²⁵¹ Walls proposal, written after the adoption of the New York Declaration, is perhaps the one which resembles the current Refugee Compact the most. The major difference is that the Compact is not a legally binding Convention but a non-binding ‘Compact’ of unclear status in relation to international law.²⁵² It does, however, embody many of the characteristics called for by Wall. Most importantly, the Compact sets out an institutional basis from which future responses, and perhaps even Framework Conventions, can be initiated.

The above are but a few of the scholarly proposals put forward in the last decade,²⁵³ but they serve to illustrate the main theoretical stances in the academic debate in which one can distinguish between a realist and a more idealistic approach, revealing also what the Global Compact on Refugees is trying to balance.

4.5 Potential future impact

As shown by this chapter, there is a lacuna in international refugee law regarding responsibility sharing. Hence, as an instrument of primary soft law agreed upon by all 193 UN Member States, there are great opportunities for the Compact to exercise normative impact on states, despite its non-binding character. Aiming for increased responsibility sharing, some pragmatism is necessary but the risk of watering down commitments to mere business-like relationships carries with it apparent risks. The responsibility sharing arrangements as envisioned in the Compact contain all the necessary components for a more predictable and equitable system – if states comply with them. In doing so, it may not only have indirect legal effects in terms of increased protection and as a basis for regional arrangements on an ad hoc basis, but also direct effects in terms of an increasingly hardening normative framework governing state behaviour.

²⁵⁰ See e.g. Rebecca Dowd and Jane McAdam, ‘International Cooperation and Responsibility Sharing to Combat Climate Change: Lessons for International Refugee Law’ (2017) *Melbourne Journal of International Law* 18 180. Compare also *supra* on Hathaway/Neve, whom proposed responsibility allocation to draw from “Common but Differentiated Responsibility” employed in international environmental law.
²⁵¹ Wall 218.

²⁵² See further *supra* chapter 3.

²⁵³ Other proposals include Betts (2009) on cross-issue persuasion as a tool for achieving increased responsibility sharing; Kevin Appleby (*supra*) giving recommendations for the GRC. See also Nikolas F. Tan and Thomas Gammeltoft-Hansen, ‘The end of the deterrence paradigm? Future directions for Global Refugee Policy’ (2017) *Journal on Migration and Human Security* 5(1) 28.

5 Human Rights of Refugees

The Refugee Compact, while first and foremost aiming at increased responsibility sharing in the context of mass influx or protracted refugee situations, also aims to “strengthen (...) national protection systems and response capacities worldwide that safeguard the rights of refugees”.²⁵⁴ This section seeks to assess and critically analyse what impact for the development of enjoyment of refugee rights the Compact may have in the light of the current legislative and factual situation. It will do so by highlighting rights complexes that have been subject to some of the most important discussions, through tracing the developments in the Compact process.

As opposed to the chapter above which is characterised by the *lack* of an international norm, human rights of refugees are governed by a relatively well-established legal regime regulating state behaviour. What role the Compact may take in the development of the refugee regime in that regard can thus be said to take a *norm-filling*, rather than a norm-creating role, as exemplified in *chapter 3*. In the field of human rights of refugees the potential of the Compact therefore lies in its rather technical and operationalising nature, which can serve to facilitate the realisation of already existing norms.

5.1 Human rights approach in the GCR

The Report of the Secretary General released prior to the adoption of the NYD repeatedly stressed that human rights of refugees must be respected and fulfilled as an important component of the Refugee Compact,²⁵⁵ and that states should move away from the current situation where the rights of refugees are all too often violated.²⁵⁶ The report focuses largely on non-discrimination and inclusion of refugees. To achieve this, the SG called on Member States to develop national policies for inclusion of refugees and migrants, primarily through securing access to all types and levels of education, access to health care and employment at all skill levels for both refugees and host communities.²⁵⁷ Importantly, the SG also implicitly highlighted the importance of overcoming the strict dichotomy between political and legal obligations, through stating that meeting the essential needs of refugees is a *common responsibility* and not merely a legal obligation of receiving countries.²⁵⁸ Furthermore, the report highlighted the importance of being granted the appropriate status connected to the need of international protection, as well as the rights connected to such status, and how the issuance of status documentation enables individuals to access essential services and durable solutions.²⁵⁹ The report of the SG was bold, and in retrospect perhaps held higher expectations of State’s willingness to further encroach on their sovereignty than could reasonably be

²⁵⁴ GCR Draft 1 para 5.

²⁵⁵ See e.g. Report of the Secretary-General, ‘In Safety and Dignity’ paras 53, 55, 57, 58, 68, 70 72, 84 and 102(b)-(d).

²⁵⁶ *Idem* para 1.

²⁵⁷ *Idem* para 65.

²⁵⁸ *Idem* paras 3, 76.

²⁵⁹ *Idem* paras 72, 73, 103(e).

expected. Throughout the drafting process of the Compact itself, different approaches to and emphasis on human rights protection haven been taken. While the approach taken in the initial report of the Secretary General was largely rights-based and held the view that safeguarding human rights of refugees is one of the main aims of responsibility sharing²⁶⁰ the New York Declaration and its annexed Comprehensive Refugee Response Framework, as well as the Programme of Action all take a more careful approach to refugees' human rights.

The New York Declaration set out quite far-reaching standards in terms of refugees' human rights in some regards. First and foremost, it affirms that the Member States in their response will “*fully protect the rights of all refugees and migrants, regardless of status; all are rights holders*”.²⁶¹ Furthermore, it affirms states' obligations of non-discrimination and everyone's right to be recognised as a person before the law.²⁶² The NYD also repeatedly affirms that the Member States commit to ensure full respect and protection for the rights and freedoms of refugees and migrants,²⁶³ and encourages states who have not yet done so, to ratify the Refugee Convention and its 1967 Protocol²⁶⁴ as well as the 1954 Convention relating to the Status of Stateless Persons²⁶⁵ and the 1961 Convention on the Reduction of Statelessness.²⁶⁶

The Compact largely follows the same human rights approach as the New York Declaration. It primarily speaks of “needs” of refugees rather than rights,²⁶⁷ and the general standard of rights protection seems to be to “meet the essential needs” of refugees.²⁶⁸ The lack of a rights-centred approach that this signals was criticised by scholars as well as NGO's after the release of the zero draft Compact.²⁶⁹ The UNHCR on the other hand motivated this approach as a conscious decision not to risk putting up for discussion what already is established international law and policy.²⁷⁰ Considering the plausibly deteriorating effect of norm-filling soft law as explained in chapter 3, this standpoint is understandable. However, when the first revised draft was released after the first round of formal consultations were held in the beginning of the year²⁷¹ the draft Compact underwent a considerable number of positive changes from a human rights perspective, inter alia taking what could be considered a more human rights-centred approach, although in the present authors opinion, not forcefully enough.

One the one hand, some very positive developments can be observed. Of perhaps greatest importance is the change in style of language. What in the Zero Draft Compact was framed in

²⁶⁰ Idem paras 68, 70.

²⁶¹ Idem para 5.

²⁶² Idem paras 13-14.

²⁶³ See idem inter alia paras 5, 11, 21, 22, 26, 66.

²⁶⁴ NYD para 65.

²⁶⁵ Convention relating to the Status of Stateless Persons (adopted 28 September 1954, in force 6 June 1960) 360 UNTS 117.

²⁶⁶ Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

²⁶⁷ See e.g. NYD paras 40, 68, 83 and 86 and CRRF para 5(c).

²⁶⁸ CRRF para 5(c).

²⁶⁹ See e.g. Charlotte Alfred, 'Expert views: How Promising is the Global Refugee Compact Zero Draft' (*Refugees Deeply*, 9 February 2018) <www.newsdeeply.com/refugees/articles/2018/02/09/expert-views-how-promising-is-the-global-refugee-compact-zero-draft> accessed 17 May 2018, views of Sana Mustafa and Behzad Yaghmaian.

²⁷⁰ Charlotte Alfred, 'UN Official: Refugee Compact Will Meet Fear and Ignorance with Facts' (*Refugees Deeply*, 1 March 2018) <www.newsdeeply.com/refugees/community/2018/03/01/u-n-official-refugee-compact-will-meet-fear-and-ignorance-with-facts> accessed 17 May 2018.

²⁷¹ The first round of formal consultations was held in Geneva on the 13 and 14 February 2018.

very vague terms²⁷² now changed to more direct language such as “*States and other relevant Stakeholders will*”, although still without specifying any firm commitments further.²⁷³ Secondly, a strengthened focus on refugee rights as one of four overarching goals of the Compact was included.²⁷⁴ Thirdly, the new draft somewhat increased collective accountability, an issue which had been voiced by many in relation to the zero draft.²⁷⁵ For example, it was clarified that the key indicators to be developed by the UNHCR will be measurable against the overarching goals.²⁷⁶ Together with the more affirmative language which indicates that the main responsibility for realising those aims lies primarily on states, the changes arguably can be conducive to strengthened accountability for human rights compliance. Furthermore, the new draft even included the explicit mentioning of some new substantive rights although without framing them in such language, for example that of food security and nutrition.²⁷⁷

On a more negative note for human rights realisation, the revised draft clarified that the Compact is not to impose any new obligations on host states.²⁷⁸ This was the result of critiques from (mainly) host states, fearing that the Compact seemed mainly to impose new obligations on host states but no measurable commitments for other states.²⁷⁹ Indeed, the CRRF as well as the zero draft could be interpreted to have such effects, suggesting that receiving and host states were to implement a line of measures while other states were subject to more discretionary and less defined commitments.²⁸⁰ Considering the imbalance of refugee distribution on the one hand and the paradoxical legal obligations on host states to provide protection as well as the linked international pressure to do so on the other, those fears are not unfounded.²⁸¹ If the Compact were to impose additional obligations on already struggling host states, that would indeed counteract the overarching aim of achieving responsibility sharing and relieving host states of pressure.

5.2 Human rights of refugees

Human rights of refugees are based mainly on two complementary sources; that of general international human rights law on the one hand, and the 1951 Refugee Convention on the other. International human rights law many times allows for differential treatment of refugees due to their non-citizenship, and generally does not contain any refugee specific rights.

²⁷² Such as “*interested states will*”, “*states could (...) as appropriate*” and “*support could be provided for*”. See GCR Zero Draft e.g. paras 14, 43, 50, 52.

²⁷³ See e.g. GCR Draft 1 para 40.

²⁷⁴ What in the GCR Zero Draft was phrased “*The success of the global compact will ultimately hinge on how much progress is made in the following areas: (...) (2) strengthened national refugee response capacity;*” (para 2) in the GCR Draft 1 was changed to “*(2) strengthened national protection systems and response capacities worldwide that safeguard the rights of refugees;*” (paragraph 5).

²⁷⁵ See e.g. Norwegian Refugee Council and 14 other NGO’s, ‘NGO Reaction to the Zero Draft of the Global Compact on Refugees’ Programme of Action’ (12 February 2018) <www.nrc.no/news/2018/february/ngo-reaction-to-the-zero-draft-of-the-global-compact-on-refugees-programme-of-action/> accessed 17 May 2018, Expectation #2, at 2.

²⁷⁶ GCR Draft 1 paras 5, 91.

²⁷⁷ GCR Draft 1 paras 68-69.

²⁷⁸ GCR Draft 1 para 43.

²⁷⁹ See Volker Türk, ‘Opening Remarks to the Second Formal Consultation on the Global Compact on Refugees’ (UNHCR 20 March 2018) <www.unhcr.org/admin/dipstatements/5ab0bb787/opening-remarks-second-formal-consultation-global-compact-refugees.html> accessed 17 April 2018.

²⁸⁰ Compare e.g. CRRF paras 5-8.

²⁸¹ See supra section 4.1.1.

Generally, states owe human rights obligations towards individuals within their jurisdiction, to the extent the state has chosen to be bound by an international treaty. In this regard international refugee law also serves an additional purpose: at its very heart its aim is to provide surrogate or substitute protection for human rights from the protection state, due to the lack of such protection in the country of origin.²⁸² To that end, the Refugee Convention gives gradual access to rights, based on an incremental attachment between the refugee and the State in question.²⁸³ However, for States not party to the Refugee Convention, which is the case with many of the major refugee hosting countries, their obligations towards refugees must be drawn from international human rights law rather than the Convention.²⁸⁴ This will be explored further in the following sections, as I now turn to assessing some of the substantial rights that have, for one reason or another, been of particular importance throughout the Compact process and examine what impact the Compact can be expected to have for the future development of the refugee regime in general, and for human rights of refugees in particular.

5.3 Access to asylum and non-refoulement

One of the main flaws of the zero draft Compact was that it lacked any reference whatsoever to the cardinal principle of the international refugee regime – the principle of non-refoulement. For obvious reasons its absence received harsh critiques from NGO's,²⁸⁵ academics²⁸⁶ as well as states themselves.²⁸⁷ The principle was not incorporated and acknowledged in the Compact until in the revised draft of 9 March 2018.²⁸⁸

In the last decades states, particularly in the Global North, have taken a plethora of 'legally creative' measures to deter refugees.²⁸⁹ Among the various deterrence means you find everything from interception of migrant boats at the high-seas, push-backs at the territorial borders of EU, erecting razor wired fences, adoption of restrictive domestic asylum laws entailing stricter definitions of refugee status and decreased access to socio-economic and civil rights of refugees, imposing carrier liability, reinstating temporary border controls in the Schengen area²⁹⁰, usage of off-shore processing and detention centres, and restrictions on family reunification rights - the list can be made long. One of the apparent effects of these

²⁸² James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 4f.

²⁸³ Hathaway (2005) 154-56.

²⁸⁴ Karen Kong, 'Refugees' Right to Work in Hong Kong – or Lack Thereof: *GA v Director of Immigration*' (2014) *Oxford University Commonwealth Law Journal*, 14(2) 337, 339.

²⁸⁵ NRC et al. 'NGO Reaction' (supra) Expectation #4 at 2f.

²⁸⁶ See Statement by Alice Lucas in Alfred, 'Expert views' (supra).

²⁸⁷ See e.g. Volker Türk, 'Opening Remarks to the Second Formal Consultation on the Global Compact on Refugees' (UNHCR 20 March 2018) [website] <www.unhcr.org/admin/dipstatements/5ab0bb787/opening-remarks-second-formal-consultation-global-compact-refugees.html> accessed 17 April 2018.

²⁸⁸ In the New York Declaration it is mentioned three times: under 'Commitments that apply to both refugees and migrants' para 24; under 'Commitments for migrants' para 58 and 'Commitments for refugees' para 67. However, it is not mentioned once in the CRRF.

²⁸⁹ See e.g. Gammeltoft-Hansen T and Hathaway JC, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) *Colum. J. Transnat'l L.* 53 235.

²⁹⁰ At the time of writing six EU countries are carrying out border controls on their internal borders due to 'persistent terrorist threats' (France); the 'security situation in Europe and threats resulting from the continuous significant secondary movements' (Austria, Germany, Denmark, Sweden and Norway). See European Commission: Migration and Home Affairs, 'Temporary reintroduction of Border Control' (Last update 25 April 2018) [website] <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en> accessed 25 April 2018.

measures is that refugees access to asylum – i.e. the key to refugee protection – is severely restricted - something that has been noted by many scholars, NGOs and international institutions.²⁹¹ Studies also show how the restrictive measures taken by wealthy countries in the Global North have ripple effects on other, lower-income states whom replicate the negative attitudes towards refugees, resulting in shrinking protection space also there with obvious global repercussions.²⁹² This disheartening trend was also noted by the Secretary-General in his report, whom noted with worry the trend of Member States “*erecting fences and walls in response to large movements of refugees and migrants*” which “*in themselves are inimical to the protection of the dignity and safety of migrants and refugees.*”²⁹³ To that end, he called on Member States to adopt a Refugee Compact stressing the need to guarantee the principle of non-refoulement.²⁹⁴ He specifically highlighted how the principle today is violated in several countries when refugees, asylum seekers and migrants are subject to accelerated returns at borders, without access to adequate safeguards.²⁹⁵

It is a well-established fact of international law that it is a State’s prerogative to control their borders.²⁹⁶ However, this is not an unlimited right of the State – it is largely restricted by international human rights law. The right to seek asylum, recognized by states also in the New York Declaration²⁹⁷ is well-established. The problem of deterrence, however, is not so much that the existence of a right to *seek* asylum is denied, but that *access* to that right is effectively barred which, in principle, is legally permissible. As there is no positive right to *access asylum*, we must look elsewhere to evaluate the compliance of these practices with international law. What first was formulated as “*Everyone has the right to seek and to enjoy in other countries asylum from persecution*” in the legally non-binding UDHR from 1948, has subsequently transformed into a procedural right to seek asylum.²⁹⁸ Thus, while there is no substantial right of asylum, there is a procedural right which guarantees refugees the right to seek asylum and which has been codified in a number of international and regional instruments.²⁹⁹ The prohibition of non-refoulement – found in Article 33 of the 1951 Refugee Convention and often referred to as its cornerstone³⁰⁰ – prevents states from expelling or returning a refugee “*in any manner whatsoever*” to a territory where his or her life or freedom would be threatened on account of a persecution ground.³⁰¹ Owing to the declaratory nature of

²⁹¹ See e.g. Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, ‘The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU’ (2008) *European Journal of Migration and Law* 10 439; Gammeltoft-Hansen and Hathaway, ‘Non-Refoulement’ (2015) (*supra*) 235; UNHCR, ‘Hungary violating international law in response to migration crisis: Zeid’ [website] <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16449&LangID=E> accessed 25 April 2018. See also Karen Hargrave, Sara Pantuliano with Ahmed Idris, ‘Closing Borders - The ripple effects of Australian and European Refugee Policy: case studies from Indonesia, Kenya and Jordan’ Humanitarian Policy Group Working Paper (September 2016) <www.odi.org/sites/odi.org.uk/files/resource-documents/10862.pdf> accessed 25 April 2018.

²⁹² Hargrave, Pantuliano, Idris (*supra*) 1.

²⁹³ Report of the Secretary-General, ‘In Safety and Dignity’ para 37.

²⁹⁴ *Idem* para 102(a) in fine.

²⁹⁵ *Idem* para 33.

²⁹⁶ See e.g. *Hirsi Jamaa and Others v Italy*, ECtHR GC, Application No. 27765/09 (23 February 2012) para 113.

²⁹⁷ Para 67.

²⁹⁸ Gammeltoft-Hansen and Gammeltoft-Hansen (2008) 439.

²⁹⁹ Most notably Convention Governing the Specific Aspects of Refugee Problems in Africa Art II(3) and American Convention on Human Rights “Pact of San José, Costa Rica” (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 Art 22(8).

³⁰⁰ It has many times been suggested that non-refoulement is a norm of customary international law, but there is no consensus as to the existence of such a status, see eg. Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 88-9.

³⁰¹ The prohibition of non-refoulement is also established in a line of international treaties, e.g. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) Art 3;

refugee status, this provision necessarily applies to anyone claiming to be in need of international protection.³⁰² As opposed to most other rights in the Convention, non-refoulement is not dependent on an incremental attachment to the State in question, but applies to everyone within the State's *de facto* and/or *de jure* jurisdiction.³⁰³ In a border control context this means that all such persons must be granted admission into the territory of the state at least until the refugee status assessment is determined, as the opposite would risk infringing Article 33. We may thus speak of a *de facto* obligation to grant admission to anyone claiming asylum needs emanating from the non-refoulement prohibition.³⁰⁴ As jurisdiction (and hence also state obligations owed towards individuals) is “*essentially territorial*”³⁰⁵ – this also means that access to asylum - as well as access to most other rights of refugees - is completely dependent on full adherence to the principle of non-refoulement. Importantly, while the principle of non-refoulement is subject to possible limitations under the Refugee Convention,³⁰⁶ it is considered a non-derogable right under human rights law.³⁰⁷ Furthermore, the principle is generally considered customary law and as such, it applies to all states.³⁰⁸

Thus, the significance of the principle for the maintenance of the global refugee regime cannot be highlighted enough, and the late incorporation of the principle in a global endeavour seeking to be “*a comprehensive refugee response framework for each situation involving large movements of refugees*”³⁰⁹ is therefore quite appalling. The fact that the CRRF and the zero draft evidently ignored the call of the Secretary-General to include it in the Compact can most probably be traced back to the fact that UNHCR in the first draft sought not to put up for discussion already established norms of international law.³¹⁰ But why then, if the principle is already customary law and non-derogable under human rights law and as such applies to all parties to the Compact, is it important to reaffirm it in the instrument itself? As explained in *chapter 3*, primary soft law fills important roles in reaffirming and strengthening already existing norms. As deterrence is increasing and spreading and non-refoulement is violated despite its customary status, a failure to include the norm in the Compact may have had the undesirable effect of states interpreting its absence as a legitimising factor to weaken or dilute the principle. Affirmations of already established principles can thus play a significant role in the continued adherence to the norm, and to

Convention Governing the Specific Aspects of Refugee Problems in Africa, (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, Article II(3); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), (adopted 4 November 1950, entered into force 3 September 1953, amended by Protocols Nos. 11 and 14 on 1 November 1998) ETS 5, Art 3 (The Convention text does not explicitly contain such a prohibition, but the Court has since long interpreted article 3 (prohibition against ill-treatment) to imply, *inter alia*, a prohibition against refoulement. This was first established in *Soering v United Kingdom*, ECtHR, Application No. 14038/88 (7 July 1989).

³⁰² Although being declared a refugee fills an important instrumentalist role, refugee status is essentially determined by *de facto* circumstances, see Hathaway (2005) 370.

³⁰³ This follows from the language and structure of the Convention. See e.g. Hathaway (2005) 160-1.

³⁰⁴ Gammeltoft-Hansen and Hathaway, ‘Non-Refoulement’ (2015) 238.

³⁰⁵ This has been reiterated by, *inter alia*, the ECtHR many times, initially in *Banković and Others v Belgium and 16 other States*, ECtHR GC, App no 52207/99 (12 December 2001) eg. Para 67.

³⁰⁶ Refugee Convention Art 33(2) provides an exception to refugees whom can reasonably be regarded as a threat to national security or whom constitutes a danger to the community and has been convicted for a particularly serious crime.

³⁰⁷ UNHCR ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’ (Geneva, 26 January 2007) <www.unhcr.org/4d9486929.pdf> accessed 17 May 2018, 20 at 10.

³⁰⁸ *Idem* 15-16 at 7.

³⁰⁹ CRRF para 4.

³¹⁰ Compare Alfred, ‘UN Official’ (*supra*).

maintain the centrality of the principle in the existing international refugee regime, why its inclusion in the Compact carries such importance. The fact that states themselves called for its introduction in the instrument must also be considered a progressive step for refugees' rights, as it signals a common understanding of its importance. Once included, the centrality of the principle as the core of the international refugee regime was further highlighted in the subsequent draft of 30 April³¹¹ indicating that it is there to stay.

5.4 Non-penalisation and detention

On a similar note, a discrepancy between the visions of the Secretary-General and the willingness of states to encroach on their sovereignty can be observed in the Compact in relation to the approach taken to refugee arrivals. Evaluating the current situation, Ki-Moon in his report warned about the risks tied to *not* seizing the opportunity to create new approaches to large flows of refugees and migrants, which he predicted would lead to “*greater loss of life and heightened tensions among Member States and within communities.*”³¹² Furthermore he stated “*I am concerned about the growing trend of criminalization of irregular movements. International refugee law is clear that the fact that asylum seekers use irregular means of entry should not be held against them.*”³¹³ For that reason, he called on Member States to ensure that their border procedures are in compliance with international human rights law and refugee law, and to move away from the increasing trend of securitisation and closure of borders, to consider alternatives to detention for purposes of immigration control and to adopt a commitment never to detain children for that purpose.³¹⁴ While the SG called on Member States to end criminalisation practices, the Member States took a much vaguer stance at the New York summit, showing a different approach to the nature of irregular movement and how to deal with it, merely stating that “*we will ‘consider reviewing’ policies that criminalize cross-border movements.*”³¹⁵ The NYD seems to balance between human rights of refugees and migrants and the security of states as two partly opposing values. The document largely takes a securitisation approach and emphasises the rights of states to manage and control their borders and prevent irregular movement, focusing on combating human smuggling, terrorism and illicit trade, with only rather perfunctory references to international human rights law and the protection of refugees in that regard.³¹⁶ The explicitly different objectives showed by the Member States is worrying considering current global developments, where criminalisation of different aspects of irregular movement is becoming all the more common, in particular the use of detention as a deterrence strategy.

While human trafficking is a serious crime, in the global context of deterrence we find ourselves in, human smuggling often constitutes the only way of reaching safety for refugees, as non-entr e and deterrence mechanisms leave large numbers of refugees with no choice but to employ human smugglers and reach their destination irregularly. Without addressing these

³¹¹ GCR Draft 2 para 5.

³¹² Report of the Secretary-General, ‘In Safety and Dignity’ para 7.

³¹³ Idem para 57.

³¹⁴ Idem paras 55-56, 101(b)(ii).

³¹⁵ NYD para 33.

³¹⁶ Compare idem eg paras 24, 27, 34.

obstacles and providing legal access into territories for those in need, preventing and punishing human smuggling arguably is not so much of a cure than as a prolongation of deterrence policy. When forced to pay human smugglers and to endeavour on dangerous journeys, refugees are exposed to a line of vulnerabilities throughout their journey, risking abuse by recruiters, smugglers and exploitative employers and running a high risk of becoming victims of trafficking.³¹⁷ As noted by the UN Human Rights Experts commenting on the Draft New York Declaration short before its adoption:

*(...) combatting smuggling is essentially useless as long as barriers to mobility erected by States create an underground market that criminal gangs will exploit” and that “[d]isrupting the smugglers’ and traffickers’ business models will only happen when States take over the mobility market, by offering safe, regular, accessible and affordable mobility solutions to migrants and asylum seekers.”*³¹⁸

What more is, the increased difficulty of accessing border-crossings, combined with the intensification of measures criminalising irregular movement of migrants and the actions of those who facilitate it, risks limiting access to asylum and all rights connected to such status declaration, as explained above.³¹⁹ Although criminalisation of irregular movement is perhaps even more central to the Migration Compact, it has detrimental effects on refugee policy as well, as a proper distinction between the two groups is not always carried out upon arrival.

It is a well-known phenomena that states in the last decades have changed their attitudes towards migration in general and asylum seekers in particular, inter alia by using penalisation of refugees as a deterrent.³²⁰ Criminalisation of irregular movement is closely connected to a discursive development which produces and reinforces a negative image of refugees as a risk category; as criminals, terrorists and/or as abusers of the system - etymologically evident in the use of vocabulary such as “illegal immigrant” and “clandestine” in both official and unofficial discourse.³²¹ As noted by the Secretary-General “*Xenophobic and racist rhetoric seems to be not only on the rise, but also becoming more socially and politically accepted.*”³²² As populist right-wing winds are blowing across the globe, using refugees as a political vehicle to appeal to xenophobic electorates is becoming increasingly accepted. Discursive portrayals such as the ‘European refugee crisis’ and the like in that sense serves to reinforce and legitimise criminalisation and securitisation of migration. This has been particularly evident in e.g. Australia, where public discourse suggest that mandatory detention of refugees is “*part of the process of sending a signal to the world that you cannot come to this country*

³¹⁷ OHCHR, ‘Statement by the UN human rights mechanisms on the occasion of the UN High Level Summit on large movements of refugees and migrants’ (Geneva, 16 September 2017) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20516&LangID=E> accessed 19 April 2018.

³¹⁸ Ibid.

³¹⁹ Tan and Gammeltoft-Hansen ‘The end of the deterrence paradigm?’ (2017) (supra) 37.

³²⁰ See e.g. Gammeltoft-Hansen and Hathaway, ‘Non-Refoulement’ (2015) (supra).

³²¹ Parkin J, ‘The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research’ CEPS Paper in Liberty and Security in Europe No 61 (October 2013) <www.ceps.eu/system/files/Criminalisation%20of%20Migration%20in%20Europe%20J%20Parkin%20FIDUCIA%20final.pdf> accessed 22 March 2018; 2, 4-7. See also Council of Europe Commissioner for Human Rights (prepared by Elspeth Guild), ‘Issue Paper - Criminalisation of Migration in Europe: Human Rights Implications’ CommDH/IssuePaper(2010)1 <<https://rm.coe.int/16806da917>> accessed 22 April 2018, 4-5.

³²² Report of the Secretary-General, ‘In Safety and Dignity’ para 1.

*illegally*³²³ and that push-backs at sea are absolutely necessary to beat the “scourge” of people smuggling.³²⁴ The Australian approach has gained popularity around the world, in particular in the EU, where countries are taking unilateral measures to contain refugees, and create negative incentives for refugees as push-factors. Of particular concern in the European context are the recent legislative and administrative changes in Hungary. Following a public campaign coloured by heavily xenophobic notions in September 2015, the Hungarian authorities implemented a line of restrictive measures negatively affecting people trying to seek protection in the country. The country closed the remaining strip in the razor wire fence built facing Serbia and Croatia through which most asylum-seekers had come thus far. At the same time a new border procedure came into force, as well as a criminal offence for illegally crossing the fence, punishable by imprisonment up to ten years and which are not suspended in case of the submission of an asylum application.³²⁵ Furthermore, the country uses administrative detention as a deterrent for future refugees.³²⁶ By the end of 2017, nearly 500 asylum seekers were in illegal detention at the border.³²⁷ Several international and regional human rights bodies and NGO’s have noted how the Hungarian practices violate international law.³²⁸ What more is, the ripple effects of deterrence policies seem not only to stretch to other states in the Global North whom have engaged in such measures for the last few decades, but also to low- and middle-income refugee-hosting countries.³²⁹

This trend thus explains why Member States were unwilling to follow the calls of the Secretary-General, but all the same make their omission more serious, as it signals that criminalisation practices will not cease. On the other hand, the NYD and the Compact does acknowledge that all refugees are rights-holders, encompassing also those in an irregular situation, i.e. that all measures under the GCR targeting refugees shall be in compliance with existing human rights law.³³⁰ We will now turn to what protection the international refugee regime offers refugees whom are subject to such criminalising measures to assess what normative impact this omission may have on the future development of the international

³²³ In 2002, in response to a hunger strike in Woomera refugee camp by afghan refugees protesting a governmental decision to suspend the consideration of their applications, prime minister John Howard said "That is not a solution (...) Mandatory detention is part of the process of sending a signal to the world that you cannot come to this country illegally." Patrick Barkham, 'PM calls the asylum protest blackmail' *the Guardian* (Sydney, 26 January 2002) [online] <www.theguardian.com/world/2002/jan/26/immigration.uk> accessed 22 April 2017. See also Hathaway (2005) 375-6.

³²⁴ In 2015, Prime Minister Tony Abbot stated this and continued '*To start a new life, come through the front door, not the back door*' to justify Australia's denial of entry of more than 8000 Rohingya refugees whom were stuck at sea for weeks awaiting access to protection. See Medhora S, 'Nope, nope, nope': Tony Abbott says Australia will take no Rohingya refugees' *the Guardian* (21 May 2015) [online] <www.theguardian.com/world/2015/may/21/nope-nope-nope-tony-abbott-says-australia-will-take-no-rohingya-refugees> accessed 22 April 2018. See also Tan and Gammeltoft-Hansen 'The end of the deterrence paradigm?' (2017) 37.

³²⁵ UNHCR, 'Hungary as a country of asylum: Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016' (May 2016) <www.refworld.org/docid/57319d514.html> accessed 24 April 2018, 19-

³²⁶ Global Detention Project (GDP), 'Immigration detention in Hungary' (September 2016) <www.refworld.org/docid/5864d0fc4.html> accessed 25 April 2018, 1.

³²⁷ Amnesty International, 'Amnesty International Report 2017/18: The State of the World's Human Rights' (2018) <www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF> accessed 25 April 2018, 187.

³²⁸ In March 2017, the ECtHR found that the confinement of two asylum seekers in one such transit zone amounted to arbitrary deprivation of liberty, Ilias and Ahmed v Hungary, ECtHR Fourth Section, Application No. 47287/15 (14 March 2017).

See also the UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein: UNHCR, 'Hungary violating international law in response to migration crisis: Zeid' [website] <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16449&LangID=E> accessed 25 April 2018, and Amnesty International, 'Amnesty International Report 2017/18: The State of the World's Human Rights' (2018) <www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF> accessed 25 April 2018, 187-8.

³²⁹ Hargrave and Pantuliano have conducted a study which shows how e.g. Australian refugee policy is replicated in Singapore, which directly affects national policy in the direction of criminalisation of irregular movement and increasing use of immigration detention. Hargrave, Pantuliano, Idris 9-11.

³³⁰ NYD para 5, GCR Draft 2 para 10.

refugee regime.

5.4.1 Non-penalisation of irregular entry

As noted by the Secretary-General, the Refugee Convention Article 31(1) prohibits the imposition of penalties on refugees on account of their illegal entry or stay. The provision has gained increased importance in light of the development of a global deterrence regime, firstly due to that such measures limit legal access to territories thus provoke increased rates of irregular movement, and secondly because of the interrelated ‘crimmigration’ trend.³³¹ In fact, the non-penalisation provision was incorporated in the Convention due to the very fact that refugees often are faced with the *necessity* to breach immigration laws in order to reach protection.³³² Due to the declaratory nature of refugee status, the right applies to all persons which are physically present in a State’s territory claiming refugee status, until such status has been confirmed or denied.³³³ One of the most prominent problems in this regard is the fact that a proper distinction between asylum seekers/refugees and other aliens is often not carried out, leading to that they risk being punished and detained for irregular entry into the territory of a country in the same way as other irregular migrants, in contravention with international law.³³⁴ However, it follows from the wording of Article 31(1) that it does not protect all refugees at all times from imposition of penalties, but only those who make themselves known to the authorities of the asylum country within a reasonable time, and if the reasons they present for breaching the immigration laws can be justified as necessary in their search for protection.³³⁵ This means that essentially, to enjoy the protection of Article 31(1) the refugee must represent good faith and seek asylum “as soon as possible” – a standard which naturally varies depending on the circumstances. The refugee must also present “good cause” for breaching immigration laws, which as a main rule is satisfied by the fact that the refugee is fleeing persecution, but is not strictly limited to that: also fear of summary rejection at a border may constitute a good cause to breach immigration laws.³³⁶ An additional requirement is that the refugee has to “*com[e] directly from a territory where their life or freedom was threatened in the sense of Article 1*”³³⁷ which in regards to secondary movement essentially means that the refugee, if she or he received any form of protection in the first country of asylum in principle must comply with immigration laws of the third country she or he wishes to enter. On the other hand, if the onwards movement was motivated by a risk of persecution the “coming directly” requirement is fulfilled, as well as if the refugee only spent a short time in another, safe country before arriving in the State in question.³³⁸ An asylum seeker who

³³¹ Cathryn Costello, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees’ co authors: Yulia Ioffe and Teresa Büchsel (UNHCR Division on International Protection, July 2017) PPLA/2017/01 <www.refworld.org/pdfid/59ad55c24.pdf> accessed 24 April 2018, 7. ‘Crimmigration’ has been used in academic literature to describe the trend of increasingly using criminal law, or administrative sanctions which resembles those of criminal law, to manage migration, and which consists of what appears as a collective of disparate law and policy developments which are directed at refugees and other migrants. They include, but are not limited to, tightening of border controls and conditions of entry, increased use of detention and deportation and imposition of criminal sanctions for offences of migration law. See further Parkin (supra) 1.

³³² Hathaway (2005) 387-8.

³³³ Refugee hood is determined by de facto circumstances and is not dependent, in theory, on any official proclamation.

³³⁴ Hathaway (2005) 370.

³³⁵ Idem 388-9.

³³⁶ Idem 393.

³³⁷ Refugee Convention Art 31(1).

³³⁸ Hathaway (2005) 392-6. To exemplify, the Swiss Federal Court has ruled that a refugee from Afghanistan was “coming directly” to Switzerland, although he had spent one month in Pakistan and two days in Italy before arriving in Switzerland.

spent time in another safe country before arriving in the State Party must, however, explain why they were unable or unwilling to seek protection in the first country.³³⁹ In sum, the prohibition to impose penalties applies to all refugees³⁴⁰ who entered illegally due to the risk of being persecuted in the country of origin or transit.

So, what ‘penalties’ are then prohibited to impose on refugees? Legal scholars seem to agree that the notion of ‘penalties’ is to be understood in a broad sense, encompassing any disadvantage imposed on account of illegal entry or presence.³⁴¹ Generally, penalties are prohibited when they are imposed as a result of illegal entry or stay. That is – not only general sanctions for having entered the territory unlawfully are exempted, but all measures which subject refugees to any detriment for reasons of their illegal entry or stay.³⁴² The State in question is thus not allowed to impose penalties in the form of denial of due process rights for the asylum application or to deny a refugee income support benefits solely on the ground of illegal entry or presence.³⁴³ As is suggested by the term “impose”, there is no absolute prohibition against charging or prosecuting refugees for breach of immigration laws, as the immunity of a particular refugee is to be decided by a Court, and not necessarily brings with it any material disadvantage. In principle, as long as no conviction is entered until the person is found not to be a Convention refugee, the provision has not been breached.³⁴⁴ However, if the bringing of charges entails any material disadvantage, it may be considered a ‘penalty’.³⁴⁵ Similarly, the denial of social or economic rights, an obstructed or delayed asylum procedure, or punitive detention imposed for a refugee’s irregular entry, may constitute a breach of Article 31(1).³⁴⁶

Thus, despite the evidently weaker commitment to ‘consider reviewing’ criminalisation of irregular movement in the NYD and the Compact than called for by the Secretary-General, Member States are still subjects of obligations of international law, prohibiting them from imposing any penalties on refugees whom enter their territory in an irregular manner. However, as not all states are Parties to the Convention, the failure to acknowledge this obligation in the Compact may legitimise such practices on their behalf. This is all the more worrying as the criminalisation of irregular movement has global ripple effects. In this regard,

³³⁹ *Idem* 398.

³⁴⁰ Criminalisation increasingly also stretches to third parties assisting refugees to reach a State’s territory. As is obvious from the wording of the provision, article 31(1) does not prohibit penalisation of others than refugees. Hathaway suggests, however, that “*asylum countries should be slow to impose immigration-related penalties on innocent agents of entry.*” The reason for this statement is found in what was said at the negotiations held in the Ad Hoc Committee when drafting the Refugee Convention. The Committee agreed that no provision excluding third parties from penalties should be included, as in some circumstances refugee organisations might “*literally become organizations for the illegal crossing of frontiers*” which would risk exploitation of the refugee. Generally, however, refugee organisations assisting a refugee should not be penalised, something the French Representative considered “*an obvious humanitarian duty*” and which gained countenance from the others. But the Committee decided to leave that acknowledgement only in the records of the meeting and they “*hoped that countries would take them into consideration*”. Thus, such third-party criminalisation is not a violation of article 31, even when assistance is given on purely humanitarian motives. Nevertheless, the drafters of the Convention assumed that States would not penalise persons or organisations assisting refugees, unless there is clear evidence that they acted in an exploitative way or in bad faith. See Hathaway (2005) 403-5; Statement of the French Representative, Mr Juvigny, in UN Ad Hoc Committee on Refugees and Stateless Persons, Second Session: Summary Record of the Fortieth Meeting, (Geneva, 22 August 1950) E/AC.32/SR.40, at 16 and Statement of the American Representative, Mr Henkin, *idem* at 12.

³⁴¹ See *inter alia* Costello ‘Article 31’ (supra) 32-33.

³⁴² Hathaway (2005) 409-10.

³⁴³ *Idem* 409-12.

³⁴⁴ *Idem* 407.

³⁴⁵ Costello ‘Article 31’ 34.

³⁴⁶ Costello ‘Article 31’ 37. Punitive detention will be further dealt with *infra* at 5.4.2.

to reiterate the existing norm of prohibition of penalties for irregular entry could have had the positive effect of affecting non-parties to the Convention. As shown in chapter 3, this type of soft-law provisions may at times have even better effects in terms of compliance, and could thus serve as an important counterweight to the current ‘crimmigration trend’. The fact that the Compact fails to acknowledge the importance of the non-penalisation principle is therefore worrying.

5.4.2 Detention as ‘migration control’

The perhaps most common measure of securitising migration control and criminalising irregular entry, is the use of detention as a punitive measure for breaching a state’s immigration law, which also serves as a deterrence for future arrivals and therefore has gained increased ‘popularity’ among states. As already mentioned, this was also noted by the Secretary-General, whom called on Member States to consider alternatives to detention.³⁴⁷ This call was subsequently taken up by Member States in the NYD whom stated that they will “pursue alternatives to detention while [the reviews of criminalisation measures] are under way”³⁴⁸ and have maintained that position throughout the Compact process, although detention is only mentioned once in the Plan of Action.³⁴⁹

In the EU, detention for purposes of immigration enforcement is increasingly used, and all Member States practice some form of detention for immigration purposes.³⁵⁰ In 2011, a research project funded by EU’s Fundamental Rights Agency found that 17 of the then 27 Member States consider irregular border crossing and/or stay a criminal offence - in most cases punishable by incarceration and/or fines.³⁵¹ Forms of detention varies from detention on arrival to prevent unauthorised entry or assessment of whether grounds for lawful entry prevail, to detention in reception centres while the application for asylum is assessed, to detention for reasons of irregular stay, usually justified by its necessity to carry out a removal decision.³⁵² The institutionalisation of detention as immigration ‘management’ can thus be said to be an inherent part of a policy development which aims at deterring future immigrants and as fast and efficient removal of those whom find themselves on national territory.³⁵³ As mentioned in the section above, ‘punitive detention’ is prohibited under article 31(1). Whether detention is punitive in character depends on its purpose and character and intent on part of the state: in case its objective is similar to those of penal law, such as retribution or deterrence, it is punitive and hence incompatible with article 31(1).³⁵⁴ Practices such as those of Australia³⁵⁵ and certain countries in the EU, in particular Hungary³⁵⁶ but arguably the

³⁴⁷ Report of the Secretary-General, ‘In Safety and Dignity’ paras 56, 101(b)(ii).

³⁴⁸ NYD para 33.

³⁴⁹ GCR para 64.

³⁵⁰ Parkin 12ff.

³⁵¹ European Union Agency for Fundamental Rights (FRA), ‘Fundamental rights of migrants in an irregular situation in the European Union: Comparative Report’ (Luxembourg, 2011) 42-3.

³⁵² Parkin 13.

³⁵³ Idem 14.

³⁵⁴ Costello, ‘Article 31’ 38.

³⁵⁵ See supra at 5.4.

³⁵⁶ Only between 15 September 2015 and 31 March 2016, 2353 persons were convicted for unauthorized entry into Hungary. In some instances the defence relied on article 31(1), but it was struck down by the national courts, inter alia because the defendant could not be considered a refugee due to that an asylum application was not lodged before the trial, the defendant was not considered to ‘come

majority of Member States, thus most likely breach international refugee law, in that detention is used as a deterrent in breach of article 31(1). The inconsistency with international norms of such measures has been highlighted by, inter alia, UNHCR.³⁵⁷

However, detention of refugees other than ‘punitive’ constitutes an exception to the non-penalisation rule, and the second paragraph of the article specifically regulates detention of refugees. Article 31(2) prescribes that restrictions on the refugee’s freedom of movement, such as detention, is an exception to the obligation to refrain from penalisation. Hence, the State has a right to detain a refugee whom entered the territory illegally until his or hers refugee status is regularised or when the refugee is admitted into another country.³⁵⁸ However, the prerogative of states to detain asylum seekers is *situation specific*: only detention which is “necessary” to achieve external relocation is allowed.³⁵⁹ Although article 31(2) itself does not define when detention is necessary or not, its scope is in turn determined by Article 26 of the Convention which accue to all refugees lawfully present in a State Party a right of freedom of movement. As explained supra, a refugee is lawfully present inter alia once he or she has lodged an asylum claim, and a final decision of the refugee’s status is not required.³⁶⁰ Thus, up until an asylum claim and all necessary documentation has been submitted, detention is allowed - if it is ‘necessary’. Once such an application has been filed and the State’s authority has gotten an opportunity to establish the refugee’s identity and circumstances, no restriction on the refugee’s freedom of movement is in principle legitimate as after that point Article 26 allows detention of refugees only on the same grounds as applied to aliens generally.³⁶¹ This does not mean, however, that national legislation can provide it ‘necessary’ that all refugees will be subject to detention on the basis of irregular entry up until that point. The combined effect of article 26 and 31(2), which also follows from international human rights law,³⁶² is that the authorities must justify any decision to detain a refugee for reasons of irregular entry.³⁶³ Detention and other limitations on personal freedom is also governed by international human rights law, primarily the ICCPR articles 9 and 10, which do not prescribe any exceptions for non-citizens. Detention shall be a measure of last resort and the default position liberty. As such, detention under international human rights law must pursue a legitimate aim, and be necessary to pursue that aim, to comply with international refugee law.³⁶⁴

directly’ from the country of origin and because the defendant allegedly did not contact the authorities immediately when arriving in the territory. See further UNHCR, ‘Hungary as a country of asylum’ (supra) 22-3.

³⁵⁷ See UNHCR, ‘Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012) <www.refworld.org/docid/503489533b8.html> accessed 24 April 2018, para 32.

³⁵⁸ Hathaway (2005) 412-414.

³⁵⁹ *Idem* 414.

³⁶⁰ *Idem* 417-18.

³⁶¹ *Idem* 419-22.

³⁶² A line of instruments regulate the legality of restrictions on freedom of movement, see inter alia International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Arts 9 and 10 and ECHR Art 5.

³⁶³ Hathaway (2005) 423. The UNHCR ExCom has expressed that “(...) *detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order;*” UNHCR (ExCom) ‘General Conclusion on Detention of Refugees and Asylum-Seekers No. 44’ (adopted at its Thirty-Seventh Session, 13 October 1986) UN Doc A/41/12/Add.1 <<http://www.unhcr.org/4aa764389.pdf>> accessed 23 April 2018, at (b).

³⁶⁴ See e.g. UNHCR, ‘Detention Guidelines’ (supra) para 14.

The Compact as it stands today is thus evidently weaker in its commitments than what called for by the SG, but in principle stands in accordance with international refugee law which allows for detention of refugees in certain circumstances. However, it does not distinguish between lawful and unlawful detention. On the other hand, as mentioned initially in this chapter the NYD and the Compact both acknowledge that all refugees are rights-holders, encompassing also those in an irregular situation,³⁶⁵ which in the light of the current criminalisation trend and increased used of detention as ‘migration control’ send partly contradictory messages. For the sake of clarity, and to give the assertion that that “all are rights-holders” a meaningful content, the Compact should spell out that Member States commit to refrain from criminalisation as a means of migration control and expressly state that detention for the purpose of penalisation for irregular entry as well a deterrent for future refugee arrivals is unlawful. Whether an aware act on behalf of states or not, the omission may run the risk of distorting the interpretation of existing standards governing refugee detention and may serve to legitimise current practices of using refugee detention as a deterrent and migration control. This is thus another opportunity for the Compact to play a clarifying role in regards to established standards. The fact that it does not seize this opportunity may arguably have a deteriorating effect on international human rights protection for refugees.

5.4.3 Detention of refugee children

The unquestionably most contentious issue at the negotiations leading up to the New York Declaration, and perhaps also the issue which has received most criticism after the adoption of the document, is that of detention of children.³⁶⁶ The Secretary-General in his report had called on states to “*consider alternatives to detention for purposes of immigration control and to adopt a commitment never to detain children for this purpose.*”³⁶⁷ In the subsequent New York Declaration, after a suggestion by the United States,³⁶⁸ this standard was altered to “*detention for the purposes of determining migration status is **seldom**, if ever, in the best interest of the child(...)*”.³⁶⁹ The main reason for the massive dissension on this formulation lied in differences of the age definition of a child. Some states, however, contended that detention of children is at times necessary and appropriate to protect children, e.g. unaccompanied minors.³⁷⁰ That position is firmly contested by, inter alia, UNHCR.³⁷¹ Considering the efforts to alter the international human rights standard in this field, the new formulation can be seen as a step back.³⁷² In fact, ahead of the 2016 Summit, a line of UN

³⁶⁵ NYD para 5, GCR Draft 2 para 10.

³⁶⁶ The Overseas Development Institute (supra).

³⁶⁷ Report of the Secretary-General, ‘In Safety and Dignity’ paras 56 and 101(b)(ii) (my emphasis).

³⁶⁸ Sengupta (supra)

³⁶⁹ NYD para 33 (my emphasis).

³⁷⁰ The Overseas Development Institute.

³⁷¹ See UNHCR (Division of International Protection) ‘UNHCR’s position regarding the detention of refugee and migrant children in the migration context’ (January 2017) <www.unhcr.org/protection/detention/58a458eb4/unhcrs-position-regarding-detention-refugee-migrant-children-migration.html> accessed 17 May 2018, sections 4-6.

³⁷² See, for example Goal No 1 (End detention of children) of UNHCR ‘Beyond Detention 2014 – 2019: A global Strategy to Support Governments to end the Detention of Asylum-seekers and Refugees’ (UNHCR June 2014) <<http://www.unhcr.org/53aa929f6>> accessed 17 April 2018 7, 17-18. See also the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) articles 22 and 37(b), which allows for detention of refugee children, although only as a ‘measure of last resort and for the shortest possible time’ and if it is in the best interest of the child. The UN Special Rapporteur on torture found that the deprivation of liberty of children may sometimes violate their human rights, see UN Human Rights Council, ‘Report of the Special Rapporteur on torture

Human Rights Experts³⁷³ expressed their grave concern over the draft Declaration in reference to children in detention, and expressly referred to the Committee of the Rights of the Child and other human rights mechanisms, whom “*have unequivocally declared that immigration detention can never be in the best interest of a child and that immigration detention of children, whether unaccompanied or together with their families, constitutes a violation of the rights of the child.*”³⁷⁴

The provision is hence an evident example of how the Compact can serve a norm-filling role and has the potential not only to change current standards in a positive direction of refugee protection, but also can stall a progressive development of rights, or even bluntly decrease human rights protection.³⁷⁵ On the other hand, an alternative interpretation of the provision may lead to slightly different conclusions. While the Secretary-General called on states to adopt a self-standing blanket ban on the issue, the NYD took a different approach. The provision in question continues

“(...) *we will use [detention of children] only as a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child, and we will work towards the ending of this practice.*”³⁷⁶

Notwithstanding that it adopted a clearly lower standard than called for, it refers to an existing legal principle (the best interest of the child) and provides a more specific understanding of international law governing such behaviour. As explained in chapter 3, an instrument or provision may gain its character of soft law, thus normative authority, through its normative *content*. Through referring to an existing legal standard and develop on its substantive content, although less encompassing than a prohibition, the NYD provision may in a sense even be more powerful than the formulation of a “new” standard of an absolute prohibition. The current formulation may instead serve as an interpretative aid to solidify existing legal standards, and could therefore potentially have a better outlook than if trying to force a “new” rule of international law.

and other cruel, inhuman or degrading treatment or punishment’ (5 March 2015) A/HRC/28/68, paras 59-62 <www.refworld.org/docid/550824454.html> accessed 17 April 2018. The ECtHR has several times found administrative detention of children for immigration purposes to be so severe that it amounted to a violation of articles 3 and 5 § 1 (f), see for example *Popov v France*, ECtHR Fifth Section, Application Nos. 39472/07 and 39474/07 (19 January 2012).

³⁷³ Special Rapporteur on trafficking in persons, especially women and children, Ms. Maria Grazia Giammarinaro; Special Rapporteur on the human rights of migrants, Mr. François Crépeau; Special Rapporteur on internally displaced peoples, Mr. Chaloka Beyani; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr. Mutuma Ruteere; Chair of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Mr. Jose Brillantes; Chair of the Committee on the Rights of the Child, Mr. Benyam Dawit Mezmur; Chairperson of the Committee on the Elimination of Racial Discrimination, Ms. Anastasia Crickley. The Statement was also approved by the *Committee on the Rights of the Child, Chair of the Committee on the protection of the Rights of All Migrant Workers and Members of their Families, CERD, SR on Trafficking, Racism, Migrants and IDPs.*

³⁷⁴ OHCHR, ‘Statement by the UN human rights mechanisms on the occasion of the UN High Level Summit on large movements of refugees and migrants’ (Geneva, 16 September 2017) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20516&LangID=E> accessed 19 April 2018.

³⁷⁵ Compare supra chapter 3.

³⁷⁶ NYD para 33.

5.5 Access to work

This section focuses on a completely different aspect of refugees' human rights, namely the right of access to work. The right to work has been a hot topic in general global refugee policy recently, in particular in relation to the Jordan Compact and similar agreements between EU and refugee hosting countries.³⁷⁷ The importance of work rights has been voiced by numerous commentators on the Compact too, and it has been one of its main subjects of discussion.³⁷⁸ As it currently stands, the normative value of the provision dealing with work in the Compact is weak: it does not impose any obligations nor incitements to amend national legislation so as to include a right to work of refugees. Nor does the Compact recognise existing State obligations or the obligatory character of work rights under international law. While the NYD, which is not formally part of the final Compact, vaguely states that “*we encourage Governments to consider opening their labour markets to refugees*”³⁷⁹, the Programme of Action merely invites interested states and relevant stakeholders to “*promote economic opportunities for host communities and refugees, including specifically for women, youth and those with disabilities, through enabling policy, legal, and administrative frameworks*”.³⁸⁰ Instead the Compact sets out more technical and instrumental provisions, such as that states will encourage development of funds and instruments to attract private sector and infrastructure investment, facilitate access to affordable financial products such as bank accounts, savings, credit, insurance and payments. Furthermore, it sets out that states will negotiate preferential trade agreements and facilitate access to supply chains for host communities and refugees and promote access to different technologies so as to enable online livelihood opportunities.³⁸¹ Again, the Compact takes a pragmatic and technical approach setting out specific measures which can facilitate the realisation of existing norms, rather than reaffirming existing international legal principles. However, no matter what incentives for private actors or facilitating measures one creates, such are of no use if the state in question does not allow for refugees to work in the first place.

Access to wage-earning employment is crucial to refugee self-sufficiency – one of the main aims of the GRC. It can also ease the pressure on host states – another of the main aims of the Compact.³⁸² This is so firstly as less governmental handouts are needed to support working refugees and secondly, since their activity stimulates the national economy.³⁸³ Allowing refugees to enter the job market can be highly beneficial to the host state in economic terms.³⁸⁴ Refugees contribute to national economies through engaging in and expanding local

³⁷⁷ See e.g. Betts and Collier (2017) (supra).

³⁷⁸ See inter alia Jennifer Gordon, ‘For Refugee Compact to Talk jobs, it Must Listen to Migration Compact’ (*Refugees Deeply*, 5 March 2018) [website] <www.newsdeeply.com/refugees/community/2018/03/05/for-refugee-compact-to-talk-jobs-it-must-listen-to-migration-compact> accessed 18 May 2018 and Türk (2016).

³⁷⁹ Para 84.

³⁸⁰ GCR Zero Draft e.g. para 54. The formulation remained unaltered in content in GCR Draft 1.

³⁸¹ GCR Zero Draft para 54.

³⁸² GCR Draft 2 para 7(i)-(ii).

³⁸³ Asylum Access and the Refugee Work Rights Coalition (Anna Wirth, Cara Defilippis and Jessica Therkelsen), ‘Global Refugee Work Rights Report 2014’ (September 2014) <http://asylumaccess.org/wp-content/uploads/2014/09/FINAL_Global-Refugee-Work-Rights-Report-2014_Interactive.pdf> accessed 13 April 2018, 8.

³⁸⁴ That self-reliance of refugees contributes to the development of local economies was acknowledged e.g. by the Secretary General in his report ‘In Safety and Dignity’ para 80.

markets, and can contribute to increased domestic and cross-border trade. Growing economies needing a strong labour force benefit heavily from the increased workforce that refugees represent and self-employed refugees create job opportunities and expand markets.³⁸⁵ Wage-earning employment can also be crucial for refugees' ability to enjoy *other rights*, something that has been recognised by several authoritative sources. In fact, this was recognised already by State representatives in the Ad Hoc Committee discussing the draft to the Refugee Convention.³⁸⁶ Its significance has also been emphasised by the UN Committee on Economic, Social and Cultural Rights (CESCR) stating that the right to work "*forms an inseparable and inherent part of human dignity*".³⁸⁷ Furthermore, there are numerous accounts of refugees themselves, stating that the ability to work is also imperative to achieve personal agency, security and possibilities to plan for the future.³⁸⁸

Currently, the right to work for refugees is severely restricted around the world, and violations of refugees' right to work globally are manifold. Most host countries today place serious restrictions on the right to work.³⁸⁹ While legislative barriers are perhaps the main concern, administrative and social obstacles also often make it impossible for refugees to access employment.³⁹⁰ Often-mentioned problems are lack of knowledge of the local language and culture, as well as barriers to cultural assimilation, at times due to xenophobia and discrimination.³⁹¹ The reasons for barring refugees from work are multivariate. Some states are of the perception that allowing refugees to work threatens the local workforce and functions like an unwanted 'pull-factor'.³⁹² The latter position seems to carry little veracity, however.³⁹³ As Betts and Collier (and many others with them) have noted, refugees' incitements for moving is widely different from that of 'regular migrants', whom are seeking a better life elsewhere. Refugees, on the other hand, are *moving away* from persecution seeking protection elsewhere. What is decisive for refugees' destination is generally location, rather than national economy or access to work, leading to that most refugees flee to neighbouring countries.³⁹⁴ Furthermore, the majority of refugees do not live in camps, but in

³⁸⁵ Asylum Access and the Refugee Work Rights Coalition (supra) 8.

³⁸⁶ UN Ad Hoc Committee on Refugees and Stateless Persons, Second Session: Summary Record of the Thirty-Seventh Meeting, (Geneva, 26 September 1950) E/AC.32/SR.37 at 'Article 12: Wage-earning employment' subpara 3: "Mr HENKIN (United States of America) (...) wished to stress that without the right to work all other rights were meaningless. Without that right no refugee could ever become assimilated in his country of residence."

³⁸⁷ UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 18: The Right to Work (Art. 6 of the Covenant)' (6 February 2006) E/C.12/GC/18 <www.refworld.org/docid/4415453b4.html> accessed 12 April 2018. "(...) The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community."

³⁸⁸ Norwegian Refugee Council (Claire Beston and Leeam Azoulay), 'Putting Protection at the Heart of the New Global Compact: Refugee Perspectives from Ethiopia, Kenya and Djibouti' (December 2017) 53 <www.nrc.no/resources/reports/putting-protection-at-the-heart-of-the-new-global-compact/> accessed 16 April 2018.

³⁸⁹ Betts and Collier (2017) 7, 156f. Refugees have generally been granted relatively free legal access to labour markets in developed countries, although often restricted - if not by legal barriers then by practical obstacles such as of language, lacking social connections, relatively high age when establishing on the labour market and discrimination. See generally Hathaway (2005) 734-8.

³⁹⁰ UNHCR/Jackie Keegan 'UNHCR and ILO sign memo on helping refugees to find work' (1 July 2016) <www.unhcr.org/afr/news/latest/2016/7/577676eb4/unhcr-ilo-sign-memo-helping-refugees-find-work.html> accessed 13 April 2018.

³⁹¹ Asylum Access and the Refugee Work Rights Coalition (supra) 5.

³⁹² See e.g. Kong (supra) 348.

³⁹³ There is no evidence showing that allowing refugees to work would cause a higher number of refugees to seek protection in a particular country. See Possum Comitatus, 'Push vs. Pull – Asylum Seeker Numbers and Statistics' (Crikey, 19 October 2009) <<https://blogs.crikey.com.au/pollytics/2009/10/19/push-vs-pull-asylum-seeker-numbers-and-statistics/>> accessed 13 April 2018. See also Asylum Access and the Refugee Work Rights Coalition 8.

³⁹⁴ Betts and Collier (2017) 30-33. This can be illustrated by the fact that 2/3 of the worlds displaced persons are located within their country of origin, see UNHCR 'Global Trends: 2016' 2.

urban areas.³⁹⁵ Labour markets in cities may be more diverse than on the countryside, but lack of access to clear legal status and economic and social rights make it difficult to access work even where refugees are allowed to work. Refugees in urban areas are exposed to somewhat different vulnerabilities for a line of reasons. They are often left to the complete mercy of the employer who hires them which can lead to unfair competition and unauthorised and unprotected jobs.³⁹⁶ When refugees are excluded from the formal work sector due to legislative and/or other barriers to legal work, it pushes refugees into the informal market, forcing them to take low-paid and possibly unsafe and even dangerous jobs, which likely decrease wages for both refugees and host communities.³⁹⁷ Thus, in opposition to what has been brought forward as reasons for barring refugees from access to work, the same outcomes may be an effect of the restrictive policies themselves. Instead of protecting national economies and work-opportunities for citizens, barring refugees from the labour market may cause lower wages for nationals and less increase in national economy as would have been the case if refugees were allowed to work.

For these reasons, a forceful recognition of the importance of access to work is of paramount importance to reach the goals sought by the Refugee Compact, something which also has been recognised by several commentators.³⁹⁸ If the Compact is truly seeking to reach higher levels of refugee self-sufficiency and strengthened national protection systems that safeguard the rights of refugees, the importance of removing legal and other barriers to refugees' access to work should thus be a top priority, something which was also recognised by the Secretary General in his report, stating that *"The self-reliance of refugees should be facilitated by (...) a commitment to expand access to legal employment wherever possible."*³⁹⁹

5.5.1 Legal framework

Under the Refugee Convention refugees have a right to work once they are lawfully staying⁴⁰⁰ in a State Party to the Convention, in line with *"the most favourable treatment accorded to nationals of a foreign country in the same circumstances"*.⁴⁰¹ Refugees may hence have to qualify for employment permissions and the like in essentially the same way as other foreign nationals, but only allows requirements governed by the most-favoured-national treatment,

³⁹⁵ Betts and Collier (2017) 7.

³⁹⁶ Hathaway (2005) 734. ILO, 'The access of refugees and other forcibly displaced persons to the labour market: Background paper and draft ILO guiding principles for discussion at the ILO tripartite technical meeting on the access of refugees and other forcibly displaced persons to the labour market' (Geneva, 5–7 July 2016) TMAPRLM/2016 <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/meetingdocument/wcms_490753.pdf> accessed 13 April 2018, at 16.

³⁹⁷ UNHCR/Jackie Keegan, 'UNHCR and ILO sign memo on helping refugees to find work' (supra). See also Asylum Access and the Refugee Work Rights Coalition 8.

³⁹⁸ See e.g. Gordon, 'For Refugee Compact to Talk jobs'.

³⁹⁹ Report of the Secretary-General, 'In Safety and Dignity' para 81.

⁴⁰⁰ This level of attachment is determined by *de facto* circumstances of the refugees stay, which must be officially sanctioned and ongoing in practical terms, but does not require habitual residence, a prolonged stay or permanent residence. It also includes those refugees who are receiving 'temporary protection', and have *de facto* settled in the host state.⁴⁰⁰ However, due to the provisional nature of the presence of a refugee whose status has yet not been regularised, a refugee whom have not yet had their status verified is not considered as *lawfully staying* and thus do not enjoy the more integration-oriented rights attached to such status, such as the right to a wage-earning employment. This applies as long as the determination procedure is not unduly prolonged or if determination procedures systematically in a State are not complying with reasonable processing times. In that case, a State cannot rely on the lack of status recognition as precluding "lawful stay" but the *de facto* stay in the State determines, see Hathaway (2005) 730, 755.

⁴⁰¹ Refugee Convention Art 17(1). The same standard applies for freedom of association, Art 15. To impose a higher standard of treatment as regards employment rights, was motivated by the importance of allowing refugees the right to work, and the states' role as surrogate grantors for rights, in place of the refugees' country of origin. Hathaway (2005) 231.

i.e. employment rights shall be extended to refugees in an equally beneficial way as they are to nationals of any foreign state.⁴⁰² As the most-favoured-national standard is prone to change due to e.g. the closing or termination of bilateral labour agreements, so does the standard of treatment in regards to refugees right to engage in wage-earning employment.⁴⁰³ Refugees shall also, once lawfully staying in a State Party, be accorded the same treatment as nationals in relation to labour legislation and social security, protecting e.g. levels of remuneration, hours of work and holidays with pay.⁴⁰⁴ As regards professional practice which requires a certification of some kind such as within the fields of medicine, law, engineering, architecture etc., refugees shall have the same right to exercise those as “*aliens generally in those circumstances*” where their diploma/certification or similar is recognised by the competent authorities in the State in question.⁴⁰⁵

That goes for the right to engage in wage-earning employment for refugees. However, already refugees that are merely *lawfully present*⁴⁰⁶ in a State Party to the Refugee Convention have the right to undertake independent entrepreneurial activity, and ‘*to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies*’.⁴⁰⁷ This is of paramount importance for refugees whom have not yet received any declaration as to their status, as the right to self-employment arises already once the refugee is merely *lawfully present* in the State, as opposed to the right to engage in wage-earning employment which generally requires documented status determination.⁴⁰⁸ As with most rights in the Convention, however, the standard of compliance is “*treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances*”. Consequently, a State which does not allow any non-citizens to engage in self-employment, can rightly deny refugees the same right without being in breach of the Convention.⁴⁰⁹

The ICESCR also safeguards work rights for refugees.⁴¹⁰ It protects “everyone” from undertaking any forced work, and is generally understood to also protect from unfair denial of

⁴⁰² Idem 205, 230.

⁴⁰³ Idem 234.

⁴⁰⁴ Refugee Convention Art 24. A similar right is contained in the ICESCR, which in certain aspects offer broader protection than the Refugee Convention article 7. See Hathaway (2005) 770.

⁴⁰⁵ Refugee Convention Art 19(1). See generally Hathaway (2005) 786-800.

⁴⁰⁶ Also lawful presence is determined by de facto circumstances and encompasses a wide array of situations. Firstly, presence is lawful if the entrance of the refugee has been officially sanctioned by State authorities, i.e. that the person has been legally admitted to the country, if only so for a couple of hours. Secondly, a refugee is lawfully present during the time which he or she is awaiting an assessment of his or her refugee status, irrespective of whether the initial entrance was officially sanctioned. The only requirement is that the person in question has actually filed for regularisation of her status and is pending an assessment of her case. The same applies for a person who has applied for refugee status and whose application was denied, for the period of exhaustion of the time of appeal or review. Once that time has passed, but no appeal has been filed, the person is not longer lawfully present. Lastly, in countries which temporarily or permanently have suspended formal determination procedures, for example due to a mass-influx or simply because the State has no such mechanism in place, refugees shall also be deemed lawfully present. This follows from the fact that entitlement under the Convention does not depend on the formal refugee status determination, but on de facto circumstances, Hathaway (2005) 174-185.

⁴⁰⁷ Refugee Convention Art 18.

⁴⁰⁸ Status determination is required unless the State is unable or unwilling or the process for other reasons is unduly prolonged, see supra. See also Hathaway (2005) 720, 725.

⁴⁰⁹ Idem 726-7.

⁴¹⁰ Article 6 reads: “Article 6 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”

work. Unfortunately, that is about as far as the absolute nature of that provision goes. ICESCR Article 6, which is the case for most economic and social rights⁴¹¹, is subject only to progressive and non-discriminatory implementation, but not to any set result.⁴¹² In practical terms, this means that a higher level of implementation is expected from states with more resources than from those with more limited resources. What more is, economic rights of non-citizens are expressly excluded from any obligatory implementation for developing countries.⁴¹³ With exception of the “minimum core obligation” of the provision, which reaches only to non-discrimination and equal protection of employment⁴¹⁴ but does not imply an obligation to grant non-citizens a right to work, developing states may hence choose not to grant non-citizens a right to work under the ICESCR.⁴¹⁵ Thus, no very valuable right *to access work* can be derived from ICESCR in most countries where the majority of refugees are situated.⁴¹⁶ In that sense, the Refugee Convention provides essentially the only substantive protection of the right to work for refugees, as it does not allow for any relativity in implementation based on economic development.

In conclusion, the right to work emanating from the Refugee Convention is relatively strong. However, not all countries are State Parties to the Refugee Convention and refugees located in those countries hence instead have to rely on international human rights law for a right to work. At the time of writing, 148 states are parties to the Refugee Convention, whereas the ICCPR and ICESCR have 170 and 167 parties, respectively.⁴¹⁷ The states hosting the highest numbers of refugees in 2016 were Turkey (2,9 million people), Pakistan (1,4 million), Lebanon (1,0 million), Islamic Republic of Iran (979,400), Uganda (940,800) and Ethiopia (791,600).⁴¹⁸ Turkey, the country hosting most refugees in the world and more than twice as many as the second largest refugee host Pakistan, *is* a State Party to the Convention, but exercises a geographical limitation making it non-applicable to most of the world's refugees.⁴¹⁹ Neither Pakistan nor Lebanon (the world's second and third largest refugee hosting countries) are State Parties to the Refugee Convention and/or its 1967 Protocol. Alarming, Pakistan is not a State Party to the ICESCR, either. The world's 4th, 5th and 6th largest refugee hosting

⁴¹¹ Article 2(1) ICESCR. The obligations of State Parties to the Covenant are relative to the availability of resources and development of societal structures. States are only undertaking to *'take steps (...) to the maximum of its available resources (...) with a view to achieving progressively the full realisation of the rights recognised in the (...) Covenant'*. The positive nature of the steps required to implement the right to work, e.g. legislative changes, motivates progressive implementation, rather than immediate which may be required for negative obligations. See generally Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Bloomsbury Publishing, 2009) 49-104.

⁴¹² Hathaway (2005) 740.

⁴¹³ ICESCR article 2(3) reads: "3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

⁴¹⁴ UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 18: The Right to Work (Art. 6 of the Covenant)' (6 February 2006) E/C.12/GC/18 para 31 <www.refworld.org/docid/4415453b4.html> accessed 12 April 2018.

⁴¹⁵ See Ssenyonjo (supra) 66-7 and Hathaway (2005) 740.

⁴¹⁶ In 2016, developing countries were hosting 84 % of the world's refugees under UNHCR's mandate, and the least developed countries in the world hosted 28 % of the global total. See UNHCR 'Global Trends 2016' 1.

⁴¹⁷ United Nations Treaty Collection, 'Depositary, Status Of Treaties: Multilateral Treaties Deposited with the Secretary-General' <https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en> accessed 13 April 2018. Chapter IV(3) International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) and (4) International Covenant on Civil and Political Rights (New York, 16 December 1966), and Chapter V(2) Convention relating to the Status of Refugees (Geneva, 28 July 1951).

⁴¹⁸ UNHCR 'Global Trends 2016' 3.

⁴¹⁹ Turkey expressly adopted article 1(B)(a) when acceding the 1967 Protocol, with the implication that the geographical limitation 'events occurring in Europe before 1 January 1951' applies. See United Nations Treaty Collection, 'Depositary, Status Of Treaties, Multilateral Treaties Deposited with the Secretary-General, Chapter V: Refugees and Stateless Persons' 2. Convention relating to the Status of Refugees (Geneva, 28 July 1951) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en> accessed 12 April 2018.

countries (Iran, Uganda and Ethiopia) *are* State Parties to the Convention and/or the 1967 Protocol, but all of them have entered reservations specifically in relation to article 17 which are strong enough to allow them to exclude refugees from wage-earning employment. Iran has reserved themselves to consider article 17 altogether as not being any more than a recommendation; Uganda has entered a reservation to article 17 in respect to the standard of compliance which denies refugees the “most favoured national” treatment⁴²⁰; and Ethiopia entered a reservation stating that they consider article 17(2) to be a recommendation and not a legally binding obligation.⁴²¹ The effect is that an international human right to wage-earning employment under the Refugee Convention is not accorded to refugees in the six major refugee hosting countries of the world. Refugees in those countries hence rely on the right to work contained in the ICESCR, which in practice means no meaningful right to work at all.⁴²²

5.5.2 The role of the GCR

The Compact could hence play a crucial role for tens of millions of refugees whom at the moment cannot claim a right under international law to access work, but fails to clarify any new standards or even to reaffirm the existence of a right to work. Committing to providing a right to access work for refugees would also considerably promote the overarching aims of the Compact.

However, although often the primary step to even enter the labour market, committing to an international obligation to provide a legal right to access to work has no value in itself. Furthermore, and as outlined supra, the obstacles refugees face to access work are not only legal but often owe to other obstacles. While not clarifying any new standards in this regard, what the Compact does do, is to focus more on realisation of work. The non-normative, more technical character of the Compact may therefore be beneficial, as it specifies particular measures which could be employed to engage refugees more efficiently in wage-earning employment, thus indirectly encouraging and facilitating the realisation of the right. Instead of calling upon states to commit to formal legal obligations it takes a more informal approach to spur action. The Compact may hence, despite the failure to call upon states to commit to an international obligation to allow refugees to work, indirectly have more powerful effects than if it were merely reiterating a formal legal obligation without specifying it further.

This can be seen in that despite the normatively weak language of the Compact, several CRRF pilot countries have amended their national legislation so as to allow refugees to work, or are in the process of doing so. Already at the Leader’s Summit on Refugees on 20 December 2016 – the first opportunity to make pledges towards the realisation of the Refugee

⁴²⁰ Declaration entered by Uganda “(...) (6) *In respect of article 17: The obligation specified in article 17 to accord to refugees lawfully staying in the country in the same circumstances shall not be construed as extending to refugees the benefit of preferential treatment granted to nationals of the states who enjoy special privileges on account of existing or future treaties between Uganda and those countries, particularly states [sic!] of the East African Community and the Organization of African Unity, in accordance with the provisions which govern such charters in this respect.*”

⁴²¹ See Reservations entered by Ethiopia, Iran and Uganda in United Nations Treaty Collection, ‘Depositary, Status Of Treaties, Multilateral Treaties Deposited with the Secretary-General, Chapter V: Refugees and Stateless Persons’ 2. Convention relating to the Status of Refugees (Geneva, 28 July 1951) <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en> accessed 12 April 2018.

⁴²² See supra. See also Hathaway (2005)) 741-3.

Compact – significant pledges to enact policy changes were made that will improve access to work if implemented.⁴²³ Take the example of Ethiopia which, as already mentioned, is a State Party to the Refugee Convention but who keeps a reservation to Article 17. So far, the country has exercised the reservation in national legislation - the 2004 Refugee Proclamation⁴²⁴ - so that refugees are subject to the same restrictions to work as other foreigners,⁴²⁵ which in practice excludes them from the right to work, to join trade unions, to exercise collective bargaining, to strike and to own enterprises.⁴²⁶ At the Leader’s Summit on 20 December 2016 Ethiopia pledged to provide work permits to refugees and persons holding permanent residency, as well as to refugee graduates in the areas where foreign workers are allowed to work, by giving priority to qualified refugees. Furthermore, they committed to provide 10.000 hectares of farmable land and to let 20.000 refugee and host community households, totalling up to a 100.000 persons, crop that land - provided they receive external financial assistance. Lastly, Ethiopia also pledged to ‘potentially’, together with international partners, create work opportunities for both nationals and refugees through building industrial parks.⁴²⁷ To materialise the commitments made at the September Summit Ethiopia has subsequently decided to amend the 2004 Refugee Proclamation and draft a new Refugee Regulation, planned to be finalised in 2018, which will grant refugees the right to work, as well as access to education and freedom of movement.⁴²⁸ This shows how the Compact is already having progressive effects. At the 2016 Refugee Summit several significant pledges to enact policy changes of similar kind were made, that in practical terms will enable a total of one million refugees to pursue lawful employment and livelihood activities.⁴²⁹

These positive developments, however, are the product of a few countries one-time voluntary pledges to amend refugee policy, and not necessarily the doing of the Compact *per se*. How much of these positive developments that can be traced to the Refugee Compact and what represents general developments is hard to say. For example, in January 2016 i.e. before the adoption of the NYD Turkey, the largest refugee host in the world and which in practice is not bound by the Refugee Convention, enacted a by-law which allows Syrian refugees to work legally. In April the same year they extended the right to work to all refugees. Also Jordan has taken a number of steps towards increased refugee access to work, for example through temporarily waiving work permit fees.⁴³⁰ The latter is the doing of the so-called Jordan Compact, an agreement between Jordan and the International Community, prompted by the Syrian conflict and the subsequent refugee influx to Europe.⁴³¹ It was kicked off at the

⁴²³ UNHCR ‘Summary Overview Document: Leader’s Summit on Refugees’ (supra) Some of the pledges were made in advance or immediately after the Summit.

⁴²⁴ Proclamation No. 409/2004 of 2004 (Refugee Proclamation) (proclamation made 15 June 2004, adopted 19 July 2004) <www.refworld.org/docid/44e04ed14.html> accessed 18 April 2018.

⁴²⁵ *Idem* Art 21(3).

⁴²⁶ Abraham Yohannes, ‘General Observations on Ethiopian Refugee Proclamation No. 409-2004’ (Ethiopian Legal Brief, 12 February 2017) [website] <<https://chilot.me/2017/02/general-observations-on-ethiopian-refugee-proclamation-no-409-2004/>> accessed 18 April 2018.

⁴²⁷ UNHCR ‘Summary Overview Document: Leader’s Summit on Refugees’ 4 (Ethiopia).

⁴²⁸ Administration of Refugee and Returnee Affairs, Ethiopia (ARRA) ‘Road Map for the implementation of the Federal Democratic Republic of Ethiopia Government Pledges and the Practical application of the CRRF in Ethiopia’ (Addis Ababa, August 2017)

<<http://crrf.unhcr.org/fr/documents/download/119>> accessed 18 April 2018, 8. See also UNHCR ‘Applying Comprehensive Responses (CRRF) in Africa’ (January 2018) <www.unhcr.org/5a8fcfff4> accessed 18 April 2018, 2.

⁴²⁹ UNHCR ‘Summary Overview Document: Leader’s Summit on Refugees’.

⁴³⁰ UNHCR/Jackie Keegan (supra).

⁴³¹ Council of European Union, ‘Decision No 01/2016 of the 12th EU-Jordan Association Council of 19 September 2016’ 2016/0289 <<http://data.consilium.europa.eu/doc/document/ST-12384-2016-ADD-1/en/pdf>> accessed 19 May 2018.

London pledging conference 'Supporting Syria and the Region' of 4 February 2016 and involves, inter alia, the creation of 200.000 work opportunities for Syrian refugees in already established Special Economic Zones (SEZs) and substantively lowering work permit fees for certain sectors. In exchange, Jordan receives highly concessional loans from the World Bank (WB), additional funding and a 10 year tariff free access to the European market. However, the Jordan Compact only allows for access to employment in certain, primarily low-skilled sectors, and Syrians are not allowed to work in sectors which are closed off to non-Jordanians like professional practices.⁴³²

Whether these positive developments are the doing of the Refugee Compact or whether the Compact itself partly is a product of a general development grounded in the realisation that refugees should be incorporated into the global economy is difficult to say. However, the Compact has provided a forum where pledges towards positive developments can be made and as such stimulate further positive developments.

It seems like the more practical rather than rights-based approach of the Compact has had positive effects in terms of facilitating realisation of existing international standards. In this regard, the Compact has prospects of serving a norm-filling role as states progressively comply with existing standards without having to infringe on their sovereignty by ratifying a binding international instrument, thus indirectly contributing to the development of international law. If states follow the current trend of amending national policies and removing formal as well as informal obstacles to access to work to the benefit of refugees, the norm-filling ability of the Compact as a soft law instrument may therefore lead to progressive development of binding international refugee law. This effect would be of importance particularly for refugees located in those countries who are not parties to the Refugee Convention or who hold a reservation in relation to Article 17, and therefore are not subject to an international obligation to provide access to work for refugees. As explained above, this is the case for the six main refugee hosting countries in the world and could thus have substantive effects for global refugee protection.

However, we cannot know for certain about these effects until some time has passed after the adoption of the Refugee Compact. There is also a risk that the choice not to use a more principled approach results in that states at any time can retract their policy amendments due to internal policy change or lacking international support. The flexibility inherent in an instrument like the Compact therefore also means less stability and predictability. Albeit individual countries' policy amendments up to date are highly positive for refugees' enjoyment of the right to work, one-time voluntary pledges are not enough. For the Compact to achieve any future normative impact, as well as practical developments to the benefit of refugees, it is required that states implement all the measures set out in the CRRF and Plan of Action. As the realisation of rights of refugees is dependent on financial, technical and

⁴³² Compare supra and Refugee Convention Art 19(1). See further Daniel Howden, Hannah Patchett and Charlotte Alfred, 'The Compact Experiment: Push for Refugee Jobs confronts reality of Jordan and Lebanon' (*Refugees Deeply Quarterly*, December 2017) <<http://issues.newsdeeply.com/the-compact-experiment?>> accessed 18 May 2018.

material contributions from richer states, any future development is ultimately dependent on future fiscal as well as normative responsibility sharing.

6 Conclusion

This thesis has examined what, if any, impact the Global Compact on Refugees is likely to have on the continued development of international refugee law. For this purpose, it has been investigated what status that can be accorded to the Compact in relation to international law, how the GRC relates to and is likely to affect responsibility sharing for refugee protection, and what approach the Compact takes to specific human rights of refugees.

Chapter 3 concluded that the Refugee Compact may be placed within a broader development of international law, which is moving away from the creation of traditional legal instruments and moving towards other, less formal means of international law-making. This development can be attributed to a line of factors, and is rooted in deep societal changes consisting of increasingly diverse networks and complex knowledges which in turn have increased the importance of other actors than states in policy making processes. The Compact, which takes a “whole-of-society” approach, is an undeniable sign of this development. Chapter 3 also showed that although the Refugee Compact may not be considered a traditional source of international law under ICJ Statute Article 38 it may be said to be an instrument of soft law and as such, can serve an important function as a *norm-creator* and *norm-filler*. Irrespective of what position one takes in the conceptual debate surrounding soft law and its functions, few would deny the *legal effects* that soft law can have, in particular in regards to the development of other, established norms of international law. Often, however, non-binding agreements – and in particular those concluded by consensus by all UN Member States – have higher compliance rates than traditional treaties, which bodes well for the Compact.

Chapter 4 examined responsibility sharing as envisioned in the Refugee Compact. It was explained why responsibility sharing many times has been regarded the most imperative issue of modern-day refugee protection, and naturally of the GCR as well. It showed how the absolute majority of refugees are hosted in low- and middle income states in the Global South, whom due to large refugee numbers and national economy are carrying a disproportionate amount of responsibility protection globally, to the detriment of refugees as well as states in the Global South. This inequality can be explained partly by the fact that proximity is the main factor for refugee movements, and partly by distorted incentives created from within the international legal regime itself. Furthermore, this inequality is exacerbated by the fact that there is a lacuna inherent in the Refugee Convention, which does not prescribe a state obligation to share responsibility for providing protection. Earlier attempts to regulate this inequality have been temporary and ad hoc in character. The Refugee Compact seeks to provide a more equitable and predictable framework for how to share responsibility in future refugee responses. It does so by establishing two mechanisms – one which is global and recurring, and one regional which is to be triggered on an ad hoc basis. The Compact does not, however, set out any specific or obligatory elements, but is envisioned to function on an entirely voluntary basis. This arrangement in many ways resembles earlier scholarly proposals for how to achieve increased responsibility sharing. The Compact is distinctive on one main

aspect, however: the fact that it does not provide for any set contributions in the form of financial, material or other assistance. Despite this, the Compact may serve an important role in the future development of international refugee law. Due to the lack of a primary norm of international refugee law governing responsibility sharing the Refugee Compact has prospects of functioning as a *norm-creator* in this area of international law. As states increasingly comply with the framework set out in the Compact it, or parts thereof, it may subsequently ‘harden’ and eventually gain the status of international law, or influence the development of a binding norm or instrument. What speaks in favour of such a development is that the Compact acknowledges the global ‘problem’, sets out a framework of how to operationalise responsibility sharing, and provides an institutional framework within which responsibility sharing can be developed.

Chapter five examined the rights approach taken in the Refugee Compact, which has developed progressively throughout the drafting process. In similarity with the area of responsibility sharing, the Compact may have the potential to develop international refugee law, although in a slightly different way. As opposed to responsibility sharing which is characterised by the lack of a binding international norm, the area of refugees’ human rights is relatively regulated. Therefore, and due to the technical and action-oriented rather than principal approach of the Compact, it may play a *norm-filling* role. This is particularly evident in e.g. the area of detention as migration control which is highly regulated but seems to be, deliberately or not, largely misinterpreted by states. Nevertheless, at the time of writing states have not seized the opportunity to reaffirm existing standards on non-penalisation of irregular entry and punitive detention and thus the Compact risks having the opposite effect of legitimising current practices. One area where the Compact indeed exercises a norm-filling role is that of child detention but, as explained supra, not necessarily in a progressive manner. In the socio-economic field the Compact, exemplified by the right to access work, may also serve a norm-filling function due to its technical character, as a primary example of how the flexibility provided by a non-binding Compact may indeed produce higher levels of implementation than a traditional treaty. The drawback to this, however, is that states at any time may change policy direction or lose interest and fall back into similar restrictive patterns as before.

Based on the above observations, what conclusions can we draw in terms of potential impact on the future development of international refugee law? After systematic and thorough study of the Compact drafts released up to date as well as other documents pertaining to the Compact process, in particular the report of the Secretary-General and the New York Declaration including the Comprehensive Framework, it has become evident that the Refugee Compact indeed not only has potential, but also is likely to impact the future development of international refugee law in several areas. This is so mainly due to its *norm-creating* and *norm-filling* potential as an instrument of ‘primary’ soft law.⁴³³

⁴³³ See supra at 3.3.

Generally, the rather technical character of the Compact as a whole, comes at the expense of a more principled approach forcing adherence to established principles of international refugee law. This may either be a sign of states fearing to further encroach on their sovereignty in times of increased security concerns and xenophobia, or an intentional policy choice to achieve fast, wide-ranging and tangible improvements of global refugee protection. Perhaps both. The risk of omitting to explicitly reaffirm and develop on established principles of international refugee law is that it may water down existing protection standards and push refugees out of the realm of law into the more uncertain sphere of politics⁴³⁴ – an obvious risk in times of rising populism. On the other hand, such an approach may enable facilitated realisation of existing principles of international law without the burden of legislative change – and even develop their content and progressively establish new norms of international refugee law.

The Refugee Compact makes clear that it will draw on the existing legal framework in the international refugee regime, of which the cornerstone is the 1951 Refugee Convention and its 1967 Protocol. The Compact also explicitly calls on Member States to ratify the instruments in question.⁴³⁵ A straightforward impact on international refugee law of the adoption of the Refugee Compact may hence be that states that have not yet ratified the Convention or the Protocol, will be incentivised to do so, or at least comply with its provisions to a larger extent. As illustrated by particularly chapter 5, this change alone would mean a great deal to refugee protection globally.

As identified throughout the thesis, the Compact may have different impact on the international refugee regime in different areas of refugee law. As for responsibility for refugee protection, which is characterised by the lack of a primary norm governing state behaviour, the GCR has potential to steer state behaviour, stimulate cooperative action and in the long run fill the lacuna of the current regime. As repeatedly stated, this is so due to the potential of soft-law to either function as an inspiration for future, binding agreements, or as an ‘ultimate or intermediate expression of international consensus’ which by time may solidify into binding international law in the form of customary international law.⁴³⁶ In this regard, secondary soft law may add to this transformation as international organisations, quasi-judicial bodies and agencies start referring the Compact as a source of normative authority, which in their turn may influence states and other actors and thus indirectly the development of a binding norm. Due to the uncertainty characterising responsibility sharing as a matter of international refugee law, and the fact that there currently are no set standards for how responsibility sharing is to be operationalised, the technical character may thus be more beneficial than if the Compact were to be more legally principle-oriented, as it sets out a practical blueprint to guide state behaviour. While a reaffirmation of standards obliging states to cooperate would be normatively important, it would not necessarily achieve responsibility sharing in practice.

⁴³⁴ Supra 4.4.

⁴³⁵ NYD para 38.

⁴³⁶ Shelton (2003) 461, compare supra at 3.3.

In practice, however, the responsibility sharing mechanisms envisioned in the Refugee Compact run the risk of not altering the current state of affairs very drastically. As participation in the proposed mechanisms as well as to make any contributions at the Global Refugee Forum and the Solidarity Conferences is entirely voluntary, the system remains ad hoc in character. This is problematic as earlier intents to establish responsibility sharing for refugee protection largely have failed due to its temporary and ad hoc nature. Although the Compact tries to avoid such effects e.g. by calling for multi-year funding “wherever possible”⁴³⁷ it all comes down to implementation in the end. The same goes for material responsibility sharing which, in disregard of what was called for by the Secretary-General, was phrased as an aim rather than a set and measurable commitment. The undefined commitments thus risk leaving the Global South to the ad hoc voluntarism of Northern States once again.

As for human rights of refugees, the NYD importantly reaffirms that Member States in their response will “*fully protect the rights of all refugees and migrants, regardless of status; all are rights holders*”.⁴³⁸ This is of paramount importance as refugees by nature are a very vulnerable group, and often are subjected to various human rights abuses as a consequence of deterrence measures and criminalisation of their movement. An important role of primary soft law instruments like the Compact is to reaffirm previously accepted standards, to ensure continued and improved compliance.⁴³⁹ As shown in chapter 3, however, failure to acknowledge some crucial aspects of refugees’ rights in the Compact risks diluting the above statement. An example of this is the omission to explicitly state that penalisation of refugees for their irregular border-crossing violates of international refugee law.⁴⁴⁰ Adversely, a positive step in this regard can be identified in the inclusion of the principle of non-refoulement in the Compact, which in the CRRF and first draft Programme of Action was left out.⁴⁴¹ That states themselves specifically called for the inclusion of non-refoulement signals the importance accorded to the principle by states in any refugee response, and assures continued adherence to the principle. On the other hand, including already established principles of international law in the Compact thus putting them up for discussion is a risky endeavour, exemplified by the example of child detention. The UNHCR has made an aware choice to leave many established principles out seeking instead to develop on those already agreed upon.

The perhaps largest impact on the established refugee regime can be attributed to the area of socio-economic rights of refugees, here exemplified by the right to access to work.⁴⁴² Weak on reaffirming established standards but rather technical in nature, the Refugee Compact focuses more on facilitating the realisation of already established norms than achieving legislative change. The technical and action-oriented approach of the GCR has already stimulated progressive policy changes, without imposing international obligations. In this

⁴³⁷ GCR Draft 2 para 33 subpara 1.

⁴³⁸ *Idem* para 5.

⁴³⁹ Shelton (1997) 121, compare *supra* at 3.3.

⁴⁴⁰ See further *supra* at 5.4.

⁴⁴¹ See further *supra* at 5.3.

⁴⁴² *Supra* 5.5.

regard, the norm-filling capacity of soft law is of imperative importance and may pave the way for the progressive development of refugees' right to work through indirectly enforcing state compliance. This effect would be of importance particularly for those countries who currently are not Parties to the Refugee Convention or who have entered reservations to the provision in question and hence are not subject to an international obligation to provide access to work for refugees – which is the case for the six main refugee hosting countries in the world. The process of making those countries ratify that instrument, which the Compact also encourages but does not require, would most likely be considerably harder than to make them agree on and implement a flexible and non-binding instrument which they have been involved in designing. The drawbacks to a more technical approach is that states at any time may retract their adherence to the measures set out e.g. due to internal pressure or lack of external financing. In that sense, more normative language could be beneficial to ensure long-term compliance, but provide less and slower implementation of measures which indirectly ensures implementation of access to work. The more flexible Compact approach may hence, as discussed in chapter 3, have more far-reaching, tangible effects than a binding international agreement aiming for normative change above practical realisation. Several improvements of refugees' right to work can already be observed, although it is hard to say whether these developments are attributable to the Compact per se or are following global developments more generally.

It is in this regard that the two areas of responsibility sharing and rights of refugees intertwine. Refugees' access to protection is dependent on cooperation between states.⁴⁴³ So also under the Refugee Compact. Therefore, whether the Compact will indeed improve living conditions for refugees in the Global South, is entirely dependent on whether states in the Global North cherish the Compact agreement and provide sufficient financial, material and other assistance. This fact is evidenced by the pledges made at the Summit on 20 September 2016 where several major host states pledged to undertake a wide array of policy changes – provided they receive external financial assistance.⁴⁴⁴ A disheartening example of this is Tanzania who already pulled out of the CRRF roll-out due to unfulfilled promises of financial assistance.⁴⁴⁵

Unfortunately, altruism on behalf of Northern states towards refugees as well as refugee hosting states in the Global South, has historically proved to be an unreliable factor. The main hope in this regard, perhaps paradoxically, is the similarity between responsibility sharing and a suasion game. Although when acting individually, the most rational choice for individual states is to 'self-insure' themselves by turning to deterrence, there is more to gain globally, if acting collectively. The latter requires trust, and a common platform from which such cooperation takes place. The Compact shows not only will to seek to achieve cooperation, but also provides a platform and a normative framework within which such cooperation can take place. Therefore, the biggest challenge for the Compact is to reach a common point of understanding where the collective gains of sharing responsibility are perceived as considerably higher than if acting individually. The mere fact that states have reached the

⁴⁴³ Betts (2009) 7.

⁴⁴⁴ Compare e.g. pledges made by Ethiopia, UNHCR 'Summary Overview Document: Leader's Summit on Refugees' 4.

⁴⁴⁵ Supra 2.1.3.1.

point where they have come together to adopt a new instrument is a strong indicator of that there is potential for the Compact to have real impact on global responsibility sharing, but whether it will have the desired effect is all down to individual state implementation.

For these reasons, the Compact may not as it currently stands be a “minor miracle” but it is indeed a “child of political compromise”⁴⁴⁶ – but it is a compromise which at least has prospects of reforming refugee protection to the improvement for both refugees and host states.

⁴⁴⁶ Compare *supra* 1.1 in fine.

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