The Global Compacts and the Future of Refugee and Migrant Protection in the Asia Pacific Region

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Whether the 1951 Refugee Convention and its 1967 Protocol are still relevant to today’s displacement challenges is a recurring question, particularly with the passing of time and the fact that neither instrument deals with the causes of refugee movements, or with the scope and extent of State responsibility to determine claims for protection, or with making international cooperation both concrete and equitable. Certainly, the Convention and the Office of the United Nations High Commissioner for Refugees (UNHCR) were framed with key provisions of the UN Charter in mind – sovereign equality and non-intervention – so that the refugee regime has long been essentially reactive, rather than forward-looking. Still, the treaties have continued to attract support among States, so far as they encapsulate a widely understood, if not exhaustive, concept of the refugee and set out certain basic principles of protection. Some 148 States are now party to the Convention and/or the Protocol, but the Asia Pacific region is generally under-represented, even though historically it has played a significant role in receiving refugees and in contributing to solutions.

In the context of migration generally, the influence of sovereign competence has also been felt, so that international cooperation has long been difficult to achieve. Of the 54 States parties to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, only six are from the region. In either case, whether wider ratifications would make a difference must always remain a moot question, for nothing is self-implementing, and results depend on actions, not words. However, the realities of population displacement today could well be the catalyst that moves States away from unilateralist assumptions, and from the inclination to leave well alone.

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Since the 1920s, there has been a tendency to see the refugee, in particular, as someone benefiting from status and protection, but only temporarily. Some argue that this is integral to the Refugee Convention, but that is to see the issue from the wrong perspective. It disregards the broader lessons of experience, tends to undermine the quest for stability and human security, and encourages illusions that stand in the way of progressive, practical thinking. Of course, at some point in time, a refugee may no longer need protection because the causes of his or her flight no longer exist, but we can never know exactly when that will be; not knowing, we need to plan and to protect indefinitely, for the duration. In a similar way, the movement of people between States, both regularly and irregularly, is a constant. Migration will continue, and although it will likely ebb and flow, climate change and disasters will clearly persist as drivers of displacement in the region.

Weaning governments off their temporary inclination and away from short-term, knee-jerk policy and practice where refugees and migrants are concerned can be a hard sell, particularly when they think themselves overwhelmed by numbers and facing a constituency which sees itself seriously disadvantaged by the influx of desperate people at every level – in employment, housing, education, natural resources. For refugees and asylum seekers do have an impact, as we can see in Bangladesh, now host to close on a million Rohingya refugees from Myanmar. This is not the first time, of course, but although Bangladesh has witnessed many refugee inflows from Myanmar in the modern era, it is not a party to the Refugee Convention or Protocol and has no legislation or clear policies on the reception, identification, and protection of refugees. It is party to the 1966 International Covenant on Civil and Political Rights, the 1989 Convention on the Rights of the Child, and the 1990 Migrant Workers Convention but, like many countries, it has done nothing (yet) to make them part of the fabric of its law and policy.

Bangladesh has responded to the latest influx by focusing on short-term humanitarian assistance, while engaging bilaterally with Myanmar on early repatriation, notwithstanding serious and well-documented concerns about security. The imminent prospect of forced return has rightly been described as contrary to international law, and given what we know of the all-too-recent causes of flight, it is foreseeably likely to result in further abuse, ill-treatment, and loss of life. Meanwhile, regional organizations – the Association of Southeast Asian Nations (ASEAN) and the South Asian Association for Regional Cooperation (SAARC) – stand on the sidelines, in a display of ‘non-interference’ consistent with their charter principles of mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations.

But refugee movements, migratory movements, and the causes of displacement are not purely internal or just bilateral – they are matters of international concern, engaging the legal interests of all States. The Rohingya today find themselves not just in Bangladesh, but also in the Gulf, Thailand, Malaysia, India, Indonesia, even Australia; and for many countries in the region, they are just a boat ride away.

Can the Global Compacts help to change this? Refugee movements and migration generally demand regional and wider responses, if individual States are to be empowered and enabled to respond effectively, over the short, medium, and long term, to the protection and related needs of those who move, and in their own interests. For if nothing is done, as we know from Europe’s recent experiences, the lack of security and opportunity in first countries of refuge and the pressures that go with loss of livelihood,
extreme poverty, and underdevelopment, will just fuel further flight, bringing business inevitably to the smuggler and the trafficker, leading to yet more loss of life, adding to the security and related challenges for other States, near and far, and undermining confidence in governments and institutions. And if nothing is done, it will be the refugee and the migrant who suffer first – facing discrimination and hostility by host communities; or subject to arbitrary and unprincipled decision making; or liable to deportation, expulsion, exploitation, and even refoulement.

Earlier iterations of the Rohingya exodus, as others elsewhere, have amply demonstrated the need for an integrated approach. Such an approach requires moving beyond the ad hoc-ery of humanitarian assistance alone, as the first League of Nations High Commissioner for Refugees, Fridtjof Nansen, urged in the 1920s. It must also get to grips with the politics of the root causes of movement, as the High Commissioner for Refugees Coming from Germany (Jewish and Other), James McDonald, insisted in the 1930s. And it must also accommodate refugees within a rights-protecting framework that enables them to work and to contribute to the development and economic well-being of host communities, ensuring that children have access to education, and that refugees are strengthened in their capacity for self-reliance, as well as in the acquisition of skills and experience which may assist in their positive and successful reintegration on return in safety and dignity, or settlement where they are.

International law can provide a framework for policy and practice, for in matters of border control and management, it encompasses the rights of individuals and the rights and interests of States. What it does not do, however, is to criminalize flight in search of refuge; and the characterization of people who go in search of refuge, or their means of arrival, as unlawful or illegal is significant only at the domestic level where, all too often, it is the vehicle or excuse for discrimination, abuse, arbitrary treatment, and exclusion.

Disregarding either causes or the rights dimension to protection is ultimately self-defeating. The Refugee Convention and Protocol show the way to an alternative, while the Global Compact on Refugees (Refugee Compact) and the Comprehensive Refugee Response Framework (CRRF) now offer, at least potentially, mechanisms for translating ‘crisis’ into ‘opportunity’, for both refugees and host communities. The Global Compact for Safe, Orderly and Regular Migration (Migration Compact) can likewise help to square the circle, finally recognizing that for all its ‘sovereign’ dimensions, the movement of people is a matter of international concern in which the international community at large has an interest. That Compact, together with the Refugee Compact, promotes ‘complementary international cooperation frameworks’ (Migration Compact, para 3) and may enable States to find the way to manage migration humanely and for the good of all involved.

Between refugees and migrants, there are many instances of overlap and forward-thinking coordination will need to accommodate both, their differences included. For example, the Refugee Compact sees climate change, environmental degradation, and disasters as interacting with the traditional drivers of refugee movements (para 8), while the Migration Compact emphasizes the need for comprehensive responses in such cases, given the variety of potential permutations, and factoring in issues such as choice and adaptation, on the one hand, and preparedness, disaster risk reduction, and facilitation of movement, on the other, including through both regular
and particularized pathways (paras 18(h), 18(l), 21(h)). In this context, regional approaches must necessarily be part of the future – proximity is highly relevant – but so, too, is protection.

INTERNATIONAL LAW AND THE GLOBAL COMPACTS

The Report of the UN Secretary-General which led to the 2016 New York Declaration for Refugees and Migrants stated the obvious – causes had to be dealt with, but protection also had to be assured, and the principle of non-discrimination had to be respected at every point along the way. The Global Compacts seek to do that, aiming to develop cooperation around safeguarding the rights of refugees and migrants, while supporting States that act on behalf of the international community by providing refuge, or aspire to the better and more humane management of migration. The question is, whether there are any critical gaps, either in coverage or in substantive content.

Both Compacts emphasize their non-legally binding character, but how they are framed and the language used are nevertheless significant. The Migration Compact emphasizes that its foundations are both legal and institutional (paras 1, 2), that it is bounded by a common understanding, shared responsibilities, and unity of purpose (paras 8–15), and that implementation must be consistent with international law, irrespective of impact or national capacity (para 41). It may be a ‘milestone’ (para 6) in the global dialogue on international migration, but it is not the end; and while it aims to foster cooperation, no State being able to address the issues alone, it nevertheless upholds the sovereign dimension within the rule of law.

The Migration Compact’s objectives thus include enhancing the effectiveness of particular international legal regimes, for example, combating smuggling (Objective 9), and trafficking (Objective 10). Other goals expressly reference the existing international legal framework within which State rights may be exercised. Thus, border management requires due process, protection of human rights, and special attention to the needs of children (Objective 11); immigration detention is also subject to due process, must not be arbitrary but based in law, and be necessary and proportionate (Objective 13). Even if migrants’ access to basic services may be differentiated from that of citizens, it too must be based in law and proportionate, and the difference in treatment must pursue a legitimate aim and be consistent with international human rights law (Objective 15). The Compact also endorses fundamental principles of protection, ruling out collective expulsion, and requiring that no one be expelled, where ‘there is a real and foreseeable risk of death, torture, and other cruel, inhuman, and degrading treatment or punishment, or other irreparable harm’ (Objective 21, para 37).

In setting out its goals, the Migration Compact offers an interesting format, comprising some 23 ‘objectives’ in all, to each of which is added a commitment of its own and a range of actions considered to be relevant policy instruments and best practices (para 16). This is ‘interesting’, precisely because, in the absence of any new international obligations, States have nevertheless accepted fairly clearly delineated markers of progress towards agreed goals, and to support follow-up and review.

The Refugee Compact, by contrast, builds on an established legal framework that was affirmed in the New York Declaration; even as it emphasized States’ interest in border control and management, the Declaration stressed that the principle of non-refoulement must be upheld and that measures at the border must be ‘without prejudice to the
right to seek asylum’ (para 27). Not surprisingly, the Refugee Convention and Protocol are seen as ‘the foundation of the international refugee protection regime’ (para 65), and references to international human rights law and international humanitarian law can be read as a clear commitment to ‘ensure ... protection for all who need it’ (para 66); whether that will be sufficient to fill any protection gaps faced by groups or individuals who may be displaced remains to be seen in the practical application of the Global Compacts.

**CONTENT AND ASPIRATIONS**

The Migration Compact locates itself centrally in the debate over mobility, poverty, and development, stressing the ideal that migration should be regular and a matter of choice, not desperation (para 13). It is therefore crucial to minimize the adverse drivers and structural factors that compel people to leave their country of origin (Objective 2), tying efforts to the 2030 Agenda for Sustainable Development, as well as to UN and related initiatives on disaster risk reduction, climate change, violence, the rule of law, and good governance. When people do move, however, those with particular vulnerabilities should be identified (Objective 7), mobility should be linked to decent work (Objective 6), discrimination should be eliminated (Objective 17), and inclusion and social cohesion, which is a reciprocal engagement, should be facilitated and encouraged (Objective 16). In addition, migrants and diasporas should be enabled to contribute fully to sustainable development by, among other things, the integration of migration into development planning (Objective 19). The complexities of migration, in turn, demand a ‘whole-of-government’ and ‘whole-of-society’ approach (para 15). In the absence of new obligations, accountability and visible indicators of progress and steps still to be taken will acquire particular weight.

The Refugee Compact has four goals: (1) improved burden and responsibility sharing; (2) strengthened national protection systems and response capacities; (3) enhanced socio-economic conditions for both refugees and host communities; and (4) greater efforts to resolve protracted refugee situations. It incorporates the CRRF – the Comprehensive Refugee Response Framework – which was included in the General Assembly’s New York Declaration of 2016. The CRRF and the Compact’s Programme of Action cover reception and admission, as well as support for immediate and ongoing needs (for host countries and communities) and for durable solutions; and since February 2018, it has been piloted in Chad, Djibouti, Ethiopia, Kenya, Rwanda, Uganda, Zambia, Somalia, Belize, Costa Rica, Guatemala, Honduras, Mexico, Panama, and Afghanistan.

Certainly, the language on admission and reception is equivocal in places, and this is a matter of some concern. From an international law perspective, however, a considerable body of jurisprudence and doctrine steers in the direction of effective protection, and ought to be sufficient to fill any gaps. For example, in the case of those displaced by the impacts of climate change or disasters, any necessary protection function would fall to UNHCR under its mandate, no matter the assistance or related responsibilities of other institutions.

On the support and solutions front, there is material enough in the CRRF to build a comprehensive structure for the way ahead, provided that we can find the political will and the necessary resources, which is where the Programme of Action comes in. Its
potential resides not so much in States having bound themselves to concrete contributions, as in the mechanisms which are proposed – the institutionalization of processes to make burden and responsibility sharing more equitable and predictable. This includes identifying various points in the cycle of displacement at which States may be expected to step up: for example, on early warning and preparedness, immediate reception, safety and security, registration and documentation; or in meeting long-term needs, such as education, livelihoods, health, special measures for women and girls, children, adolescents and youth, food security, registration of births, the avoidance of statelessness; and, of course, solutions.

Some of the means to achieve these aims have been tested already, for example, in the Global Concessional Financing Facility established by the World Bank, the Islamic Development Bank Group, and others in 2016, and in what’s known as the World Bank’s IDA18 replenishment, which provides up to US$2 billion in grants and concessional loans to low-income countries to help meet the development needs of refugees and host communities. Within this initiative, parties agree on a set of mutually reinforcing commitments (resources, policy changes, projects), with an eye on outcomes and under host country leadership. The essential idea, in a refugee context, is to bridge the longstanding gap between humanitarian assistance and development assistance.

IDA18, the International Development Association, is the World Bank’s fund for the poorest. The ‘Sub-Window for Refugees and Host Communities’ underpins the development approach to displacement. Eligibility depends on the country in question: (1) hosting at least 25,000 refugees (or 0.1 per cent of its population); (2) having an adequate framework for refugee protection (the Refugee Convention is not mentioned; perhaps it should be ...); and (3) having an action plan or strategy with concrete steps, including possible policy reforms for long-term solutions that benefit refugees and host communities. These might, perhaps should, include such measures as policies to promote social and economic inclusion, freedom of movement, labour force participation, the issue of residence and identity permits, access to basic services for both refugees and host communities (equality is something that all should enjoy, as a matter of right and common interest), support for livelihood initiatives, and activities to facilitate and sustain refugee returns, as and when that becomes feasible and consistent with international standards. Nine countries have been found eligible under the IDA18 ‘sub-window’: Cameroon, Chad, Republic of Congo, Djibouti, Ethiopia, Niger, Pakistan, Uganda, and Bangladesh.

**IMPLEMENTATION AND ASSESSMENT**

Will it all work? Implementation involves a series of challenges, but the Migration Compact recognizes that such an ambitious agenda will require cooperation and global partnerships, including joint actions to assist each country in meeting the challenges, especially with regard to areas from which desperation drives movement (Objective 23). That agenda also calls for a capacity-building mechanism in the UN (para 43) and a network on migration under the UN Secretary-General (para 45), and will require ‘a periodic and effective follow-up and review mechanism’ (para 14). As with the Refugee Compact, a multi-stakeholder approach is called for, in this case bringing in migrants, civil society, migrant and diaspora organizations, faith-based organizations,
local organizations and communities, the private sector, trade unions, parliamentarians, national human rights institutions, the Red Cross and Red Crescent movement, academia, the media, and other relevant interest groups (para 44).

The Secretary-General is called upon to report biennially to the General Assembly (para 46), and the Global Platform on Migration and Development is to provide a platform for implementation, highlighting good practices and innovative approaches (para 47). The necessary progress review is to be State-led, which might appear to suggest a bias towards national policies and decision making (the sovereignty aspect), which has long stood in the way of effective international cooperation. Similarly, the High-Level Dialogue on International Migration and Development will be ‘repurposed’ and renamed the ‘International Migration Review Forum’, serving as the intergovernmental global platform meeting every four years from 2022, and charged with producing an ‘inter-governamentally agreed’ Progress Declaration (para 49). Within the Compact scheme, however, the participation of all relevant stakeholders will be key to success, and a critical element in determining whether goals have been achieved commensurate with principle.

For its part, the Refugee Compact also recognizes the need for follow-up and review, for clear objectives to be identified, and for UNHCR to set out the indicators by which to assess progress. To this end, a Global Refugee Forum will be held every four years (starting in 2019), with high-level officials’ meetings every two years between the forums. Assessment will require input from all ‘relevant stakeholders’ (para 17) here as well, and this must include the voices of refugees and civil society, in ways and to a degree that is truly representative.

It is all too easy to pick apart the Refugee Compact, and many have already begun to do so, in an academic way – ‘academic’ in the less-than-positive sense of speculation conveniently removed from outcomes, let alone any empirical basis or assessment of impact or progress. We know that much, perhaps everything, will depend on political will, on funding, and on finding new coalitions of actors, and we may not find them – but that is a trite observation. It is easy to propose perfect alternatives, but in a divided world, it is and always has been a lot harder to get States, in particular, to accept formal undertakings and additional obligations in what is a highly politicized and divisive field.

Still, it is in its apparent lack of firm accountability provisions that the Refugee Compact has been criticized, and for leaving to States individually the opportunity to do what they want, to ‘cherry-pick’ issues of interest in which to invest resources, rather than contributing generally, on the basis of established need. This is true, and contributions to the Compact ‘will be determined by each State and relevant stakeholder, taking into account their national realities, capacities and levels of development, and respecting national policies and priorities’ (para 4). In this respect, the proposed support model looks little different from the current system of budget building through voluntary contributions. There have long been disparities between what is needed and what is actually forthcoming; of UNHCR’s US$8.2 billion budget for 2018, it is estimated that 55 per cent at best will be met. Will the Refugee Compact make any practical difference?

The issue is not just that of the perennial budget shortfall, however. No less staggering are the obstacles placed in the way of refugee solutions – obstacles that prevent the
refugee from working, that keep refugee children out of education, that deny access to basic rights and freedoms, such as health care, accommodation, and the ways and means by which refugees can be positive and productive contributors to the communities that host them. These obstacles may be placed deliberately, in a futile effort to deter or dissuade, or to pacify some local constituency which sees itself now as doubly disadvantaged, by underdevelopment and influx. Or those obstacles may reflect institutional challenges – the lack of preparedness and future planning, the lack of an appropriate legislative or policy framework, a lack of resources, latent and systemic infrastructural weaknesses, or corruption and incompetence.

But this means that obstacles, having their origins in human actions and omissions, can be remedied or removed in the same way. Here, the Refugee Compact suggests alternatives, drawing attention away from the humanitarian assistance model, and onto the development assistance model. This is critically important, because while ‘humanitarian assistance’ engages international donors and organizations in what are essentially short-term, self-contained, life-saving operations, with a focus on providing food, water, medication, and shelter, ‘development assistance’ involves national and local governments, is long term, integrated with national plans and systems, and aims to reduce poverty through job creation, education, and the development of health and related infrastructure. Low- and middle-income countries host 88 per cent of the world’s displaced people, and what is needed, and what the Refugee Compact aspires to do, is to find new ways in which to bring together donors, humanitarian and development agencies, the private sector, civil society, and refugees themselves in order to achieve sustainable outcomes. The emphasis on host country leadership may look like the cynical endorsement of this world of sovereign entities, but it is also a corrective to ‘donor bias’ in the humanitarian assistance context. Moreover, initiatives taken under the Compact and its Programme of Action will nevertheless be internationalized – that is, a matter in which the community of States at large has a recognized legal interest.

Is the architecture now stronger? Certainly, it tends in the right direction – in bridging the humanitarian–development divide, in expanding the constituency of ‘stakeholders’, in emphasizing resilience and self-reliance for refugees and host communities, and in maintaining a rights focus. Whether it will deliver must depend on the willingness of the international community of States at large to ‘buy in’, but non-binding agreements and understandings have certainly worked in the past.

**MOVING ON**

Just as ‘internally’, law, order, and social justice depend for their achievements on something like a compact between government and people, so internationally does the effective management of borders, in normal and critical times, depend on compacts, understandings, and agreements with others having an interest in the subject matter or the condition of those affected. Arguably, it is not so much a dearth of ratifications in the region that is the issue – after all, many Asia Pacific States are parties to the International Covenant on Civil and Political Rights and thus bound also to refugees and asylum seekers – as it is one of incorporation or practical implementation. There has long been a tendency to cleave to the old ways, in particular, of dealing with the non-citizen at discretion, and therefore arbitrarily.
But given the dynamic of people on the move today, there is much to be said in favour, not only of ratifying relevant conventions, but also of helping to develop a regime of protection and solutions which, building on law’s foundations, can aspire to cover the broad field of human mobility from a position of principle. International law, as understood today, has a justice component, premised on and bound to equality, non-discrimination, and due process. It is and must be part of the overall picture, for it offers a more effective basis for the resolution of common problems than arbitrary executive authority or discretion driven by the trivial, short-term political concerns of the moment.

The Asia Pacific region will assuredly be witness to continuing movements of people, with a multiplicity of drivers behind them – ethnic tensions, persecution, climate change, rising sea levels, extreme weather, loss of livelihoods, conflict, underdevelopment, and the reality, still often resisted, that for many who move, there will in fact be nowhere for them to go back to. Some may categorize such movements as ‘drivers of instability’, but that will be determined by how we respond. Others may argue that the likelihood is too remote, not requiring immediate attention, but experience says otherwise. Still others may incline to unilateralism and going it alone, but too often that destroys lives and damages regional relations.

Refugee rights and migrant rights are human rights, are civil rights, and rights do not implement or fulfil themselves – they need the support of civil society at large, of legislators and policymakers, courts and tribunals, of decision makers who themselves are rooted in the international legal order of protection, and in its dynamic aspects. In this context, the Refugee Convention is something of a paradigm – the model from which to analogize, as judges frequently do, and determine the scope of that category of those who, not having the protection of their own or any other government, are entitled to the protection of international law. Notwithstanding the carping from time to time, international conventions on the protection of refugees and migrants ought to have a future in the Asia Pacific region, first, because they can provide States with clarity in determining national policy and practice, and secondly, because if they are integrated into the new or reinvigorated schemes of practice proposed by the two Global Compacts, ways can be opened to protection and solutions and, in particular, to enhanced support for host communities. There is much common ground in the two Global Compacts, not least on the development front, and this belated recognition of migration’s positive contribution, on the one hand, and the likely indefinite need of the refugee for protection and a livelihood solution, on the other, may well be the most significant achievement of the preceding years of dialogue and practical experience.

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