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The Global Compact on Refugees: inadequate substitute or useful complement?

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The Global Compact on Refugees is touted by its supporters as a soft law instrument that advances solutions for refugees in a way that complements the fundamental human rights protections afforded by the hard law Refugee Convention. In practice, however, the Global Compact appears to have replaced the Refugee Convention as the centerpiece of multilateral dialogue about states' actions vis-à-vis refugees. This paper argues that the substitution of the Global Compact for the Refugee Convention is problematic from a human rights perspective because the Global Compact makes very little provision for refugees' rights and interests, instead focusing on the rights and interests of states. The Compact thus exerts a gravitational pull that distances the forced displacement response sector from the objective of realizing refugees' human rights. To counter this, the paper suggests a need for increased attention and deeper investment in bolstering the use of human rights treaty mechanisms and processes to enforce refugees' human rights.

KEYWORDS

Global Compact on Refugees, human rights, 1951 Convention Relating to the Status of Refugees, refugees, refugee rights, International Covenant on Economic Social and Cultural Rights, New York Declaration on Refugees and Migrants, law and society

Origin of the Global Compacts: a solution for states, not refugees

The Global Compact on Refugees emerged from a series of global dialogues driven by the Syrian civil war and the subsequent sharp increase in refugee arrivals in Europe in the early 2010s (Aleinikoff, 2016; Ignatieff et al., 2016). Although forced displacement had been rising for some time alongside migration generally, European countries that hold substantial power in the global humanitarian ecosystem found themselves suddenly experiencing a much larger number of people arriving within their borders who had been displaced as a result of an Arab Spring conflict.

One result of this surge was increased political will among the humanitarian powers to identify so-called “solutions”—although whose problem was being solved was sometimes glossed over (Easton-Calabria and Omata, 2018). Participants in the forced displacement response sector widely acknowledged that European governments were interested in stemming the arrival of refugees, for a variety of reasons ranging from the challenges of integrating foreigners seeking residence in significant numbers to the possibility of one or more factions gaining political power by fanning flames of xenophobia (Arar, 2017). Furthering this interest required cooperation between European destination countries and African and Middle Eastern countries in which refugees initially sought refuge.

Thus, the increased political will to identify solutions for European government concerns found form and substance in a set of global convenings, the 2016 World Humanitarian

Summit and subsequent UN Summit on Refugees and Migrants, which produced the New York Declaration on Refugees and Migration (Zetter, 2021). The New York Declaration was a statement of broad principles, but did not address what these principles required in terms of state action. At the time of its adoption, the United Nations General Assembly agreed that more specific instruments would be drafted to give effect to the Declaration (United Nations, n.d.).

Over the subsequent two years, two Global Compacts were created: The Global Compact on Migration and the Global Compact on Refugees, the latter a framework that claims to set forth the intentions of the global community to concretely address modern day forced migration and displacement (IFRC, 2017; United Nations, n.d.). In negotiating this framework, European governments sought to advance their interest in limiting refugee movement into Europe. African and Middle Eastern governments, on the other hand, sought to secure greater financial resources from Europe and North America, both directly tied to costs incurred in relation to hosting large numbers of refugees,¹ but also for the pursuit of other goals. These refugee-hosting governments argued that such a resource transfer was appropriate to recognize the global service performed by states that host disproportionate numbers of refugees (Arar, 2017).

Refugee communities, meanwhile, were not widely included in the discussions or processes that ultimately led to creation of the Global Compact.² They also have no representation at the United Nations³ (Kanyamanza and Arnold-Fernandez, 2022). As a result, refugees' interests were deeply underrepresented in negotiation of the Compact (Arnold-Fernández, 2019).

The text of the Global Compact on Refugees reflects this history. The text primarily focuses on the moral obligations of wealthier states and the international community toward the often less wealthy states that host a majority of the world's refugees — framed as sharing the burden and responsibility associated with hosting refugees — while remaining virtually silent on the moral and legal obligations of host states toward their refugee populations (Arnold-Fernández, 2019). Vincent Chetail argues elsewhere in this volume that the Compact should be understood as an operational

agreement between states, and indeed the Compact is explicit that it seeks to translate the principle of “international cooperation” into concrete action—not the principles of human rights or state obligations to refugees.

Most of the critique of the Compact's text has therefore focused on the extent to which opportunities for international cooperation were missed or insufficiently leveraged. Refugees International called the final text of the Compact “a backsliding of political will,” (Thomas and Yarnell, 2018) while former United Nations Deputy High Commissioner for Refugees Alexander Aleinikoff lamented that it “establishes no formal structure for joint operations or for accountability” (Aleinikoff, 2018). Later reviews of its implementation have been mixed, although most acknowledge that the COVID-19 pandemic created unforeseen challenges that are still being understood and addressed (IRC et al., 2021).

This line of discussion misses an important question, however: What is the impact of the Global Compact on the realization of refugees' human rights? To answer this question, this paper asserts, we must look not only at what the Compact says about refugees' human rights, but more importantly at how the Compact is used in practice and how that usage impacts the understanding and implementation of states' obligations to ensure refugees' human rights are respected, protected, and promoted.

Overview of argument and methodology: a law and society lens

This paper argues that the treatment and use of the Global Compact on Refugees by multilateral agencies and governments in political and diplomatic forums, discussions and processes poses a significant threat to refugees' human rights. This danger derives not only from the Compact's text, which sets out a vision of state entitlements and obligations that does not include responsibility for respecting, protecting, and promoting refugees' human rights, but also and perhaps more importantly from the *de facto* positioning of the Compact by multilaterals as a replacement for the Refugee Convention.

In doing so, this paper situates its argument within the theoretical framework of the law and society movement, which recognizes that “law, legal practices, and legal institutions can be understood only by seeing and explaining them within social contexts” (Silbey, 2002). Although a theoretical framework of legal formalism would understand the Global Compact as “soft law” and thus consider it subordinate to “hard law” such as the Refugee Convention (Hathaway, 2021), a law and society framework recognizes that this theoretical understanding does not align with the treatment, use, and impact of the Global Compact in the dominant practices of forced migration response since its adoption.

Using a mixed methodology of document analysis, legal analysis, and participant observation, this paper demonstrates that powerful actors in the forced migration response sector have positioned the Global Compact on Refugees as a central guiding instrument of humanitarian and development responses to forced migration. Analyzing the data generated through this mixed methods approach, the paper argues that notwithstanding a formalist understanding of the Compact as “soft law,” the

1 While in most countries, the bulk of direct costs of humanitarian aid to refugees are financed by donor governments that provide funds to the United Nations Refugee Agency and international NGOs to deliver aid to refugee populations, host governments tend to bear indirect costs such as the social and environmental impacts of increased population numbers.

2 Refugee-led community-based organizations created a civil society network known as the Network for Refugee Voices (NRV) to engage in advocacy in relation to the Global Compact's development. While NRV's advocacy as a civil society entity succeeded in making refugee meaningful participation a widely-discussed topic in global dialogue related to forced displacement response, neither the network nor any other group representing refugees was empowered to negotiate the provisions of the Compact as an equal participant with states.

3 The UN Refugee Agency, UNHCR, might argue that it represents the interests of refugees within the UN system. However, with UNHCR's governing body comprised only of states — where refugees are not voters or constituents — and no refugee representation in any decision-making roles within the agency, this argument rings hollow.

positioning of the Global Compact on Refugees has in practice made it a replacement for the Refugee Convention, rather than a complement. The Global Compact on Refugees, the paper asserts, exerts a metaphorical gravitational pull that increases the distance between state treatment of refugees and the putative protection provided to refugees by the international human rights law corpus.

After arguing that the Global Compact on Refugees thus poses a practical danger to the objective of realizing refugees' human rights, the paper considers possible ways to mitigate this danger. Specifically, the paper argues for generating momentum around the use of human rights instruments that are not specific to refugees in order to advance refugees' human rights. In doing so, this paper first considers the absence of an enforcement mechanism in the Refugee Convention that could lessen the gravitational pull of the Compact. Finding that the construction of power in UNHCR both explains this absence and makes redressing it unlikely, the paper next considers the core human rights treaties and their respective enforcement mechanisms, exploring their potential for use by refugees and their allies to create pressure on states to uphold, implement, and enforce refugees' human rights. Finally, the paper examines the potential for the pledging processes of the Compact itself to be subverted into a tool to advance refugees' human rights, but concludes that structural dynamics severely limit this potential.

In making this argument, the paper draws on the author's two decades working in forced displacement response, including participation in the World Humanitarian Summit, drafting efforts around the Global Compact on Refugees, and the 2019 Global Refugee Forum at which the Global Compact's pledging process was first used, as well as her leadership role in a group of civil society organizations advocating for refugees' human rights across various countries in Africa, Asia and Latin America. It also relies on document analysis, in particular public strategy documents issued by UNHCR, and on legal analysis of various international instruments, particularly the Compact, the Refugee Convention, and the core human rights instruments.

Analyzing the compact: formal vs. contextual

The Compact is far from the first instrument to set forth an agreement between states about the treatment of refugees. When it was adopted at the end of 2018, it joined an array of international legal and quasi-legal instruments that address state obligations in relation to refugees, forced migration response, and human rights. To understand the Compact and its implications for refugees' access to and enjoyment of their rights, it is helpful to first contextualize it within this larger legal landscape.

As a non-binding expression of "political will and the ambition to operationalize the principle of burden- and responsibility-sharing," the Compact is what is known as "soft law". Soft law refers to instruments that do not impose binding obligations on any party, but offer "guidelines of behavior" that "are more than mere statements of political aspiration". Other soft law instruments that specifically address the treatment of refugees include the Michigan Guidelines that provide guidance on various issues in refugee law (Hathaway, 2019) and the New York Declaration on Refugees and Migrants, which served as a precursor to the Global Compact

on Refugees and a related instrument, the Global Compact on Migration (United Nations, n.d.).

Soft law instruments are often complementary to "hard law" instruments, which impose binding obligations and generally can be enforced in courts or tribunals (Pronto, 2021). International hard law instruments are, of course, only binding on the states that have agreed (ratified or acceded) to them. The 1951 Convention Relating to the Status of Refugees, also called the Refugee Convention or the 1951 Convention, is the primary international hard law instrument specifically addressing the treatment of refugees *as refugees*. Ratified by 147 states, the Refugee Convention commits states to provide a wide range of rights including *inter alia* free movement, rights related to civil status and political participation, access to labor markets and state services such as education and healthcare, and a pathway to citizenship (UN General Assembly, 1951).

Less widely discussed among displacement response actors but potentially more powerful instruments include the Economic and Civil Covenants, which provide a comprehensive range of rights to all people, including refugees (Sharpe, 2014; Chetail, 2021). Refugees also are entitled to the rights set forth in instruments addressing specific populations, such as the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of the Child, and the International Convention on the Elimination of Racial Discrimination, as well as instruments relating to activities, such as the work rights conventions developed by the International Labour Organization, in jurisdictions where these instruments apply.

The Global Compact on Refugees makes a preliminary reference to these hard law instruments, naming the Refugee Convention and including the others in a footnote. Although it claims to be grounded in the Refugee Convention and guided by other hard law human rights instruments, however, it then sets forth myriad provisions that conflict overtly or implicitly with these instruments, as discussed in the subsequent section of this paper. Meanwhile, the instruments and the rights they provide are never mentioned again.⁴

In formal legal theory, the Compact, as soft law, cannot replace or supercede hard law instruments such as the Refugee Convention and core human rights instruments. A formalist lens, however, is perhaps particularly inappropriate when it comes to international law: Within a state, domestic law is arguably formally or theoretically imposed by the single entity of the state, even if law and society theorists would contest this description, describing law instead as functioning as "a set of recognizable patterned processes and cultural aspirations" that occur or are given effect through myriad societal interactions (Silbey, 2018). International law, by contrast, is formally as well as practically upheld largely through consensus and shared patterns of behavior, rather than through its imposition by a single entity.

A law and society lens, with its focus on context and power analysis, provides a more useful approach to understanding the impact of the Compact, despite its designation as soft law. Such

⁴ Footnote 22 in the Global Compact on Refugees references the Refugee Convention, but only in the context of recognizing states' "legitimate security interests," not refugees' rights or states' obligations.

an approach recognizes that international law derives its power and legitimacy through shared adherence to its tenets, while also acknowledging that states and multilateral institutions wield disproportionate power to shape and define international law through their choices and behavior vis-à-vis international law instruments. The following sections of this article address these choices and behavior in relation to the Compact.

Refugee rights in the text of the Global Compact

Support for refugees' human rights in the text of the Global Compact on Refugees is very weak. The Compact states that it is "grounded in the international protection regime... at the core of which is the 1951 [Refugee] Convention and its 1967 Protocol" and "guided by relevant human rights instruments," but even these vague assurances are diluted by further caveats: The "international protection regime" is framed as "centred on the cardinal principle of non-refoulement," which implies refugees' substantive rights are negligible provided they are not forcibly returned home.

Meanwhile, human rights instruments are described as only one of many sources of guidance for actors who engage with refugees, along with "humanitarian law" and "humanitarian principles of humanity, neutrality, impartiality and independence". Instead of asserting the obligatory nature of human rights commitments, the text of the Compact suggests that neutrality and impartiality hold equal weight with rights. Indeed, the inclusion of neutrality and impartiality could be read as an attempt to implicitly justify the Compact's failure to take a position on many aspects of states' actions toward refugees, even when those actions constitute human rights violations. If anything, the Compact suggests that it defers to states' positions over those of refugees, as it relies on "national ownership and leadership... taking into account national legislation, policies, and priorities". In many countries, national legislation authorizes or endorses violations of refugees' human rights (CGD, RI, *Asylum Access*, 2022).

Aside from the initial half-hearted reference to the binding human rights instruments that provide a theoretical guarantee of human rights for refugees, the remainder of the Compact text speaks almost exclusively to the interests of states. The four "objectives" of the Compact, for example—"to: (i) ease pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions; and (iv) support conditions in countries of origin for return in safety and dignity"—are framed primarily around states' interests (UNHCR, 2018). Achieving refugee "self-reliance" is primarily the interest of donor states that foot the bill for material assistance to forcibly displaced people, effectively providing a form of social security (albeit deeply inadequate) for those whose home states cannot or will not protect them. Easing pressure on host countries, including by expanding access to resettlement and other "third country solutions" and supporting repatriation to refugees' "countries of origin", primarily reflect the interests of host states.⁵

⁵ Some would argue that "self-reliance," "access to third country solutions" and "return in safety and dignity" address the interests of refugees. However,

The Compact exhorts and encourages states to take certain steps to support refugees' power to move freely, work on fair and equitable terms with others, access education and healthcare, and participate in civic life—but it generally stops short of requiring states to fulfill the obligations to which they have already committed, instead using language such as "take measures" or "expand opportunities" to access fundamental rights, caveating these using phrases such as "subject to national laws" (UNHCR, 2018). The Compact thus directly contradicts a range of human rights instruments.

For example, almost every country in the world has ratified the Convention on the Rights of the Child, which requires states to "make primary education compulsory and available free to all" in ways that ensure "equal opportunity" for "every child," specifying without discrimination of any kind" (CRC arts. 28. 1, 2) (UN General Assembly, 1989). The Compact, however, simply provides:

"In line with national education laws, policies and planning, and in support of host countries, States and relevant stakeholders will contribute resources and expertise to expand and enhance the quality and inclusiveness of national education systems to facilitate access by refugee and host community children..." (UNHCR, 2018).

The Compact thus implies that participating states may elect to include refugee children in primary schooling, without addressing either the obligatory nature of refugee children's access to education, nor the requirements that such education be provided on non-discriminatory basis that provides equal opportunity for refugees and nationals.

refugees' expressed preferences do not support this view. In discussing their economic participation, refugees tend to express interest in increased economic access and opportunity, reduction in work rights violations such as wage theft and harassment, greater economic power, and the role of work as a source of purpose, meaning, family support and community contribution (*Asylum Access*, 2011; Leghtas and Hollingsworth, 2017). The framing of "self-reliance," with its connotations of not receiving economic resources from a source other than one's own labor, does not reflect the way refugees talk about their interests, nor the reality that many refugees receive (and give) economic support through remittances and community mutual support structures in addition to formal aid mechanisms, regardless of whether they also engage in paid labor (UNHCR, 2017). Similarly, in regards to repatriation to a country of origin, while refugees often express wishes around returning to an idealized version of their country where they can live free from threats to their safety and wellbeing, very few refugees choose to return to their countries in real-world conditions (UNHCR, 2022b). Host states, by contrast, frequently want refugees to return home; many impose a variety of measures, from border closures to arbitrary detention, to encourage returns and deter new arrivals. Along the same lines, while refugee interest in resettlement (assisted relocation) to a "third country" exceeds offered opportunities, this interest can only be assessed in a context where host states widely violate refugees' human rights through arbitrary detention, impediments to equitable economic participation, exclusion from education and more (Long, 2010; OHCHR, 2017; IDC, 2022). Host states, on the other hand, often have the power to integrate refugees but instead choose to encourage and demand resettlement to "third countries" (UNHCR, 2018).

Similarly, the Economic Covenant requires that refugees be permitted to access the labor market immediately, on an equal basis with nationals, as clarified by interpretations issued in 2006, 2009, and 2016 by the UN committee charged with interpreting the Covenant (UN CESCR, 2006, 2009, 2016). The Refugee Convention, while providing more limited work rights, requires that refugees who have attained a certain “level of attachment” to a country of refuge, such as having a national spouse or child, or residing in the country for three years without state action to remove them, must be allowed to access the labor market on an equal basis with nationals (Hathaway, 2021). In total, 171 countries have ratified either the Economic Covenant and/or the Refugee Convention without relevant work-related reservations.

The text of the Global Compact on Refugees, however, positions work rights as optional for refugees, providing for example that “subject to their relevant national laws and policies,” states agree to “promote economic opportunities [and] decent work.” This obfuscates states’ obligation under the Economic Covenant to “refrain[] from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including...migrant workers” (UN CESCR, 2009). The Committee charged with interpreting the Economic Covenant elsewhere specifies that this and other economic rights apply “to all workers in all settings [including] refugee workers,” and directs that “States parties should enact legislation enabling refugees to work and under conditions no less favorable than for nationals” (UN CESCR, 2016). In other words, the text of the Global Compact treats access to decent work as optional for states, even though most states participating in the Compact are obligated to provide such access as a matter of legal obligation.⁶

From a strict legal formalist lens, these contradictions between the Compact and “hard law” human rights instruments do not significantly diminish the human rights obligations of states. According to a formalist theoretical framework, human rights instruments retain their binding qualities; while the Compact can provide interpretive guidance, direct contradictions are resolved in favor of the binding hard law instruments for the states that have agreed to be bound.

Viewing the Compact’s text with a law and society lens, however, we can see that it expresses a change in the shared conceptions of powerful actors (particularly states and multilateral institutions) about how states are obligated to act vis-à-vis refugees and those who may be refugees. Because these powerful actors are both those who hold obligations to refugees under human rights instruments and those who enforce the same obligations on each other, the drafting of a Compact that articulates weaker rights for refugees, in the form of less stringent standards for state action in regards to this group of people, poses a practical danger. While the Compact is allegedly non-binding, it nevertheless is a

text collectively drafted by those with power over refugees that sets out a vision for cooperation between these powerful actors in their response to forced displacement—and that vision does not include upholding and enforcing their human rights obligations toward refugees.

Beyond text: how the positioning of the Compact threatens rights

The text of a legal instrument cannot be separated from its context, if we are to examine how the instrument functions in the world. To assess the potential danger of the Global Compact on Refugees, therefore, we must look not only at its text, but at how it is treated and used, and what impacts result.

While the Compact’s text is problematic because it suggests that states have far fewer obligations to refugees than human rights instruments assert, this problem could be substantially mitigated if states, multilaterals, and other actors in the forced displacement response sector treated it as complementary to human rights instruments, in line with the understanding of the Compact advanced by some scholars (Guild et al., 2022). UNHCR in particular appears, on a surface-level examination, to be appropriately situated to lead other actors by example: As the multilateral body responsible for supervising and coordinating cooperative responses to forced displacement, the UN Refugee Agency acts as a convenor and interlocutor with states, and plays a central role in defining norms around forced displacement response. Unfortunately, however, UNHCR has not treated or used the Compact as a complement to the Refugee Convention or other human rights instruments. Instead the Compact is widely used, by UNHCR and others, in ways that position it as a replacement for the Refugee Convention and other human rights instruments, favoring the provisions of the Compact *over* such instruments.⁷

This is true in regard to both the Refugee Convention and broader human rights instruments such as the twin central human rights Covenants—the International Covenant on Economic, Social and Cultural Rights or “Economic Covenant” and the International Covenant on Civil and Political Rights or “Civil Covenant”—that comprise the foundation of our current system of protection of individuals in light of the greater power of states. With the adoption of the Global Compact on Refugees, UNHCR and other multilateral institutions routinely engage states in dialogue and build strategies based on the Global Compact, but instruments that safeguard the rights of refugees are rarely mentioned.

⁷ Various scholars have argued that UNHCR not well-positioned in its current incarnation to promote a strategy that centers refugees’ human rights and holds states accountable for non-compliance with their obligations in this regard (Betts et al., 2011; Alexander and Singh, 2022). UNHCR’s role in coordinating refugee humanitarian aid (which creates conflicts of interest within the agency), its donor dependence, and its lack of an enforcement mechanism for the Refugee Convention all limit its fulfillment of its mandate responsibilities to supervise state compliance with the Refugee Convention. UNHCR also has not significantly embraced a role as an advocate for refugees in contesting or opposing state practice through the use of other human rights treaty mechanisms.

⁶ While the migration governance sector has actively addressed the relationship between the Migrant Workers’ Convention and the Global Compact on Migration, with a draft General Comment on the topic under discussion in late 2022, the forced displacement response sector has not undertaken similar steps to reaffirm states’ obligations to uphold refugees’ human rights under binding international conventions. See <https://www.ohchr.org/en/treaty-bodies/cmw/general-comments>.

For example, in UNHCR's Strategic Directions 2022-2026, the Global Compact on Refugees is substantively referenced as a basis for the agency's global strategy eight times in the 19-page document. No other core human rights convention is mentioned. Neither is the Refugee Convention, which forms the theoretical basis of UNHCR's authority and legitimacy. The only mention of any international human rights instrument is a brief reference to the Convention on Statelessness. Instead, the Strategic Direction articulates UNHCR's goals thusly: "We will work towards the objectives of the Global Compact on Refugees, the 2030 Agenda for Sustainable Development, and Our Common Agenda" (UNHCR, 2022a). In other words, UNHCR aims to serve the interests of states, host communities, and multilateralism, but not the particular needs and interests of refugees.

This focus on the Global Compact in lieu of human rights instruments is not unique to the Global Strategic Direction. UNHCR's most recent Livelihoods Strategy (2019-2023) makes no reference to any human rights instrument, including the Economic Covenant and other worker rights instruments, but substantively references the Global Compact on Refugees twice (UNHCR, 2019). The Joint Data Center Strategy 2021-2023, which sets forth how UNHCR and the World Bank will gather and analyze data to inform forced displacement response decisions around the world, substantively references the Global Compact three times, but makes no references to any human rights instrument other than the Convention on Statelessness (JDC, 2021). Strategy documents for two of the largest refugee situations in the world, the Afghanistan Situation Regional Response Plan and the Refugee and Migrant Response Plan for Venezuela, each substantively reference the Global Compact three times, making it a centerpiece of response framing. Each mentions human rights instruments only once (the former in the context of Uzbekistan's possible accession to the Refugee Convention; the latter in reference to application of the European Convention on Human Rights in Curacao) (UNHCR, 2022c,d).

Beyond UNHCR, other multilaterals also reference the Global Compact as the guiding instrument on forced displacement, without mentioning or considering the Refugee Convention or other human rights instruments applicable to refugees. For example, in its 2020-2025 Strategy for Fragility, Conflict, and Violence, the World Bank, arguably a powerful actor influencing forced displacement response globally, states that it will "support transforming the global response to forced displacement" with specific reference to the Global Compact, and then goes on to emphasize that it will not pursue or specifically align with a rights-centric approach (even as the Strategy recognizes the importance of human rights in mitigating conflict in other circumstances) (World Bank, 2020).

The trend illuminated in these and other strategy and guidance documents is also reflected in the content of forced displacement response conversations since the Compact's drafting, both formal dialogues convened and led by multilateral and state actors, and informal conversations where staff of states and multilaterals are asked about their priorities, aims, and activities. The consistent absence of human rights instruments in multilateral institutions' forced displacement response strategies and activities, coupled with a repeated positioning of the Global Compact on Refugees as the

guiding framework for forced displacement response, creates a pattern of action and aspiration that effectively replaces the Refugee Convention with the Compact.

Mitigating the dangers posed by the Compact

Some would argue that the primacy of the Global Compact on Refugees over the Refugee Convention simply reflects a pre-existing reality, that states honored refugees' rights under the Convention mainly in the breach. Certainly, examples of state violations of these rights abound.

If we accept that the Compact has displaced the Refugee Convention as the framework that guides the actions of states and others with regard to refugees, however, it becomes clear that this is likely to further erode refugees' access to the rights set forth in the Refugee Convention, as states parties to that convention feel less pressure to comply with it.

What may be less obvious is the potential implication for refugees' access to human rights beyond these two instruments: By reinforcing the notion that states' treatment of refugees is established through international cooperation agreements focused on state-state relations rather than on states' relationships with refugees, the Global Compact on Refugees contributes to an understanding of refugees as falling outside of the population or society to whom a state is accountable. Prior to the adoption of the Global Compact, global dialogue and multilateral strategies and guidance on forced displacement response rarely referenced human rights instruments beyond the Refugee Convention. The Global Compact on Refugees, as an instrument that expresses state conceptions of their role in forced displacement response, adds a metaphorical gravitational pull that widens the divide between state treatment of refugees and the guarantees of core human rights instruments.

The second part of this paper therefore asks: How can we counter this gravitational pull and mitigate the impacts of the way the Compact is positioned, understood, and used by states and multilaterals? In answering this question, the paper considers specifically the role of human rights enforcement mechanisms and processes, understood broadly to include mechanisms and processes that exert pressure in a variety of ways.

Of preliminary note, the Refugee Convention—unlike other human rights treaties—lacks any sort of international enforcement mechanism. No global adjudicatory body exists to hear and decide claims by a refugee against their host government for violation of their rights under the Refugee Convention. Despite the fact that UNHCR is empowered to "supervise compliance" of states parties with respect to the Convention, like other human rights treaty bodies, UNHCR's supervisory role has not manifested in the development of an adjudicatory mechanism by which lack of compliance could be addressed. Similarly, the UN Refugee Agency has no mechanism for formal reporting and debate on state compliance (UN General Assembly, 1950).

Scholars have described various reasons UNHCR has not developed an adjudicatory mechanism for the Convention. One is that UNHCR's Statute provides that the work of the agency shall be "of an entirely non-political nature; it shall be humanitarian and social," which UNHCR has frequently interpreted as limiting its ability to publicly critique states' non-compliance with the Refugee Convention (UN General Assembly, 1950).⁸

Another is UNHCR's dependence on states' good will. While all multilateral entities operate at the consent of their members, UNHCR has increasingly taken a leadership and coordination role in the delivery of humanitarian aid over its 70 year existence. Providing aid requires maintaining access, which means UNHCR is dependent on the good will of refugee-hosting states in order to fulfill the role it has created for itself. At the same time, UNHCR also depends financially on donor states' voluntary contributions. These twin aspects of dependence on states have caused the agency to retreat from the treaty supervision aspect of its mandate, which necessarily entails critique of state practice (Betts et al., 2011).

Perhaps the greatest factor contributing to UNHCR's lack of treaty compliance assurance mechanisms lies, however, in its governance. Unlike human rights treaty bodies, which generally comprise independent human rights experts, UNHCR's governing body comprises refugee-producing, refugee-hosting and refugee-supporting donor states but, notably, not refugees — even though refugees are not represented by their host state, nor by their home state in the way other people are (Kanyamanza and Arnold-Fernandez, 2022). As a result, all of those charged at the highest level with ensuring that UNHCR fulfills its responsibility to "supervise compliance" of states vis-à-vis the Refugee Convention represent the very entities that comprise potential Convention violators—and none represent the people potentially harmed by such violations.

One could argue that the construction of power within UNHCR makes it almost inevitable that state interests would predominate over the interests of refugees. Seen in this light, the text and usage of the Global Compact, its elevation in place of the Refugee Convention in UNHCR strategies and guidance, and the lack of an enforcement mechanism that would hold states accountable for violations of their obligations to refugees under the Refugee Convention, are consequences of the same structural dynamics. While exploring these dynamics in depth is beyond the scope of this paper, it seems reasonable to conclude that UNHCR lacks an appropriate mechanism by which to counter the pull of the Compact toward state interests and away from refugees' human rights. Moreover, it is likely that any attempts to develop an enforcement mechanism for the Refugee Convention would require a shift in UNHCR's governance as a prerequisite.

Human rights treaty bodies: a promising possibility

Beyond the Refugee Convention, however, the possibilities are more promising. Each of the treaty bodies responsible for supervising compliance with the nine core international

human rights legal instruments has a mechanism for receiving complaints from individuals who believe they have experienced rights violations (OHCHR, n.d.a,b,c). Many of these bodies also demand regular reports from states parties addressing compliance. While the structures of these processes often reinforce some aspects of existing power relations, they also vest power in rights-holders such as refugees, and constrain power of states. Both types of processes could serve as a way of enforcing refugees' human rights.

For example, the Economic Covenant, like the Refugee Convention, is overseen by a body charged with "supervising compliance," specifically the Committee on Economic, Social, and Cultural Rights, to whom authority has been delegated by the United Nations Economic and Social Council. This Committee receives regular reports from all states parties detailing their implementation of Economic Covenant rights, and responds by raising concerns and making recommendations for improvement. Refugee-hosting states, like other states, are required to make such reports if they are parties to the Covenant. Additionally, in certain cases, the Committee may also hear complaints from individuals and make recommendations to the relevant state(s) regarding specific actions or remedies to address a rights violation (OHCHR, n.d.d). A refugee, like any other person, may make such a complaint against their host state.

Enforcement mechanisms like those of the Economic Covenant are imperfect and limited, of course. Inadequate compliance assurance mechanisms is a common failing across international human rights legal instruments (Dutton, 2012; Boutros, 2018). In many cases, those whose rights are violated by a state are unlikely to have complaints heard by a body that could authoritatively confirm the violation. Not all violations can be brought to a treaty body, and those that can typically require prior exhaustion of domestic remedies—that is, a complainant must have litigated their complaint through all possible domestic courts, and failed to secure a remedy, before bringing the complaint to a treaty body. Moreover, treaty bodies often have other limits on the complaints that can be brought before them; for example, the Human Rights Council can only consider "consistent patterns of gross and reliably attested violations," not violations occurring to a single person or a small number of individuals. Even where a treaty body hears a complaint and pronounces a right violated, the body may have limited ability to secure redress for the person making the complaint (OHCHR, n.d.a,b,c). Other treaty compliance monitoring mechanisms such as state reporting may suffer from inadequate independent investigation or a lack of accountability to improve (Dutton, 2012).

Nonetheless, enforcement pathways exist for most human rights treaties, which—even if not available to everyone who might experience a rights violation—can serve to deter rights violations (OHCHR, n.d.a,b,c).

At present, the mechanisms and processes of the core human rights treaties are currently deeply underutilized as a tool for enforcing refugees' human rights, and thus warrant increased attention.

Particularly promising is the Universal Periodic Review (UPR) process. This process, run by the UN Human Rights Committee, aims to consolidate human rights monitoring by considering a state's compliance with all of the core human rights treaties on a quadrennial basis. It accepts reports from the state being reviewed as well as from civil society, multilateral agencies, and

⁸ It is worth noting, however, that this interpretation is at odds with the meaning of the term "social" in the Economic Covenant, and with other treaty bodies' understanding of their supervisory roles.

knowledgeable individuals to amass a comprehensive picture of the state's compliance with its human rights obligations. It also leverages the power of peer pressure as a soft enforcement mechanism, inviting other states to conduct the review and to make recommendations for concrete improvements. These recommendations may be accepted or rejected by the state under review; if accepted, the state must report on progress at its next quadrennial review. UPR recommendations have proven effective at improving lived access to and enjoyment of human rights across a wide array of countries (UPR-Info, 2022). Refugees and their allies could benefit from using the UPR process to advance refugees' human rights, both by submitting reports to the Human Rights Committee and by encouraging reviewing governments to make specific recommendations addressing refugees' human rights (the latter is best done by engaging the reviewing government's principal embassy in the state under review and/or that government's mission to the United Nations in Geneva).

Asylum Access Thailand and other Thai NGOs used this approach effectively during Thailand's 2016 Universal Periodic Review. After advocacy of the type described above, peer states made a recommendation to Thailand that it should develop a procedure to recognize the legal status and lawful presence of refugees. At the time, Thailand was violating refugees' human rights by providing no pathway to regularize their stay in Thailand, and by subjecting them to detention and *refoulement* (forcible return). Thailand's peers determined that the government was failing in its human rights obligations in this regard, and formally recommended the Thai government remedy this failure (UPR-Info, n.d.). Thailand accepted the recommendation and began developing a procedure to legally recognize and regularize refugees within its borders. While there are valid critiques of the Thai government's effort in this regard, both in process and in result, Thai human rights advocates and refugees in Thailand have expressed a belief that it represents on balance a positive development (Thanawattho et al., 2021).

The Compact's pledge mechanism: form but not substance

Despite the Compact's antagonistic role vis-à-vis the realization of refugees' human rights, it is worth asking whether any aspect of the Compact's implementation could be used subversively to advance refugees' access to rights. This question is particularly pertinent in regard to the Compact's pledging process, a mechanism for renewing political will around progress toward the Compact's goals that is open not only to states and multilaterals but to all actors. Activist lawyers aligned with the law and society movement have historically used laws to subvert the very interests those laws were designed to protect; if the Compact is firmly positioned as the framework that guides state action, could its pledging process be utilized to produce normative effects that support stronger state adherence to human rights norms in relation to refugees?⁹

9 Various scholars have argued that international law has normative effects that extend beyond the direct relationship between enforcement and compliance (Martin, 1989; Simmons, 2009). The Compact likely will

A review of the pledging process to date, and an examination of a highly-touted pledge related to refugees' economic rights, suggests that while some human rights advances may be possible through this process, those advances are likely to be limited—and may reify state action that falls substantially short of a state's actual human rights obligations.

Pledges under the Global Compact are voluntary commitments by actors in the forced displacement response space, with progress toward those commitments reported every four years at a Global Refugee Forum. In theory, states could make pledges regarding the implementation of refugees' human rights, such as pledging to create a system or framework that institutionalizes certain rights, or to improve enforcement of those rights through added resources.

However, the structural dynamics around the pledging process suffer from the same patterns of power (and lack thereof) that are at play in the governance of UNHCR and the construction of the Compact's vision of state cooperation: The process offers refugees and their allies little power to force or pressure states to act in alignment with their human rights obligations.

One example of this is Ethiopia's 2019 pledge to create pathways by which refugees could access national labor markets. Although Ethiopia is already a signatory to the Economic Covenant, which provides a range of work rights for refugees, refugees in Ethiopia were at the time barred from working and confined to internment camps. Ethiopia pledged to change its policies to allow some refugees to leave the camps and obtain work permits, although it did not extend labor protections to refugee workers. Work permits did not accord refugees their full work rights under either the Refugee Convention or the Economic Covenant, but instead were subject to a number of restrictive conditions unless the refugee worker agreed to take a job in a so-called industrial park—a special economic zone with favorable export rules that was far from locations where workers can seek support if their rights are violated, and in which, at the time the permits were issued, unions were not allowed (UNHCR, 2019). Special economic zones are widely regarded as facilitating worker abuse, to the extent that labor rights advocates and migrant worker organizations often refer to them as “Special Exploitation Zones” (Crawley, 2017).

The Ethiopia example highlights a central risk of attempts to use the pledging process to advance refugees' rights and interests: States are likely to make pledges that are touted as improving refugees' wellbeing but actually serve state interests, potentially at the expense of refugees. In the Ethiopia example, rather than insisting on a coherent suite of work-related rights, as a human rights or labor rights enforcement body might have done, the pledging process allowed the government to claim that it had advanced implementation of refugees' human rights—and reap the benefits thereof—while selecting only those aspects of rights that served government interests. At the 2019 Global Refugee Forum, Ethiopia was showered with praise for its pledges. The framing of the Forum and the pledging process as a locus for cooperation meant that space and openness for critique was virtually non-existent.¹⁰

play some role in acculturation of new norms developed or implied within it—although whether these norms align with the rights in the Refugee Convention or detract from it is open to significant debate (Chimni, 2019; Triggs and Wall, 2020).

The Global Compact's pledging has some similarities to human rights enforcement mechanisms. For example, it demands regular state reporting, just as the Committee on Economic, Social and Cultural Rights does vis-à-vis the Economic Covenant. It encourages and rewards progress toward concrete actions to address failings, as the Universal Periodic Review (UPR) process does. However, the pledging process is distinct from the structures of human rights mechanisms because the yardstick against which a state is measured is created by the state itself, not by an external entity such as a treaty body or group of peer states. Moreover, the state creates this yardstick by selecting elements of the Compact on which it will be measured, allowing it to evade responsibility or even consideration of its performance on elements that involve human rights obligations. The pledging process in effect mirrors the form of the UPR and other rights enforcement mechanisms without the substance: At the Global Refugee Forum, states report on their compliance with pledges they voluntarily create—pledges to implement an instrument that is not centered on refugees' rights but rather on state interests. At the UPR and other human rights reporting forums, states report on their compliance with mandatory treaty obligations. Thus, while the form is similar—both the Forum and the UPR use a reporting structure—the substance is substantially different.

Conclusion: mitigating danger requires investing in human rights enforcement

In the face of the Compact's pull against realization of refugees' human rights, reinvigorating this objective requires investing in building the legal power of refugees and their allies to utilize human rights enforcement mechanisms. As described above, procedures of the treaty bodies for the core human rights treaties offer some promising avenues. Making effective use of these avenues will require resources, substantive and procedural legal knowledge, and a trusting relationship between the refugee communities experiencing actionable rights violations and those representing their interests via these avenues.

10 Pledges made under the Global Compact are insulated from critique not only because the Global Refugee Forum at which pledges are announced emphasizes cooperation, but also because those most directly affected by inadequate, disingenuous, or even unintentionally harmful pledges are largely excluded from the invite-only Forum. At the first Global Refugee Forum in 2019, refugees and members of host community civil society together totaled only two percent of all Forum participants (UNHCR, n.d.). By contrast, most human rights enforcement mechanisms are driven by, or significantly consider, the perspectives of those most affected: Complaints mechanisms such as those established by the Committee on Economic, Social and Cultural Rights or the CEDAW Committee are mobilized at the instigation of a complaint by a person whose rights have been violated, while reporting mechanisms such as the Universal Period Review process regularly receive "shadow reports" from local civil society in the country where rights compliance is being assessed (OHCHR, n.d.a,b). The Forum has no analogous centering of the perspectives of refugees. Indeed, because the Forum is invite-only, refugees or others who are perceived as overly critical may be denied access.

At present, states and other actors are directing substantial funding toward realization of the goals of the Global Compact on Refugees. The goal of realizing refugees' human rights requires comparable, complementary investment. Holding states accountable to their human rights obligations can only happen if those interested in holding them accountable—that is, refugees—are resourced to do so.

The forced displacement response sector has a long way to go in this regard. At present, almost no resources are invested in refugee human rights enforcement strategies, including effective utilization of treaty bodies and processes such as the Universal Periodic Review, the Committee on Economic Social and Cultural Rights and the CEDAW Committee and more. Similarly, very little is invested in other forms of enforcement such as litigation in national and regional courts, which may be necessary to exhaust domestic remedies in order to gain access to an international human rights enforcement process. The Global Strategic Litigation Council for Refugee Rights, for example, has at time of writing been unable to secure resources to fund even a single litigation attempt, much less a comprehensive rights enforcement strategy. Asylum Access, a leading refugee human rights organization, typically funds its limited strategic litigation from general operating funds because project-specific funding is not available.

Until such efforts are viewed as equally important to state cooperation under the Global Compact on Refugees, and adequately resourced for success, human rights will continue to be words on paper that bear little resemblance to most refugees' lived realities.

Author's note

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The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the author.

Author contributions

The author confirms being the sole contributor of this work and has approved it for publication.

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The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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