

## **The NY Declaration for Refugees and Migrants Adopted by the UN General Assembly: Towards a New International Legal Framework?<sup>1</sup>**

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### I Introduction

On migration, there is no doubt that the current refugee crisis in Europe, North Africa, and the Middle East is one of the central issues under discussion. Indeed, voices from several sectors have called it one of the biggest issues that needs to be addressed by the international community in the 21st century.<sup>2</sup> This phenomenon of a “large movements of refugees and migrants”<sup>3</sup> has also provoked a serious debate on whether existing international legal frameworks can adapt to such a reality. The present legal frameworks are fundamentally based on the distinction between refugees and migrants, where primary importance is placed on the protection of refugees who are part of forced migrations. As a response, the United Nations General Assembly (UNGA) held a high-level meeting on September 19, 2016, and adopted the New York Declaration for Refugees and Migrants (the NY Declaration).<sup>4</sup> The adoption of the Declaration can be seen as an apex of current efforts at the UN level.

This short essay aims to provide a brief overview of current international legal frameworks and investigate the potential implications of the NY Declaration. The following questions will be explored: is there any impact of the NY Declaration on current international legal frameworks, including institutional mechanisms for responding to large movements of refugees and migrants? If so, what are the impacts, and what are the challenges for the UN and the international community?

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1 This essay is written based on my presentation in “interdisciplinary” Symposium: “Joint Research Forum on Migration” held in University of San Carlos (16 March 2017). Furthermore, some parts of this essay is based on the description in my article: Maruyama, M. “The Concept of ‘Mixed Migration’ and Human Rights-Based Approach by International Organizations: Some Reflections on the Refugee Crisis in the North Africa and the Middle East”, 65 *Yamagata Daigaku Hoseironso (Yamagata University journal of law and politics)* (2016), pp.1-42 [in Japanese].

2 See for example Goodwin-Gill, G. S. “The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change,” *International Journal of Refugee Law*, Vol.28, (2016), pp.687-688.

3 This phrase is consistently used in “the NY Declaration.” See A/RES/71/1, September 19, 2016. For example, the text of that resolution provides:

“The General Assembly,

Adopts the following outcome document of the high-level plenary meeting on addressing large movements of refugees and migrants.”

4 *Ibid.*

## II Current international legal frameworks: main shortcomings

As is well known, there is no comprehensive multilateral international treaty on migration that has been entered into force by all States. There are, however, various international frameworks related to migration. For the purpose of analysis, these can be categorized into four groups: (1) protection of refugees, (2) human rights protection for migrants workers, (3) regulation of international crimes, and (4) informal multilateral fora for international cooperation on migration. The following is an overview of each category focusing on shortcomings and limitations.

### (1) Protection of refugees

There are two core instruments at the universal level for the protection of refugees: the Convention relating to the Status of Refugees (adopted in 1951 with 145 ratifications) and the Protocol relating to the Status of Refugees (adopted in 1967 with 146 ratifications).<sup>5</sup> The Refugee Convention defines “refugee” as a person, “owing to *well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*, is *outside the country* of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country” (Article.1-A (2), emphasis added). According to the Conventions, the UN High Commissioner for Refugees (UNHCR) assumes the function of providing international protection to refugees. In so doing, it has evolved three basic measures—voluntary repatriation, integration, and resettlement in a third country—as durable solutions. Furthermore, the UNHCR has progressively been expanding “the protection space” to include those fleeing from international armed conflicts and internally displaced persons (IDPs) mainly fleeing internal armed conflicts who are not recognized in the mandate of the Refugee Conventions.<sup>6</sup> Corresponding to such expansion, the focus of academic study has also been shifting from “refugee studies” to “forced migration studies” since the 1990s.<sup>7</sup>

At any rate, the Refugee Conventions have no provision imposing strict obligations on State Parties for international cooperation, while Article 35 of the Convention only provides a soft framework for cooperation. In other words, the Refugee Conventions do not legally require or guarantee the reception of refugees by States in resettlement programmes. This means, in part, that there is no legal rationale for how to achieve equitable burden or responsibility sharing within the present legal frameworks.

### (2) Human rights protection for migrant workers

The International Labour Organization (ILO) has long been setting international standards to protect

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<sup>5</sup> Combined, these two conventions are known as the “Refugee Conventions.” Another regional treaty, the OAU Convention Governing Specific Aspects of Refugee Problems in Africa, adopted in 1969, expands the definition of refugee to include persons fleeing from armed conflicts.

<sup>6</sup> Goodwin-Gill, *supra* note (2), p.682.

<sup>7</sup> See for example Fiddian-Qasmiyeh, E., G. Loescher, K. Long, and N. Sigona (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford University Press (2014).

migrant workers' rights. This has been done through the ILO Conventions and Recommendations, which are equipped with a supervisory mechanism to promote the implementation of standards in each Member State. The Migration for Employment Convention (Revised), No. 97 (adopted in 1949 with 49 ratifications) and the Migrant Workers (Supplementary Provisions) Convention, No.143 (adopted in 1975 with 23 ratifications) are particularly important. They aim to protect migrants in the process of movement and in receiving equal treatment in recipient States.

At the UN level, the UNGA adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in 1990 (with 51 ratifications). As the name of the treaty indicates, it has a broad objective and it diminishes any distinction between "regular" and "irregular" migration. Although there was some doubt as to whether the convention would be entered into force, this was achieved in 2003. This convention has, like other human rights treaties, its own supervisory mechanism to ensure implementation by the State Parties. However, neither the ILO Conventions nor the Rights of Migrant Workers Convention have many ratifications, and almost all of the State Parties are sending States. Therefore, expectations for their effectiveness are low.

With regard to the universality of Parties and effective supervisory mechanisms, we cannot ignore various human rights treaties, including two international covenants and the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. While these human rights treaties do not deal with migration directly or comprehensively, all of these provide for equality and non-discrimination as fundamental principles. Two of them focus on women and children respectively, who are frequently placed in fragile and severe conditions as refugees or migrants.

There are some attempts to codify one inclusive instrument by combining the plethora of relevant human rights and principles. To raise one example, the Georgetown University Law Center's International Migrants Bill of Rights Initiative aims to provide "a dynamic blueprint for the protection of the rights of migrants, drawing from all areas of international law, including treaty law, customary international law, areas of State practice and best practices."<sup>8</sup> To be sure, there are criticisms that more effort should be placed on ensuring the implementation of existing norms by States rather than drafting such an instrument, and that such an instrument cannot be an effective legally binding treaty when we look at the current situation surrounding the Rights of Migrant Workers Convention. Despite some truths in these criticisms, such an inclusive document for migrants' rights could present a viable pathway to

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8 See Georgetown University Law Center, "International Migrants Bill of Rights," *Georgetown Immigration Law Journal*, Vol. 24, (2010), pp.395-506. On the international legal framework based on customary international law, see Chetail, V., "The Transnational Movement of Persons under General International Law-Mapping the Customary Law Foundations of International Migration Law," in Chetail, V. and C. Bauloz (eds.), *Research Handbook on International Law and Migration*, Edward Elgar Publishing (2014), pp.1-72.

building a more effective and comprehensive global governance on migration.

### **(3) Regulation of international crimes**

Recently, human trafficking and migrant smuggling in the large movements of refugees and migrants have been increasingly regarded as serious problems. In 2000, the UNGA adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (with 169 and EU ratifications) and the Protocol against the Smuggling of Migrants by Land, Sea and Air (with 141 and EU ratifications). Both are supplements to the UN Convention against Transnational Organized Crime. The former obliges State Parties to criminalize human trafficking (Article 5) and also imposes on States obligations to assist and protect victims of human trafficking (Article 6). The latter also obliges State Parties to criminalize the smuggling of migrants (Article 6), but denies criminal liability of migrants (Article 6). For example, it also provides that measures to prevent smuggling at sea shall be taken in accordance with relevant domestic and international laws (Article 8 (7)) and that States shall ensure the safety and humane treatment of the persons on board when they take measures against a vessel (Article 9 (1)).

These Protocols have not been equipped with supervisory bodies as is the case with human rights treaties. On the other hand, the International Organization for Migration (IOM) is given an important role of providing technical assistance for States to prevent human trafficking and protect victims. The UN Office on Drugs and Crime (UNODC), as the Secretariat of the Conference of Parties to the UN Convention against Transnational Organized Crime, also assists States with implementation. Taking the protection of victims based on the above two Protocols into consideration, these two Protocols might also be regarded as a kind of framework for human rights protection. On the other hand, as these regimes consider people as objects to be controlled and regulated by States, they may also function to confine migrants who want to move from the South to the North, where there are severely restricted (almost closed) regular routes in the name of the security of industrialised countries (securitization).

### **(4) Informal multilateral fora for international cooperation on migration<sup>9</sup>**

In the 1990s, many international conferences to address various global issues were held under the aegis of the UN. The International Conference on Population and Development held in 1994 strongly recognized the need for a comprehensive response to migration. For many years after that conference, however, a multilateral framework for comprehensive response was not formalized. A turning point was the UNGA High-Level Dialogue on International Migration and Development convened in September 2006. Before this UNGA plenary session, the UN Secretary-General established the Global Migration Group (GMP) for the purpose of inter-institutional coordination and cooperation. The GMP is composed

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<sup>9</sup> See in detail, Omelaniuk, I., "Global migration institutions and processes" in Opeskin, B., R. Perruchoud, and J. Redpath-Cross (eds.), *Foundations of International Migration Law*, Cambridge University Press (2012), pp.356-363.

of relevant UN and autonomous subsidiary organs, specialized agencies, and the IOM.

Furthermore, the Global Forum on Migration and Development (GFMD) was established as an independent and informal multilateral forum. The GFMD is open to every State and UN observer, and characterized as a voluntary, informal, and non-binding State-led process. The GFMD aims to promote understanding and cooperation for strengthening the relationship between migration and development and to produce practical and action-oriented results. While it is not a part of the UN, the contents of discussions in the GFMD are reported to the UNGA and there is close relationship with the Secretary-General's Special Representative for international migration and the GMP. The GFMD took on the role of hosting the preparatory meeting for the Second High-Level Dialogue on International Migration and Development held in 2013.

As indicated by their names, the informal fora for dialogue aim to strengthen international cooperation that connects economic development and international migration, and indeed they have contributed to doing so. It is also important to note that humanitarian dimensions such as protection of migrants' rights and response to human trafficking and migrant smuggling have also been put on the agenda in these fora.

As a whole, the current international legal frameworks can be characterized as a patchwork of various human rights instruments and weak implementing mechanisms in which many international actors are involved. A comprehensive framework for international migration, if any, is embryonic and informal.

### III Overview of the NY Declaration

#### (1) Antecedent to the NY Declaration

One of the key characteristics of the current "large movements" of people might be that it is "mixed" in that refugees who legally must be protected and migrants who are not necessarily protected move along the same routes, and that the person who is on the move often has mixed motivations—both to be free from fear or persecution and to seek opportunities for better living conditions. Where States and various international organizations and NGOs have faced this phenomenon, they cannot help but make refugees and migrants objects of protection and assistance. The distinction between the two is thus certainly becoming blurred and obsolete. On this point, the NY Declaration says the following:

"We are witnessing in today's world an unprecedented level of human mobility. More people than ever before live in a country other than the one in which they were born. Migrants are present in all countries in the world. Most of them move without incident. In 2015, their number surpassed 24.4 million, growing at a rate faster than the world's population. However, there are

roughly 65 million forcibly displaced persons, including over 2.1 million refugees, 3 million asylum seekers and over 40 million internally displaced persons.”<sup>10</sup>

Reflecting this new reality, there has been shift from “refugee studies” to “forced migration studies” in the international legal scholarship as mentioned above. At the same time, legal norms have been evolving to protect persons who are forced to move, such as the internally displaced.

In International practices, there has been progress in “mainstreaming human rights” within the UN system since the beginning of the 21st century. This trend is noticeable at all levels of UN activities and its influence is also felt in the area of development and migration. In advance of the High-level Dialogue on International Migration and Development referred to above, the UNGA requested the High Commissioner for Human Rights to ensure that the dialogue “analyses the linkage between migration and development in a balanced and comprehensive manner that includes, among others, a human rights perspective.” The High Commissioner’s report noted the “mainstreaming human rights” movement within the UN, and indicated that the role of the UN in international migration governance is fundamentally defined by a “human rights-based approach.”<sup>11</sup>

In this regard, successive reports by the Special Rapporteur on the human rights of migrants (Special Rapporteur) appointed by the Human Rights Council are also indicative. The Special Rapporteur submitted a report on the management of the external borders of the EU in 2013<sup>12</sup> and a follow-up report entitled “Banking on mobility over a generation” in 2015.<sup>13</sup> In the 2015 report, the Special Rapporteur connects human rights with the economic and social interests of both sending and recipient States by stating that “[d]eveloping a human rights-based framework by tackling the most pressing concerns and sustaining the political will needed to stay the course of reform over a generation will allow the European Union to bank on the economic and social benefits of mobility.” The report also points out that a human rights-based framework indicates “equality and non-discrimination, the duty to protect and access to justice.” Finally, it criticizes that “[t]he strict conceptual delineation between internal and external migrants, demonstrated by the freedom of movement within the Schengen region and the securing of external borders, conflicts with a human rights-based framework for migration that is based on equality and non-discrimination.”<sup>14</sup>

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10 The NY Declaration, para.3.

11 *Migration and Human Rights: improving human rights-based governance of international migration*, p.32, at: [http://www.ohchr.org/Documents/Issues/Migration/MigrationHR\\_improvingHR\\_Report.pdf](http://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf) (as of December 11, 2017).

12 *Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants*, A/HRC/23/46, April 24, 2013.

13 *Banking on mobility over a generation: follow-up to the regional study on the management for the external borders of the European Union and its impact on the human rights of migrants*, A/HRC/29/36, May 8, 2015.

14 *Ibid.*, paras.60, 62, 71.

Other indicative points might be statements that “[t]he view of migrants among many stakeholders as ‘illegal’ is counterproductive” because it “has also had an impact on the general public’s perception of migrants, legitimizing policies that are not in line with human rights guarantees and contributing to xenophobia and discrimination.” Similarly, “[t]he common conception that migrants are ‘job stealers’ is also a harmful fantasy....conceptions of migrants as ‘a burden’ are not based in reality, nor are they productive....Acknowledging that migrants are human beings with rights, the European Union and its member States should be talking about sharing a responsibility, not a burden.”<sup>15</sup>

The approach adopted by the Special Rapporteur appears to have sufficient flexibility in the sense that human rights consideration is integrated with development and economic goals. Indeed, the Special Rapporteur’s 2014 report recommends mainstreaming migration into the sustainable development goals, noting that migrants are internationally recognized as “drivers” and “enablers” of development.<sup>16</sup> In other words, protecting human rights of migrants contributes to the development of both sending and recipient States.

This human rights-based approach is certainly, if not entirely, reflected in the NY Declaration.

## **(2) Structure of the NY Declaration**

The NY Declaration is composed of five parts: an introduction, commitments that apply to both refugees and migrants, commitments for migrants, commitments for refugees, and a follow-up and review. Annex I of the Declaration contains a comprehensive refugee response framework and outlines steps towards the achievement of “a global compact on refugees” and Annex II sets out steps towards the achievement of “a global compact for safe, orderly and regular migration.” Both global compacts are expected to be prescribed at conferences held in 2018.<sup>17</sup>

The introduction of the Declaration lays out important principles. For example, it is restated that migrants and refugees are not only a matter of security or burden, but are also contributors to both States of origin and States of destination. In para.11, the Member States acknowledge a “shared responsibility” to manage large movements of refugees and migrants in “a humane, sensitive, compassionate and people-centred manner.” And they recall their obligations to fully respect migrants’ and refugees’ human rights and fundamental freedoms. On the other hand, in para.4, connecting with the 2030 Agenda for Sustainable Development, they clearly recognize the positive contribution made by migrants for inclusive growth and sustainable development.

Importantly, Member States reaffirm “the purposes and principles” of the Charter of the United Nations, the Universal Declaration of Human Rights, and other core international human rights treaties

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15 *Ibid.*, paras.72-74.

16 *Report of the Special Rapporteur of on the Human Rights of Migrants*, A/69/302, August 11, 2014, para.25.

17 The NY Declaration, para.21, Annex I, paras.18-19, Annex II, para.9. Hereinafter, paragraph numbers of the Declaration will be indicated in the text for references.

as well as, where applicable, international refugee law and international humanitarian law (para.5). This is related to the reconfirmation of non-discrimination and equal treatment in the domestic sphere. In recalling Member States' obligations under international law to "prohibit discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (para.13), the Declaration strongly condemns "acts and manifestations of racism, racial discrimination, xenophobia and related intolerance against refugees and migrants, and the stereotypes often applied to them, including on the basis of religion or belief" (para. 14).

As these proclamations simply reconfirm existing international legal norms, some criticize that the UNGA should have offered more vigorous prescriptions of responsibility for States. Be that as it may, the fact that Member States recognized the basic principles that had been emphasized by the High Commissioner for Human Rights and Special Rapporteur on Migrants can be seen as a positive step.

### **(3) Commitments in the NY Declaration**

#### **(a) Commitments applying to both refugees and migrants (paras. 22-40)**

"Underlining the importance of a comprehensive approach to the issues involved," Member States make a commitment to ensure "a people-centred, sensitive, humane, dignified, gender-responsive and prompt reception for all persons" arriving in their countries, particularly those "in large movements, whether refugees or migrants" (para.22). Such a commitment, even if it is in a political declaration, is significant.

First, in terms of State border control and management, border control procedures must conform with applicable obligations under international law, including international human rights law and international refugee law. In line with the principle of *non-refoulement*, individuals must not be returned at borders (para.24). At sea, Member States commit to intensifying international cooperation to strengthen search and rescue mechanisms (para.28). Due process guarantees also require that all individuals "who have crossed or are seeking to cross international borders" are entitled to due process "in the assessment of their legal status, entry and stay," and Member States commit to review "policies that criminalize cross-border movements" (para.33). Combatting human trafficking and migrant smuggling is also proclaimed (para.35). The Declaration also mentions that addressing the drivers and root causes of large movements will reduce vulnerability, combat poverty, improve self-reliance and resilience, ensure a strengthened humanitarian-development nexus, and improve coordination with peacebuilding efforts (para.37).

Here too, these commitments go no further than abstract statements and lack specificity when it comes to implementation. However, the Declaration is clear that Member States' commitments must be applied to both refugees and migrants as a single category, even though this is limited to "large movements."



**(b) Commitments for migrants (paras.41-63)**

As a general principle, receiving and sending States commit to protecting the safety, dignity and human rights and fundamental freedoms of all migrants, *regardless of their migratory status*, at all times (para.41). Paragraph 42 restates States' obligations thus:

“We commit to safeguarding the rights of, protecting the interests of and assisting our migrant communities abroad, including through consular protection, assistance and cooperation, in accordance with relevant international law. We reaffirm that *everyone has the right to leave any country, including his or her own, and to return to his or her country*. We recall at the same time that each State has a sovereign right to determine whom to admit to its territory, *subject to that State's international obligations*. We recall also that States must readmit their returning nationals and ensure that they are duly received without undue delay, following confirmation of their nationalities in accordance with national legislation.” (Emphasis added).

Avoiding a discussion on the interpretation of human rights treaties deeply here, the above could be evaluated as reflecting the established understandings of various human rights treaty bodies.

In terms of an international cooperation framework, some elements reconfirmed in para.46 are important; migrants can make positive and profound contributions to economic and social development in their host societies and to global wealth creation. Reducing the costs of labour migration and promoting ethical recruitment policies and practices between sending and receiving countries are committed by Member States. Another important commitment is to promote “faster, cheaper and safer transfers of migrant remittances in both source and recipient countries, including through a reduction in transaction costs, as well as the facilitation of interaction between *diasporas* and their countries of origin”.

In order to promote and strengthen international cooperation for the global governance of migration, the Declaration agrees to “bring the International Organization for Migration, an organization regarded by its Member States as the global lead agency on migration, into a closer legal and working relationship with the United Nations as a related organization” (para.49). This decision is seen as one of the few concrete outcomes of the High-Level meeting in 2016.<sup>18</sup>

**(c) Commitments for refugees (paras.64-87)**

The importance of addressing the root causes of large refugee movements, such as armed conflict, persecution, and violence, including terrorism, is reconfirmed in para.64. In addition, Member States

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18 Newland, K., *New Approaches to Refugee Crises in the 21st Century: The Role of the International Community*, Migration Policy Institute (2016), pp.8-9.

reaffirm the Refugee Conventions as the foundation of the international refugee protection regime, and that international refugee law, international human rights law, and international humanitarian law provide the legal framework to strengthen the protection of refugees (paras.64-66).

In this section, an important point worthy of attention is that of “responsibility sharing.” Para.68 states that: “[t]o address the needs of refugees and receiving States, we commit to *a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees*, while taking account of existing contributions and the differing capacities and resources among States.” This is a mitigated version in comparison with the draft, as “an equitable sharing” was changed to “a more equitable sharing.”<sup>19</sup> Recognizing such importance, while the Declaration focuses primarily on voluntary repatriation as a durable solution (paras.75-76), it also notes the need to expand the number and range of resettlement efforts to third countries. The fundamental aim is “to provide resettlement places and other legal pathways for admission on a scale that would enable the annual resettlement needs identified by the Office of the United Nations High Commissioner for Refugees to be met” (paras.77-78). Although this is one of the important elements for concretization of “sharing responsibility,” all things remain to be seen within the negotiation process for a global compact on refugees.

Yet with regard to a comprehensive refugee response, a “multi-stakeholder” approach is emphasized. Stakeholders include national and local authorities, international organizations, international financial institutions, civil society partners (including faith-based organizations, *diaspora* organizations, and academia), the private sector, the media, and refugees themselves (para.69).

#### IV Some observations: a way of conclusion

##### (1) Legal characteristics of the Declaration and prospective two global compacts

As the Declaration itself expresses that Member States “have adopted the following *political declaration*,” it is part of a UNGA resolution and thus, not a legally binding instrument. However, as mentioned above, many commitments in the Declaration are a reflection of already prescribed principles and rules of human rights treaties, including the right to leave and return, *non-refoulement*, non-discrimination, and so on. Those commitments are legally binding as far as they are established as customary international law or if relevant international treaties have bound each member state. On the other hand, there are some significant new elements which are not necessarily established as international legal principles. These include the inclusive treatment of refugees and migrants,

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<sup>19</sup> See Dowd, R. and J. McAdam, “International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why and How?” *International & Comparative Law Quarterly*, Vol. 66, (2017), p.865. They point out other muted results of the Declaration, for example that the proposed Global Compact on Responsibility Sharing for Refugees has been postponed for two years and the name of the compact has changed to simply the Global Compact on Refugees, and that while the Declaration reaffirmed existing legal obligations, it did not expand them.

“responsibility-sharing” for refugee protection,<sup>20</sup> and strengthening state border control regulations from a human rights perspective (albeit at the discretion of sovereign States). The two proposed global compacts are also not legally binding documents. They will be voluntary guidelines and are rather unambitious, probably taking “the UN Global Compact” as a model.<sup>21</sup>

At any rate, the Declaration enumerates various relevant rules and principles that apply to large movements of refugees and migrants into one document. It provides a “solid basis in international law for principles of a more binding nature, and for guidelines, which reflect existing legal obligations for States.”<sup>22</sup> It was adopted by the UNGA, which can be regarded as one representative of the international community, and many high-level representatives of States, such as presidents and prime ministers endorsed the Declaration in formal statements. Such international endorsement should not be downplayed. However, the larger challenge of how to implement those rules and principles concretely and how to build a comprehensive mechanism for international cooperation remains to be addressed. To achieve this will largely depend on the political will behind the two proposed global compacts.<sup>23</sup> Although this short essay cannot examine this in detail, it cannot be denied that through the accumulation of subsequent practices in establishing and operating those global compacts, it may be possible to achieve a full formation and maturity of emerging international legal norms.<sup>24</sup>

## (2) Towards a comprehensive institutional framework for migration?

Some may critically argue that the only concrete achievement of the Declaration is that the IOM became a part of the UN system, and that this will be useful in the construction of a comprehensive framework. At the same time, there are concerns that by joining the UN system, the traditional characteristics of IOM as an independent organization might be diminished. As an independent organization, IOM was a “non-normative” and “projectised” organization that was responsive, efficient, cost-effective, and flexible. Therefore the future activities and roles of IOM in the global compact on migration must be monitored to see if its merits and manoeuvrability will not be compromised and if it

20 The possibility of an additional protocol to the refugee conventions should be considered in the long term. See Turk, V. and M. Garlick, “From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee response Framework and a Global Compact on Refugees,” *International Journal of Refugee Law*, Vol. 28, (2016), p.673. As to the proposal of adding and strengthening the UNHCR’s mandates, see Goodwin-Gill, *supra* note (2), pp.689-692.

21 The UN Global Compact aims to mobilize a global movement of sustainable companies and stakeholders around ten principles such as human rights, labour standards, and the protection of environment. It is an entirely voluntary agreement with no enforcement mechanism.

22 Guild, E. and S. Grant, “Migration Governance in the UN: What is the Global Compact and What does it mean?,” *Queen Mary University of London, School of Law Legal Studies Research Paper No. 252/2017* (2017), p.5.

23 As to the recent development of a global compact for migration, see: <https://www.iom.int/global-compact-migration> (as of December 7, 2017). For a global compact for refugees, see: <http://www.unhcr.org/towards-a-global-compact-on-refugees.html> (as of December 7, 2017).

24 This view is drawn from the experiences of the Millennium Development Goals and the Sustainable Development Goals, which are adopted by the UNGA High-Level meetings. While those are adopted as non-legal binding instruments, their commitments and norms have functioned as *de facto* binding for various international actors or stakeholders, especially UN internal organs and autonomous subsidiary organs such as the United Nations Development Programme.

will be able to maintain its status as “the leading global agency” on migration.<sup>25</sup> From the perspective of the process of drafting a global compact on migration, whether and how IOM will be able to monitor and review the actionable commitments by States is critical.<sup>26</sup>

In practice, the main challenges will be financing and integrating human mobility into humanitarian assistance and development simply in the meaning that migration is taken into consideration in those dimensions. The former is also “traditional” challenge that various international cooperation regimes have chronically faced. And on the latter, although ideally, integration of “mobility” into development and humanitarian assistance might open the stringent States’ boundaries, actualization of this is not likely. These challenges, to some extent, apply also to the global compact for refugees. In any case, the prospective global compacts should establish mechanisms for the further resettlement of refugees in third countries and for the expansion of regular lawful routes of migration. It might be meaningless if the global compacts in the end are only maintaining “protracted refugees” and “stranded migrants”, as a matter of fact.

Another concern of a comprehensive approach might be that there remains some risk of weakening existing refugee protection regimes. In other words, individuals who must be inherently protected under the existing regime could be left legally unprotected in a new comprehensive framework where there is not an established obligation or responsibility to protect but rather a nebulous principle of “humanity,” or charity.<sup>27</sup> This alarming scenario is always worth being reminded of. In this context, the intertwined relationship of the two proposed global compacts and the role of global compacts as a supplement to existing legal regimes should be cautiously considered.

### (3) Multilateralism in crisis?

In the long term, the large movements of refugees and migrants will continue, not to mention the root causes of these movements, such as armed conflict, persecution, violence in all forms, poverty, and climate change. Although the burden is heaviest on host countries in the developing world, within the structure of “global north” vs. “global south,” “asylum fatigue” is prevalent, especially in Europe. This is leading to a crisis for multilateralism, as manifested by Brexit, the US withdrawal from various important multilateral treaties,<sup>28</sup> and so on. This has left the NY Declaration stranded between on the one hand the sense of shared responsibility, mutual trust, and solidarity that underlies

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25 There appeared to be some concerns by the IOM Member States in the debate around concluding an agreement with the UN at the IOM Council. See Guild and Grant, *supra* note (22), pp.8-11.

26 *Ibid.*, p.13. They examines the “Zero Draft” regarding the modalities for the intergovernmental negotiations of the global compact on migration.

27 Abe, K., *Kokusaiho no Jinkenka [Human Rights-ization of International Law]*, Shinzansha publishing, (2014), pp.107-126 [in Japanese].

28 During the final stage of drafting this essay, the US “decided to end participation in the UN process to develop a Global Compact on Migration.” See the statement by the US Secretary of State, at: <https://www.state.gov/secretary/remarks/2017/12/276190.htm> (as of December 7, 2017).

international cooperation, and on the other, a unilateral, country-first, populism and xenophobia that is spreading in many States. Therefore, this is “a moment of opportunity as well as crisis for international cooperation.”<sup>29</sup>

It was after the horrifying atrocities of the great wars that international organizations for maintaining international order such as the League of Nations and the UN were established. Bringing this to mind, the current crisis might be certainly a great opportunity for building a new international mechanism. It is not clear whether a multi-stakeholder approach involving the participation of civil society and refugees and migrants themselves in the process of two global compacts will bring about desirable effects. If the processes of establishing such compacts will achieve a comprehensive review of traditional international legal frameworks where state border control and management is largely left to the discretion of sovereign States remains to be seen.

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29 Newland, *supra* note (18), p.9.

## **The NY Declaration for Refugees and Migrants Adopted by the UN General Assembly: Towards a New International Legal Framework?**

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人の移動については、現在、欧州、北アフリカ及び中東をめぐる難民・移民危機が議論の中心となっていることは疑いない。これらの危機を通じて、現在の国際法は「難民及び移民の大規模移動 (large movements of refugees and migrants)」に対して現実的に対応可能なのかという問題も提起されている。現行の国際法枠組みは、基本的に難民と移民を区別して、強制的に移動を強いられた人々の保護に重点をおいている。これに対する国際社会の対応として注目すべきは、2016年9月19日に開催された国連総会ハイレベル会合において採択された「難民及び移民のためのニューヨーク宣言」(NY宣言)である。本稿では、現行の国際法枠組みを簡潔に概観し、NY宣言がそれに対してどのような影響を及ぼしうるかという観点から、若干の考察を加える。

現行の国際法枠組みは、難民の保護、移住労働者の人権保護、国際犯罪の規制などのそれぞれ異なる諸条約のパッチワークで構成され、人の移動について包括的に扱う枠組みも、インフォーマルで非拘束的なものがあるに過ぎない。他方で、人権保護の観点からはパッチワークにせよ、国々の人権義務を明確に規定し、その履行を監視するメカニズムも発展している(但し、締約国の数による限界もある)。

NY宣言は、総会決議であり「政治的宣言」であるが、それら国際法上の原則や規則を再確認し、さらにそれらを難民と移民双方に対する国々の約束 (commitments) として、ひとつの文書に列挙したことに重要な意味をもつ。さらに、評価は分かれるものの、難民条約で義務化されていない負担または責任の共有に関する概念が規定され、あるいは「安全で、秩序のある、正規の移動」を確保・拡大することが既定路線として表明されていることは、問題への包括的対応を一步進めるうえで重要である。NY宣言を具体化するための2つのグローバル・コンパクト(2018年に採択予定)もまた非拘束的文書になるであろうが、国々の約束を具体化するような方策が積極的に盛り込まれるならば、国際社会全体による包括的取組みの確固たる基礎となりうる。新しく国連との法的関係を有することとなった国際移住機関(IOM)の役割や、資金確保の問題、持続可能な開発目標(2030アジェンダ)との有機的な結びつきといった様々な視点からグローバル・コンパクト作成のプロセスを注視することが重要になるであろう。

いずれにせよ、これらの取組みが成功するかどうかは各国の政治的意思に依存せざるを得ない。米国政権による多国間枠組みからの次々の離脱を始めとして「マルチラテラリズムの危機」ともいわれる昨今の国際情勢において、これを予断することは難しい。