

Refugee Law & Migration Studies Brief

Volume 1 | Issue 2

Article 4

August 2023

International Agreements Shaping Migration Solutions

Camilo Mantilla
mantilla.camilo@gmail.com

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/refugeemigrationstudiesbrief>



Part of the [Human Rights Law Commons](#), [Immigration Law Commons](#), [International Humanitarian Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Camilo Mantilla, *International Agreements Shaping Migration Solutions*, 1 Refugee L. & Migration Stud. Brief 1 (2023).

Available at: <https://digitalcommons.wcl.american.edu/refugeemigrationstudiesbrief/vol1/iss2/4>

This Practitioner Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Refugee Law & Migration Studies Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

INTERNATIONAL AGREEMENTS SHAPING MIGRATION SOLUTIONS

By Camilo Mantilla¹

INTRODUCTION

In an increasingly complex and interdependent state of international relations, international treaty negotiation, adoption, and implementation constitute an important component of global foreign policy and activity of states. International agreements embody sovereign and state-to-state relations and behavior in a global forum. International agreements manifest in ways that vary in form, subject, formalities, parties, scope, forum and many other elements.¹

The Vienna Convention on the Law of Treaties (1969) defines treaties as “international agreements concluded in writing between States and governed by international law, embodied in any particular or related instrument regardless of designation.”² International agreements carry equal presumption of legality, regardless of the international legal framework governing them.³ Under the 1969 Convention, international agreements did not require a particular form or specific designation.⁴ The term treaty is generic, embracing all forms of international agreements in written form⁵ and varies in name (i.e., protocol, charter, covenant, pact, statute, etc.). Although some terms may be more solemn than others, the designations used by States typically have no legal significance beyond what the signatories give it. The International Court of Justice acknowledged that “terminology” is not a determinant factor as to the character of an international agreement.⁶

Contemporary international diplomacy and treaty-making has seen a surge in “non-binding” international agreements.⁷ Scholars and practitioners suggest that the rise in non-binding agreements is a widespread phenomenon,⁸ attributed to factors like the ease and flexibility by which these agreements can be concluded. These non-binding agreements also meet the desire for confidentiality and government discretion towards contracting capacity that present options to requirements, such as domestic ratification or approval from other domestic stakeholders.⁹ These factors create a powerful legal tool, that allows sovereign states to convene, allocate, and manage risks and benefits on crucial foreign policy issues, including international migration.

Recent developments in this area include the global compacts, falling under direct United Nations (UN) auspices.¹⁰ These “non-binding” compacts are also considered by the UN as international agreements, geared towards specific matters of global relevance—like international migration.¹¹ Compacts and non-binding agreements of a similar nature are increasingly used as instruments to operationalize and contextualize state intentions and obligations on a specific subject matter,¹² as well as adopting specific and consistent policies around an issue.¹³ International agreements, like the international migration compacts, are used to create frameworks, consensus on principles, or dictate prescriptions in anticipation of more specific issues or commitments, such as developing rules or state actions around a subject.

¹ Camilo Mantilla is a Senior Advisor at John Jay College of Criminal Justice in New York where he conducts research and advising, for the development of evidence-based, legal, and operational public safety and law enforcement strategies proven and evaluated in the U.S. and abroad. Prior to his work at John Jay College, he served as a legal advisor and project manager for the United Nations - International Organization for Migration in Central America, North America, and South America. Through that role, he would oversee migration management responses in complex settings and jurisdictions. Mr. Mantilla's expertise encompasses international, forced, and irregular migration, including the Colombian armed conflict, the U.S. southern border, and Central American migration. He holds a law degree from the Universidad de Los Andes in Colombia, an L.L.M. in international law from The Fletcher School at Tufts University in Boston, and an L.L.M. in U.S. Legal Studies at Cardozo School of Law, Yeshiva University in New York.

When states enter into these agreements, they do so by manifesting behavior, political intentions, and discourse, as well as the intent to likely adopt certain behavior. This can include embracing relationships or expectations between signatory parties over a period of time and over a particular issue.¹⁴ State behavior is also influenced through enforcement or compliance of obligations set forth in the agreements.¹⁵ While international agreements can influence state behavior, not all instruments are created equal. The nature and scope of each one must be treated and scrutinized with a specific lens in order to understand the intent and the extent of prescribed enforcement and compliance that ultimately influences sovereign intentions and actions. This is especially important when it relates to certain specific subject matter issues, such as sovereignty, trade, security cooperation, international migration, and others.

The following aims to illustrate that international agreements—in particular, those of a hybrid nature, like non-binding—have increasingly become a popular instrument in foreign affairs and diplomacy. These instruments can be used to build consensus, policy, and develop solutions that shape sovereign behavior and action around international migration.

I. ANALYSIS

A. INTERNATIONAL LEGAL INSTRUMENTS: TRANSACTIONAL TOOLS FOR DIPLOMACY AND INTERNATIONAL MIGRATION RELATIONS

The rules applicable to international agreements are codified primarily in two international conventions: The 1969 Vienna Convention on the Law of Treaties ("1969 Vienna Convention"), containing rules for treaties concluded between States, and The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ("1986 Vienna Convention").¹⁶ Both the 1969 Vienna Convention and the 1986 Vienna Convention did not distinguish between different designations of these instruments.¹⁷ Instead, their rules apply to all of those instruments as long as they meet certain common requirements.¹⁸ The diversity of instrument allowed by international law allows the use of different additional terms for international instruments, where some terms can be interchanged;

for example, an instrument that is designated as an "agreement" might also be called a "treaty".¹⁹

The United Nations'²⁰ definitions under the 1969 Vienna Convention on the Law of Treaties categorize international agreements broadly, representing the overarching "genre" of international instruments, not considered treaties or other subcategory defined or specified by law. Classifying treaties can be a difficult exercise and the International Law Commission has observed that due to this, an extraordinary and varied nomenclature has developed over time.²¹

The criteria to determine the existence of a treaty is the intention of the parties to create obligations under international law, something which is commonly inferred from the terms of the instrument and the circumstances in which it was drawn up.²² If that intention is lacking, the instrument is not considered a treaty. Towards this purpose, the Convention enables states to continue or modify their practice without distorting or departing from the rules of the Convention, which in turn provide a flexible framework to accommodate such developments.²³ The 1969 Vienna Convention and the 1986 Vienna Convention confirm this generic use of the term "treaty". The 1969 Vienna Convention defines a treaty as "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." The 1986 Vienna Convention extends the definition of treaties to include international agreements involving international organizations as parties.

Many provisions in the 1969 Convention expressly contemplate states departing from the rules of the Convention. Article 7(1) requires the representative of a state to produce full powers in order to adopt the text of a treaty yet makes an exception which recognizes that states often agree to dispense with full powers. The Convention acknowledges that states will want to depart from the Convention's rules, making them largely residual, leaving treaty practice very much in the hands of states—as it should be.²⁴

However, over time, international legal practice has developed a variety of terms to refer to international instruments commonly used and adopted by international legal actors.²⁵ Although many instruments differ in designation between each other, they share common features, and international law applies common and similar rules to all of these instruments.²⁶ Extended practice among the states has contributed to develop rules—regarded as international customary law, which is binding among contracting states.²⁷

International agreements (regardless of nomenclature) don't require formalities, unless stated otherwise by international law. It is common to see agreements of different nature that don't require ratification. The majority of international instruments are designated as agreements²⁸ and, just like contracts in ordinary life, international agreements are an indispensable tool of diplomacy, international relations, and transactions.²⁹

Other agreements, such as those often referred to as treaties, tend to fall under narrower categories, as a specific "genre" of international agreements generally reserved for matters of political or social importance or gravity that require more solemn arrangements.³⁰ In most, if not all instances, these require ratification (i.e., treaties covering peace, border relations, commerce, and extradition). However, the UN has recognized that the term "treaty" for international instruments has considerably declined in the last decades in favor of other terms.³¹ An important example of this evolution of treaty-making practices is the rise³² of multiple concrete multilateral efforts to build consensus over migration management principles and practices,³³ discussed below.

International agreements serve as tools for diplomacy, risk management, and regulating sovereign behavior between states by creating legal obligations, expectations, privileges, and even reputation between contracting parties. They are generally considered legally binding instruments between sovereign states, and whether they are binding or not, can provide a framework that influences behavior through cooperation, coordination, and reporting, among others. States are generally bound by the limits established in these instruments and how they interact with domestic

laws and regulations. Cooperation among signatories is often required in order to implement the provisions of an agreement; cooperation can lead to greater reputation and collaboration among governments, also influencing state behavior.

International agreements serve as a tool that, regardless of scope, reach, or legal nature, establish standards and prerogatives that shape state behavior on a particular issue or subject.

B. INTERNATIONAL AGREEMENTS TO SHAPE STATE BEHAVIOR FOR MIGRATION MANAGEMENT

Increased attention and aspirations by global actors towards international migration has prompted international legal policy development where, through international agreements, states negotiate and build consensus around international migration management at the multilateral and bilateral levels. Most notable are the UN-backed migration and refugee Compacts of 2018.

The Global Compact for Refugees³⁴ and the Global Compact for Safe, Orderly and Regular Migration³⁵ are the products of cooperative political commitment between governments. Prompted by the New York Declaration on Refugees and Migrants, the Compacts were adopted by the UN General Assembly in 2016.³⁶ They are "self-proclaimed" non-binding instruments that provide guidance, norms, and procedures governing the management of human mobility.³⁷

The UN recognizes compacts as international agreements through official UN resolutions and statements from specialized agencies.³⁸ Generally speaking, compacts are instruments negotiated between governments based on the existing human rights legal framework, and under UN auspices.³⁹ Acknowledging their relevance and instrumentality in the global governance framework, the UN has stated that it will support the implementation⁴⁰ of the migration compact.

The New York Declaration for Refugees and Migrants prompted the Global Migration Concepts embodied in the compacts—affirming core international human rights treaties as the source for the protection of the human rights of refugees and migrants regardless of status. These instruments are rooted in international law and explicitly

acknowledge existing rights and obligations under the international migration governance scheme. Examples include the shared universal human rights and fundamental freedoms for migrants and refugees, such as non-discrimination, that stem from the shared challenges and vulnerabilities migrants endure, recognized by the UN.⁴¹ The Declaration not only prescribes existing rights and shared challenges—in particular, for large movements of migrants—it also embraces a number of common political, economic, social, developmental, humanitarian, and human rights ramifications across borders, applicable to both migration plights.⁴² By doing so, the compacts reassure existing human rights obligations ratified through relevant treaties, founded on international human rights law.⁴³

Contemporary international migration frameworks reflected through international agreements, like global compacts, rally states and governments in a way traditional treaties would. Despite their intention to convene and create practices and standards around international migration management, these instruments are deliberately referred to as non-binding. Although considered non-binding, they still intend to foster international cooperation and uphold state sovereignty and obligations under international law in an interdependent approach of guiding principles.⁴⁴

Historically, the limited number of treaties devoted specifically to migration does not reflect the weight of international legal norms in this area. The eclectic set of multilateral treaties in this field only capture one parcel of the broader migration picture.⁴⁵ Concepts regarding protection and those that allude to “safe country” as a means for protection have been developed through different means, initially stemming from the 1951 Convention relating to the Status of Refugees.⁴⁶

The expansion of new and “hybrid” legal arrangements and instruments for international migration has created and consolidated standards and principles in this matter, giving states and global actors a broader choice of prerogatives in the international migration arena. These shifts in international treaty-making result from the evolution of the international legal field in the twentieth century⁴⁷ where the growing body of international law-making practices contribute to develop a

broader and more universally-accepted (sometimes enforceable) principles in non-binding format.⁴⁸ These practices hold legal construction between formal law and non-binding law, including the intersection between law and politics. The global compacts uniquely reflect these characteristics.

C. INTERNATIONAL LEGAL PRACTICES FOR MIGRATION MANAGEMENT

As international relations become more complex and determined by multiple rising geopolitical phenomena, international law requires flexibility to adapt and respond to these challenges.

International law provides flexibility in response to evolving international transactional relations and challenges. International agreements do not require a specific format in order to be binding, as stated under Article 2(1)(a) of the 1969 Vienna Convention. Could non-binding instruments potentially hinder the law’s capacity to dictate migration policy, action, and accountability? Does the increasing practice of non-binding arrangements between international actors signal the opposite? Is there increasing consensus, intent, and practice around it that prescribe a growing body of norms and principles widely accepted and for the most part codified?

The extent of the compulsory and binding nature of an agreement can be determined by the intent and subsequent behavior of participating states by looking at the text itself and identifying deliberate binding statements or provisions that reflect the overall extent of the instrument, and establishing if it prioritizes form or substantive content.⁴⁹ Where the absence of certainty on legally-binding commitments translates into limited mechanisms for an accountable legal governance in international migration management, non-binding arrangements can deliberately avoid distinguishing compliance and binding force, creating a layer of complexity. Despite this ambivalent legal nature, their scope and reach transcends state sovereignty and consistency of political statements from states when it comes to international cooperation in migration and borders.⁵⁰ In this regard, state behavior concerning the migration and refugee compacts has demonstrated that participating states affirmed their intention to implement the compacts⁵¹ regardless of nomenclature and denomination, of an overarching

framework that transcends sovereignty and borders. Growing practices are giving states the framing they need to subsequently develop and adopt more binding practices and international law in the realm of international migration management.

Global compacts attempt to encompass and streamline policy and principles, while subsequent bilateral and legal agreement-like practices put in place concrete measures to manage migration. These practices reflect the ability of international actors to leverage the flexibility and comprehensiveness in the legal framework, to further develop and adapt new arrangements for migration management. States increasingly develop nuanced and tailored legal arrangements, that go beyond prerogatives in the global governance migration framework. They construe bilateral legal agreements to develop specific actions and shape government behavior, to manage issues around migration, protection, refugees, asylum, and others; in many cases, inspired from existing legal frameworks.

D. FROM THE LAW TO ISSUES ON THE GROUND

For several decades, states have attempted to put in place specific measures to tackle migration management beyond policy development, via international legal cooperation and transactions. Europe, for example, has implemented measures to address migration through bilateral and multilateral arrangements. Important examples include bilateral arrangements between the European Union and Turkey,⁵² through return and readmission cooperation mechanisms (in the form of agreements) and directives derived from European migration and asylum policy that allude to ensuring and enhancing international protection and legal migration.⁵³ These examples have been referred to as the “externalization” of asylum and other migration situations. Externalization demands primary responsibility of destination countries and their borders but increasingly adds complexities, as well as the involvement and responsibilities, of all nations and actors involved and affected by the migration challenges.⁵⁴

Since the 1990s, the EU has sought to move aspects of the migration management cycle to “third countries” in an effort to prevent and deter irregular

migration into EU territory.⁵⁵ Cooperating or agreeing solutions and actions with third countries for migration challenges are widely framed as a humanitarian approach with the objective to “save lives and disrupt migrant smuggling networks,” along with other humanitarian needs. Yet some examples of externalization have brought on additional humanitarian challenges, evidenced in reports by human rights organizations, of violence towards migrants including human rights abuses.⁵⁶

Additional examples of migration management “externalization” include partnerships between Europe and the governments of Tunisia, Libya, Morocco, Sudan, and Turkey, where they act on behalf of the EU as “migration managers” to deter irregular migration into the EU borders.⁵⁷ European countries also transfer border control strategies and capacities in the Mediterranean by pouring millions of dollars into bolstering the Libyan and Tunisian coast guards through training, technical, and logistical supports.⁵⁸ Through bilateral engagement, the countries party to these arrangements, intercept and return migrants and asylum seekers back to Tunisian or Libyan shores.⁵⁹ This operated for several years as the main framework for third country cooperation for migration management between European nations and third countries.⁶⁰

Similar to the European cases noted, cooperation arrangements in this hemisphere mirror components adopted in Europe. Citing one example is the 2019 Joint Declaration and Supplementary Agreement Between the United States of America and Mexico.⁶¹ In response to the regional migration crisis, gaining visibility and attention in the media,⁶² the 2019 Declaration Between the United States of America and Mexico⁶³ includes a bold and complex approach to US and Mexico cooperation for immigration enforcement, framed under a humanitarian protection approach.⁶⁴ This bilateral scheme is the result of increasing complexities of migration patterns across the region, alongside a historical relationship between Mexico and United States to address the humanitarian situation caused by unprecedented migration flows at the shared border and the region.⁶⁵ The bilateral agreement⁶⁶ between the US and Mexico collects principles and practices common in the international humanitarian field such as: humanitarian emergency, durable solutions, asylum, human smuggling, migrant flows,

and other terms proper to the international humanitarian framework. This agreement, regardless of consequences and intentions, serves as an example of how agreements interact with international law to attempt develop several aspects of international law for the protection of migrants.

Like the European examples, these solutions have adopted tailored and enhanced cooperation between nations in this hemisphere (in the form of international and bilateral arrangements) to tackle regional challenges—like what is occurring south of the US southern border.⁶⁷ Additional layers of cooperation include arrangements with countries seeing large influxes of migrants, such as Central America, Mexico, and Colombia, part of a regional strategy to set up migrant processing centers in several countries throughout the region.⁶⁸

Further, the intentions behind this agreement go beyond conventional international legal and protection standards mentioned above. It includes matters of national security such as: information sharing, jobs, healthcare, education, removal proceedings, and security. The arrangement also includes principles of a safe, third country as a cooperation mechanism that introduces a “rebuttable presumption of asylum ineligibility” for individuals attempting to reach the border when passing through another country to reach the US border with Mexico, without first seeking protection there.⁶⁹ This, while acknowledging the need for protection, along with the possibility of requesting it, establishes additional scrutiny measures through the “safe” concept regarding transit countries where protection should be sought prior to seeking in the final destination. Measures of this nature acknowledge protection mechanisms and share the burden under the presumption that protection is available elsewhere.⁷⁰ Although mirroring international legal frameworks for migrant and refugee protection, this expands notions from humanitarian and protection principles resulting in a series of context-specific measures for migrants and refugees at the country and community level.⁷¹

Accounts depicting different consequences of externalization through arrangements of this nature noted the potential to strain local resources where migrants waiting in third countries have endured tensions with local and host communities.⁷² Recent

displays of this include Mexico and Tunisia, where xenophobic sentiment towards migrants has been on the rise—increasing vulnerability and attacks on migrants, amid ongoing hardships.⁷³ Politicians and policymakers argue that these efforts would reduce smuggling, but research and investigations show that tightening borders in Europe and Mexico has increased the demand for, and use of, smugglers.⁷⁴ It forces migrants to take longer and more dangerous routes, which creates repeat business for smugglers, results in high-risk journeys, and executes preventable deaths.⁷⁵

Tailored and bilateral-type arrangements (or restricted multilateral) introduce responsibility-sharing and safe third country measures.⁷⁶ They adopt these concepts like the examples above, and in most cases go beyond strictly humanitarian principles to include other items that range from security to humanitarian protection.⁷⁷ This results in more nuanced and controversial matters—like border security and deploying national armed forces to enforce immigration.⁷⁸ That might not be considered of a humanitarian nature, or consistent with humanitarian principles, but is nevertheless “inspired” by them, according to the arrangement.⁷⁹

The shared responsibility to provide protection—whether destination or transit—has given rise to interpretations, adaptations, and developments of bilateral and multilateral cooperation mechanisms that extend the reach and interpretation of protection. These situations lend themselves for actors to distribute risks and responsibilities among states. By doing so, it acknowledges that asylum and protection may place burdens on certain countries, but a solution to the problem cannot be achieved without international cooperation.⁸⁰

As migration patterns evolve, transit nations demand for protection measures that interact with the broader international migration framework.⁸¹ This is relevant in today’s migration landscape, given the UN’s position, as well as nations parties to the compacts and applicable treaties, where countries granting protection, including asylum, are not be able to do so without the help of other countries.⁸² States can look for solutions through international legal tools and respond to evolving circumstances. In particular, situations where migrants and refugees intersect, and there is no clear

solution or applicable single legal framework, international law provides the flexibility to develop and adapt solutions.

This creates new migration management scenarios where the concept of protection, along with a decentralized and expanding international migration framework, distribute and develop traditional notions of international migration law transactional arrangements between states and organizations. The narrow number of international legal regimes devoted specifically to migration do not reflect the weight and overarching set of available norms in this field.⁸³ The international legal framework cuts across and is set up to allow legal, practical migration solutions and developments where global actors introduce various practices and applications of international migration law through tailored arrangements. Compacts manifest policy and politics. Subsequent implementation reflects the power of organization, aspirations of governments that negotiate and sign them, the legislatures that ratify them, and the groups that lobby on their behalf. Compacts also set visible goals for public policy and practice, that alter political coalitions and the strength, clarity, and legitimacy of their demands.⁸⁴

II. CONCLUSION

The expansion of international migration law and practices has evolved into a decentralized ecosystem of legal and diplomatic cooperation for migration with global-reaching efforts to streamline and homogenize it. Autonomous and sovereign state behavior has fostered growth of this ecosystem, along with nuanced and context specific measures for migration management that draw from the global governance frameworks. International treaty-making practices are an important tool in the development and implementation of international migration law and will continue to do so, with the current existing governing frameworks. These shifts in international legal affairs, contribute to develop and push the boundaries of international law and international migration law, alongside state behavior, international relations, and diplomacy in an increasingly globalized world.

ENDNOTES

- ¹ Abram Chayes and Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG., 175 (1993).
- ² Vienna Convention on the Law of Treaties, art. 2 (1)(a), May 23, 1969, 1155 U.N.T.S. 331.
- ³ Brian Opeskin, Richard Perruchoud, Jyllyane Redpath-Cross, *Foundations of International Migration Law*, 57 (Cambridge University Press, 2012). (Hereinafter "Opeskin et al.")
- ⁴ *Id.* at 57.
- ⁵ *Id.* at 58.
- ⁶ *Id.* at 58.
- ⁷ "The term 'compact' has been increasingly used to denote soft law instruments, indicative more of a symbolic, rather panegyric declaration of principles and goodwill than a legally binding expression of will." The most significant and earliest example of this use is the 2000 UN Global Compact. See Maria Gavouneli, *Legislating by Compacts? – The Legal Nature of the Global Compacts*, EUR. J. INT'L L. BLOG (Feb. 18, 2019), <https://www.ejiltalk.org/legislating-by-compacts-the-legal-nature-of-the-global-compacts/>.
- ⁸ Curtis Bradley, Jack Landman Goldsmith, Oona A. Hathaway, *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 UNIV. CHICAGO L. REV. 1-76, 5 (2023).
- ⁹ *Id.* at 50-5.
- ¹⁰ Peter Hilpold, *Opening up a new chapter of law-making in international law: The Global Compacts on Migration and for Refugees of 2018*, 26 EUR. L. J. 226 (Feb. 18, 2021) (hereinafter "Hilpold").
- ¹¹ G.A. Res. 73/195 (Dec. 10, 2018) (titled "Global Compact for Safe, Orderly and Regular Migration, United Nations Human Rights").
- ¹² Elspeth Guild, Kathryn Allinson, and Nicolette Busuttill, *The UN Global Compacts and the Common European Asylum System: Coherence or Friction?*, 11 LAWS 35, XX (Apr. 12, 2022).
- ¹³ *Id.*
- ¹⁴ Hilpold, *supra*, note 10, at 228.
- ¹⁵ Chayes, *supra* note 1, at 183.
- ¹⁶ United Nations, *Definitions*, United Nations Treaty Collection (accessed May 2, 2023) https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml. (Hereinafter "United Nations Treaty Collection").
- ¹⁷ *Id.*
- ¹⁸ *Id.*
- ¹⁹ Anthony Aust, MODERN TREATY LAW AND PRACTICE, 8 (3d ed. 2013). (Hereinafter "Aust (2013)").
- ²⁰ United Nations Treaty Collection.
- ²¹ *Id.*
- ²² *Id.*
- ²³ Aust (2013), *supra*, note 19, at 7.
- ²⁴ *Id.*
- ²⁵ United Nations Treaty Collection.
- ²⁶ *Id.*
- ²⁷ *Id.*
- ²⁸ *Id.*
- ²⁹ Aust (2013) *supra*, note 19, at 1.
- ³⁰ United Nations Treaty Collection.
- ³¹ *Id.*
- ³² Kenneth W. Abbott and Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 428 (2000).
- ³³ Hilpold, *supra*, note 10, at 227.
- ³⁴ United Nations High Commissioner for Refugees, *Global Compact for Refugees*, (2018) <https://www.unhcr.org/about-unhcr/who-we-are/global-compact-refugees>.
- ³⁵ G.A. Res. 73/195 (Dec. 10, 2018).
- ³⁶ G.A. Res. 73/195, annex (Dec.10, 2018) (heads of state and government representatives declaring and reaffirming the New York Declaration for Refugees and Migrants).
- ³⁷ Gavouneli, *supra*, note 7.
- ³⁸ Refugees and Migrants, *Global Compact for Migration*, United Nations (accessed Apr. 17, 2023) <https://refugeesmigrants.un.org/migration-compact>
- ³⁹ *Id.*
- ⁴⁰ United Nations Network on Migration, *Global Compact for Migration: Follow-Up and Review* (accessed Apr. 17, 2023) <https://migrationnetwork.un.org/global-compact-migration-follow-and-review>. See also G.A. Res. 73/326 (July 19, 2019) (reaffirming that the Global Compact will be implemented through enhanced bilateral, regional and multilateral cooperation and a revitalized global partnership in a spirit of solidarity, building on existing mechanisms, platforms and frameworks to address migration in all its dimensions).
- ⁴¹ G.A. Res. 73/195, annex (Dec.10, 2018).
- ⁴² G.A. Res. 71/1 (Oct. 3, 2016) New York Declaration for Refugees and Migrants.
- ⁴³ Kathryn Allinson, Paul Erdunast, Elspeth Guild, Tugba Basaran, *GCM Commentary: The legal Status of the UN's Global Compact for Safe, Orderly and Regular Migration in International and UK Law*, REFUGEE LAW INITIATIVE BLOG (Jan. 31, 2019) <https://rli.blogs.sas.ac.uk/2019/01/31/gcm-commentary-the-legal-status/>.
- ⁴⁴ *Id.*
- ⁴⁵ Opeskin et al., *supra*, note 3, at 59.
- ⁴⁶ *Migrant Rights*, MIGRATION DATA PORTAL (accessed July 25, 2023). https://www.migrationdataportal.org/themes/migrant-rights_
- ⁴⁷ Opeskin et al., *supra*, note 45, at 56.
- ⁴⁸ Abbott, *supra*, note 32, at 421.
- ⁴⁹ Anne Peters, *The Global Compact for Migration: to sign or not to sign?*, EUR. J. INT'L L. BLOG (Nov. 21, 2018) <https://www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/>
- ⁵⁰ Opeskin et al., *supra*, note 47, at 46.
- ⁵¹ G.A. Res. 73/195 (Dec. 19, 2018).
- ⁵² Phillippe Perchoc, *EU-Turkey Statement & Action Plan*, LEGISLATIVE TRAIN SCHEDULE EUROPEAN PARLIAMENT (accessed May. 28, 2023) <https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan>.

- ⁵³ Migration and Home Affairs, *Return and Readmission, Migration and Home Affairs*, EUROPEAN COMMISSION (accessed May 28, 2023) https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/return-and-readmission_en.
- ⁵⁴ Ahlam Chemlali, *Opinion: How the U.S. is repeating Europe's failed migration policies*, LA TIMES (June 4, 2023) <https://www.latimes.com/opinion/story/2023-06-04/us-mexico-border-crisis-europe-migration-refugees-immigration>. (Hereinafter “Chemlali (2023)”).
- ⁵⁵ *Externalization of migration control: from the 1990s to the present*, STATEWATCH (June 13, 2023) <https://www.statewatch.org/analyses/2023/externalisation-of-migration-control-from-the-1990s-to-the-present/>.
- ⁵⁶ *Id.*
- ⁵⁷ Chemlali (2023).
- ⁵⁸ *Id.*
- ⁵⁹ *Id.*
- ⁶⁰ *Id.*
- ⁶¹ Press Release, White House Briefing Room, *Mexico and United States Strengthen Joint Humanitarian Plan on Migration* (May 20, 2023) (on file with author).
- ⁶² Julia Ainsley, *Judge rules against Biden immigration policy, calling it 'invalid'*, CBS NEWS (July 25, 2023) <https://www.nbcnews.com/politics/immigration/judge-rules-biden-immigration-policy-calling-invalid-rcna96272>.
- ⁶³ White House, *supra*, note 61.
- ⁶⁴ Ariel G. Ruiz Soto, *Migration Policy Institute, One Year after the U.S.-Mexico Agreement Reshaping Mexico's Migration Policies*, Migration Policy Institute (June 2020).
- ⁶⁵ White House, *supra*, note 61.
- ⁶⁶ Joint Declaration and Supplementary Agreement Between the United States of America and Mexico, Mex –US, June 7, 2019, TIAS 19-607. (Hereinafter “Mex.-US Joint Declaration”).
- ⁶⁷ Ariel G. Ruiz Soto, *Record-Breaking Migrant Encounters at the U.S.-Mexico Border Overlook the Bigger Story*, MIGRATION POLICY INSTITUTE (Oct. 2022) <https://www.migrationpolicy.org/news/2022-record-migrant-encounters-us-mexico-border>.
- ⁶⁸ Homeland Security, *Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration, Department of Homeland Security (DHS)*, (Apr. 27, 2023) <https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration>.
- ⁶⁹ Rebecca Santana and Elliot Spagat, *Biden administration to limit asylum to migrants who pass through a 3rd nation*, PBS NEWS HOUR (Feb. 21, 2023) <https://www.pbs.org/newshour/politics/biden-administration-to-limit-asylum-to-migrants-who-pass-through-a-3rd-nation#:~:text=The%20proposed%20rule%20establishes%20%E2%80%9Ca,notice%20in%20the%20Federal%20Register>.
- ⁷⁰ María-Teresa Gil-Bazo, *The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice*, 33 NETH. Q. HUM. RTS. (2015).
- ⁷¹ Hilpold, *supra*, note 10, at 241.
- ⁷² European Union Agency for Asylum, *Asylum Report 2022*, 155, 229, 280 (Publ'n Off. Eur. Union, 2022). (Hereinafter “EUAA (2022)”).
- ⁷³ *Mexico: Asylum Seekers Face Abuses at Southern Border: Improve Conditions, Procedures; US Should End Pressure to Block Arrivals*, HUMAN RIGHTS WATCH (June 6, 2022).
- ⁷⁴ Miriam Jordan, *Smuggling Migrants at the Border Now a Billion-Dollar Business*, NEW YORK TIMES (July 25 2022) <https://www.nytimes.com/2022/07/25/us/migrant-smuggling-evolution.html>.
- ⁷⁵ Chemlali (2023”).
- ⁷⁶ EUAA, *supra*, note 72, at 37.
- ⁷⁷ EUAA, *supra*, note 72, at 21-22.
- ⁷⁸ Mex.-US Joint Declaration, *supra*, note 66.
- ⁷⁹ Marnie Jane Thompson, *The Invisible Burdens of Burden-Sharing*, FRONT. HUM. DYN. (Apr. 6, 2022).
- ⁸⁰ UNHCR, *Background Note on the Safe Country Concept and Refugee Status EC/SCP68* (July 26, 1991) https://www.unhcr.org/en-us/excom/scip/3ae68ccec/background-note-safe-country-concept-refugee-status.html#_ftnref1.
- ⁸¹ G.A. Conf. 231/3 (July 30, 2018) Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly, and Regular Migration. Refugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times. However, migrants and refugees are distinct groups governed by separate legal frameworks. Only refugees are entitled to the specific international protection defined by international refugee law. However, The GA's Resolution adopted on 19 September 2016 A/RES/71/11. New York Declaration for Refugees and Migrants established that despite differences in legal frameworks governing separate treatment of refugees and migrants, they equally have the same universal human rights and fundamental freedoms. Refugees and migrants also face many common challenges and have similar vulnerabilities, including in the context of large movements. “Large movements” may be understood to reflect a number of considerations, including: the number of people arriving, the economic, social and geographical context, the capacity of a receiving State to respond and the impact of a movement that is sudden or prolonged. The term does not, for example, cover regular flows of migrants from one country to another. “Large movements” may involve mixed flows of people, whether refugees or migrants, who move for different reasons but who may use similar routes. With this understanding, the Global Compact refers to migrants and presents a cooperative framework to address migration in all its dimensions, including refugees and international migrants. The caveat to this, mainly addressed by the UN Agency for Refugees (UNHCR) is that refugees cannot (presumably) return to their country of origin because of a well-founded fear of

persecution, conflict, violence, or other circumstances that have seriously disturbed public order, and who, as a result, require international protection. For this reason, the tendency to conflate refugees and migrants, or to refer to refugees as a subcategory of migrants, can have consequences for the lives and safety of people fleeing persecution or conflict. Without question, all people who move between countries deserve full respect for their human rights and human dignity. However, the specificity in definition and frameworks for refugees are a specifically defined and protected group in international law, because the situation in their country of origin makes it impossible for them to go home.

<https://www.unhcr.org/asylum-and-migration.html>

Nevertheless, Resolution: A/RES/71/1 adopted by the General Assembly on 19 September 2016, on multiple occasions recognizes that the commitments, challenges and prerogatives that drive and prompt this humanitarian framework through the political declaration in the Resolution geared for the most part equally for both refugees and migrants, despite the important distinction. It does so by acknowledging that large movements of refugees and migrants have political, economic, social, developmental, humanitarian and human rights ramifications, which cross all borders. Both global phenomena that call for global approaches and global solutions. No one State can manage such movements on its own. Neighboring or transit countries, mostly developing countries, are disproportionately affected. Their capacities have been severely stretched in many cases, affecting their own social and economic cohesion and development. In addition, protracted refugee crises are now commonplace, with long-term repercussions for those involved and for their host countries and communities. Greater international cooperation is needed to assist host countries and communities. Refugees and migrants in large movements often face a desperate ordeal. Ultimately the Un acknowledges the overarching and shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centered manner.

⁸² UNHCR, *New York Declaration | FAQs*, (Feb. 2018)

<https://www.unhcr.org/584689257.pdf>.

⁸³ Opeskin et al., *supra*, note 50, at 60.

⁸⁴ Beth A. Simmons, *Mobilizing Human Rights: International Law in Domestic Politics* 31 (Cambridge University Press, 2009).