

UNBEARING BURDEN OF THE REFUGEE CRISIS ON DEVELOPING COUNTRIES:  
IS THE GLOBAL COMPACT ON REFUGEES THE SOLUTION?

By

Kimberly Wangeci Rimber  
Student Number: RMBKIM001

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Name: Kimberly Wangeci Rimber

Signed by candidate

Date: 24 March 2020

Supervised by Mr. Popo Mfubu and Dr. Fatima Khan  
Faculty of Law  
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Name: Kimberly Wangeci Rimber

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## 1. INTRODUCTION

The global refugee crisis received international attention in late 2015 and early 2016, with stories of the Syrian conflict at its peak and refugees crossing the Mediterranean in unseaworthy vessels that often capsized killing hundreds of people, constantly in the media. Images of children washed up on shores following their vessels capsizing in the dangerous waters evoked deep emotions globally.<sup>1</sup> The global crisis is reflected in the statistics as there are 24.5 million refugees from a larger 68.5 million displaced people globally.<sup>2</sup> In response, Heads of states convened in the United Nations Headquarters on 19 September 2016 and together they adopted the New York Declaration for Refugees and Migrants.<sup>3</sup>

It was agreed that flowing from this set of resolutions that two global compacts should be developed from consultative processes. That is, the Global Compact on Refugees (“GCR”) and the Global Compact for Safe, Orderly and Regular Migration. The United Nations Office of the High Commissioner (“UNHCR”) was tasked with developing the GCR while the compact on migration was left in the province of Switzerland and Mexico.<sup>4</sup>

In relation to refugees, the set of commitments can broadly be categorized into four; reaffirmation of states commitments to refugee protection under international law, increased commitment to burden sharing, commitments towards the GCR and adoption of a Comprehensive Refugee Review Framework (“CRRF”).<sup>5</sup> The UNHCR was tasked with applying the CRRF in the field and the outcomes would then influence the development of the GCR.

In essence, the global community was recognizing that there are states that are overburdened with hosting of refugees and asylum seekers. The New York meeting further took an approach that has been lauded for shifting the message from “burden” to

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<sup>1</sup> Helena Smith, ‘Shocking images of drowned Syrian boy shows tragic plight of refugees’ *The Guardian* Athens, 2<sup>nd</sup> September 2015 available at <http://www.theguardian.com/world/2015/sep/02/shocking-image-of-drowned-syrian-boy-shows-tragic-plight-of-refugees/>, accessed on 26 March 2019.

<sup>2</sup> UNHCR ‘Global Trends: Forced Displacement in 2018’, available at <http://www.unhcr.org/5943e8a34>. Pdf, accessed 25 March 2019.

<sup>3</sup> New York Declaration for Refugees and Migrants, UN doc A/RES/71/1 (3 October 2016).

<sup>4</sup> Randall Hansen ‘A Comprehensive Refugee Response Framework: A Commentary’ (2018) 31 *Journal of Refugee Studies*.

<sup>5</sup> *Ibid.*

“responsibility” sharing.<sup>6</sup> The UNHCR has reported that ten countries hosts 60 percent of the world’s global refugees and asylum seekers, out of which, 86 percent are hosted in the developing world.<sup>7</sup> There are varied reasons for these statistics, some scholars have named this as an accident of geography,<sup>8</sup> the socio-economic circumstances of refugees, the non-entrée measures adopted by the Global North among other reasons.

The solution proposed was the implementation of the CRRF to tackle large-scale refugee problems. The CRRF was rolled out in fifteen countries and involved a consultative process between different stakeholders on different thematic issues.<sup>9</sup> The UNHCR consulted states, civil societies, donors and refugees in different areas that resulted in a stocktaking exercise in 2017 resulting in the text of the GCR.<sup>10</sup> There were also six formal consultations on the text of the GCR.<sup>11</sup>

The solutions offered by the GCR and the CRRF aim to “ease pressures on host countries, enhance refugee reliance, expand access to third country solutions and support conditions of origin for return in safety and dignity”.<sup>12</sup> The GCR further provides mechanisms of financial and technical support to host countries, involvement of different stakeholders and a reporting procedure where it is expected that states will meet every four years to give progress reports.<sup>13</sup> This research aims to have an in-depth analysis of the GCR as a solution document to determine the practicality of the solutions to host states and communities, having in mind that refugees are not a homogenous group and the reality of third world countries hosting majority of the refugees and asylum seekers.

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<sup>6</sup> Volker Türk and Madeline Garlick ‘From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees’ (2016) 28 *International Journal of Refugee Law* 656–678.

<sup>7</sup> New York Declaration for Refugees and Migrants op cit note 3.

<sup>8</sup> Randall Hansen op cit note 4 at p 135.

<sup>9</sup> Volker Türk ‘The Promise and Potential of the Global Compact on Refugees’ 20 (2019) *International Journal of Refugee Law* 575-583. He notes the countries to be Afghanistan, Chad, Djibouti, Ethiopia, Kenya, Rwanda, Uganda, and Zambia, Belize, Costa Rica, Guatemala, Honduras, Mexico, and Panama. There is also commitment to apply the CRRF to the Somalia situation that involves the Government as well as other regional players.

<sup>10</sup> Ibid.

<sup>11</sup> UNHCR, available at <http://www.unhcr.org/formalconsultations>, accessed on 28 March 2019.

<sup>12</sup> UNHCR, Global Compact on Refugees, para 7, Supplement No. 12 (A/73/12 (Part II) (hereinafter referred simply as the GCR)

<sup>13</sup> GCR, para 103-104.

*(a) Legal framework*

It is noteworthy that the GCR is not a legally binding document. However, the document builds on the principles already established in the international refugee protection framework. At the international level, the 1951 Convention relating to the Status of the Refugees (1951 Refugee Convention)<sup>14</sup> and the 1967 Protocol to the Convention<sup>15</sup> are the legally binding instruments on refugee protection. They provide for the definition of a refugee, the duties and responsibilities of the refugees and asylum seeker vis a vis those of the receiving states. This is further supplemented by regional instruments such as the Organization of Africa Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)<sup>16</sup> and the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama.<sup>17</sup>

The refugee protection documents do not exist in isolation and refugees and asylum seekers, not being a homogenous group, vulnerable groups such as women and children are further protected in other human rights instruments. For example, the Convention on the Rights of the Child makes specific provisions for the protection of refugee children.<sup>18</sup> The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women (Maputo Protocol)<sup>19</sup> makes specific provision on equal protection of the law to women in accessing asylum in article 4(2) *k* as well as providing for their protection during armed conflict in article 11.

Based on the foregoing, the GCRs starting point is article 1(3) of the United Nations Charter<sup>20</sup> that provides that one of the purposes of the United Nations is to achieve international cooperation in solving world problems, including humanitarian problems. Although the operational aspects on how to achieve international cooperation under this provision have not been highlighted, there have been several indications through state practice of what this may entail.<sup>21</sup>

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<sup>14</sup> UN Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

<sup>15</sup> UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, UNTS, vol. 606, p. 267

<sup>16</sup> Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45

<sup>17</sup> Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984.

<sup>18</sup> UN Convention on the Rights of the Child, 20 November 1989, UNTS, vol. 1577, p. 3; article 22.

<sup>19</sup> African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.

<sup>20</sup> UN, Charter of the United Nations, 24 Oct 1945, 1 UNTS XVI.

<sup>21</sup> New York Declaration for Refugees and Migrants op cit note 7.

The 1951 Convention,<sup>22</sup> in its preamble refers to international cooperation, recognizing that hosting states may be unduly heavily burdened and further noting that international protection of refugees would be devoid if there is no international cooperation. Although preambles are not considered as part of the operative part of a convention or law, they are often used as an interpretative guide.<sup>23</sup> However, article 35 of the 1951 Convention does refer to cooperation between states and the UNHCR.

The OAU Convention<sup>24</sup> in its article 2 calls on States to invoke the principle of solidarity and international cooperation. It provides,

where a Member State finds difficulty in continuing to grant asylum to refugees, [it] may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden [of the Member State granting asylum].

Despite the very generous wording of this provision, no state has outrightly sought help from another state in Africa to provide an indication of state practice in this regard.<sup>25</sup> As such, the GCR is founded on legally binding principle of international protection of refugee law. Despite criticisms that the GCR should have been drafted as a convention or another protocol to the 1951 Convention,<sup>26</sup> there is evidence that States tend to respond better to soft law and this increases the level of commitment to solving a global problem.<sup>27</sup>

In addition, the GCR is grounded in international refugee protection regime and it categorically refers to the cardinal principle of non-refoulement. The principle that no State should return a person to frontiers where they might face persecution has been held to be the cornerstone of international refugee law.<sup>28</sup> It is provided by article 33 of the 1951 Refugee Convention and its 1967 Protocol, article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture),<sup>29</sup> article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance,<sup>30</sup>

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<sup>22</sup> 1951 Convention op cit note 14.

<sup>23</sup> GS Goodwin-Gill and J McAdam *The Refugee in International Law* 3 ed (2007) 504.

<sup>24</sup> OAU Convention op cit note 16.

<sup>25</sup> A Hans and A Suhrke 'Responsibility-Sharing' in James Hathaway (ed) *Reconceiving Refugee Law* (1997) 83.

<sup>26</sup> James C Hathaway 'The Global Cop-Out on Refugees' (2019) 30 *International Journal of Refugee Law* 591-604.

<sup>27</sup> Guy S Goodwin-Gill 'The Global Compacts and the Future of Refugee and Migrant Protection in the Asia Pacific Region' *International Journal of Refugee Law*, Volume 30, Issue 4, December 2018, Pages 674–683.

<sup>28</sup> GS Goodwin-Gill and J McAdam op cit note 17.

<sup>29</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UNTS vol. 1465, p. 85

<sup>30</sup> UN International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006.

the International Covenant on Civil and Political Rights (ICCPR)<sup>31</sup> and in regional human rights instruments such as article 2 (3) of the OAU Refugee Convention,<sup>32</sup> and paragraph 5 of the Cartagena Declaration on Refugees.<sup>33</sup>

The principle of non-refoulement has been developed and there are instances of indirect refoulement for example where the living circumstances in a host country are so dire that the refugees and asylum seekers decide to just go back to their countries of origin, despite the persecution. This then touches to the socio-economic rights provided for in the International Covenant on Socio and Economic Rights (ICESCR) such as, the right to an adequate standard of life that includes adequate food, shelter and clothing.<sup>34</sup> The GCR addresses how through international cooperation and solidarity hosting states can be able to provide refugees with among other things, food, shelter, food security and access to health as well as moving towards a system of self-reliance for the refugees to earn their own livelihood. These rights are provided for in the ICESCR which has further developed General Comments and fleshed them out.<sup>35</sup>

The GCR also tacitly acknowledges the right of people to seek asylum as provided for in article 14 of the Universal Declaration of Human Rights,<sup>36</sup> article 12(2) of the International Covenant on Civil and Political Rights that centers the right to asylum with an individual's right to leave any country he is in, including his own.<sup>37</sup> Regionally, the African Charter on Human and Peoples Rights' also provides every individual with the right to leave his country and seek asylum in article 12(2) and (3)<sup>38</sup> and the right is also guaranteed in article 22(7) of the American Convention on Human rights.<sup>39</sup>

In conclusion, the idea behind a global compact has legal backing as indicated above through provisions of the UN Charter, the 1951 Refugee Convention and the OAU Refugee Convention. More importantly, the *raison d'être* of the GCR is grounded in international refugee law as well as international human rights that provides legal obligations of states

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<sup>31</sup> UN International Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999, p. 171.

<sup>32</sup> Organization of African Unity op cit note 16.

<sup>33</sup> Cartagena Declaration op cit note 17.

<sup>34</sup> UN International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, UNTS, vol. 993, p. 3,

<sup>35</sup> For example, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4; General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10; General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22.

<sup>36</sup> Universal Declaration of Human Rights, 10 December 1948, 217 A (III), UN Doc A/810 (1948).

<sup>37</sup> Op cit note 31.

<sup>38</sup> OAU, African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982),

<sup>39</sup> Organization of American States (OAS), American Convention on Human Rights, Costa Rica, 22 November 1969, 1144 UNTS 123.

towards the refugees and asylum seekers. This as will be discussed later is important as then GCR sets commitments that enable the states meet their obligations under the principle of state responsibility.

*(b) Research problem Statement*

Ingrained in the GCR, is the concept of responsibility sharing by easing pressure on host countries, enhancing refugee self-reliance, expanding access to third country solutions and supporting conditions in countries of origin for return in safety and dignity. The durable solutions proposed are not novel and have been in the purview of international refugee protection regime.

This research paper discusses the various solutions offered by the GCR and the mechanics of the implementation to determine if indeed the GCR is an important addition to the international refugee protection regime. The research will have a historical look at the durable solutions that have been in place to determine the challenges that the UNHCR and other actors have experienced and whether the GCR adequately addresses these issues through case studies. Another key question will be around the practicability of implementing the commitments adopted through the GCR.

(c) *Literature Review*

The GCR has received its fair share of support and criticisms. Volker Türk, the current assistant High Commissioner on Protection in the UNHCR, starts the pro-GCR conversation in 2016 highlighting the strengths and potential of the CRRF (that provides the framework for the GCR and is part of the GCR).<sup>40</sup> He notes a key ideological shift from burden sharing to responsibility sharing and gives a very good background on when international cooperation and solidarity has worked in favour of refugees. He gives instances such as the resettlement of the Hungarian refugees in 1956-1958 and the comprehensive plan of action for Indochinese in the 1970s noting the key learnings from the previous responsibility sharing endeavors.

He further highlights the issue of “asylum fatigue” in some countries, noting the financial constraints as well as populist politics that have tainted refugees and asylum seekers in a negative light of terrorism. He is positive as he analyses the CRRF and hopeful of what the GCR would look like, since at this point the GCR had yet to be finalized.

Randall Hansen gives a commentary on the GCR, looking at its potentials as well as its challenges.<sup>41</sup> He argues that the first phase of the GCR, being the CRRF is commendable with the emphasize on self-reliance of refugees and its call to ease pressures on host states. On the other hand, he critiques the focus on voluntary repatriation and a call to expand third country solutions as creating an unrealistic expectation of the reach of these solutions.

He gives arguments in favor of self-reliance on refugees through education and access to labor, noting that this not only eases the burden on the host state but also give refugees a sense of dignity. He further looks at a few countries that have successfully implemented self-reliance such as Tanzania and Jordan. He also applauds the commitment of the global community to support host countries financially and through technical support.

Fatima Khan and Cecile Sackeyfio analyse what the GCR has in store for Africa and are of the opinion that it provides hope for refugees in Africa.<sup>42</sup> They are impressed by the human rights approach as well as the sustainable development angle taken by the GCR. Further, the fact that the GCR is underscored by international solidarity as well as mechanisms for the implementation of refugee rights, a strategy to meet targets as well as a system of measuring these outcomes is acknowledged. The authors also highlight the success stories that have already been experienced in some of the African countries that have rolled out the CRRF.

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<sup>40</sup> Volker Türk op cit note 6 at 656-758.

<sup>41</sup> Randall Hansen op cit note 4.

<sup>42</sup> Fatima Khan and Cecile Sackeyfio ‘What Promise Does the Global Compact on Refugees Hold for African Refugees?’ (2019) 20 *International Journal of Refugee Law*.

Githinji and Wood also analyse the GCR in respect to Africa and note that one of the key weaknesses not addressed by the GCR and is very continent specific, is the issue of ‘mixed migration’.<sup>43</sup> The discussion of the two compacts on refugees and on migrants try very hard to draw this distinction despite the fact that trends in migration have indicated the mixed nature of migration and the particular difficulties associated with mixed migration.

International refugee law scholar and expert, James Hathaway is not very optimistic about the GCR and its potential to further protect refugees.<sup>44</sup> He opines that one of the major challenges of the 1951 Refugee Convention is that it lacked an operational wing that would ensure that responsibilities and burdens are shared fairly among states. He gives a restaurant metaphor that the GCR and CRRF are like,

...what is offered is very much a menu of possibly wonderful courses (we’re not sure, however, since the descriptions are vague). Indeed, this is not really a menu so much as an indication of items that might (or might not) be available on a given day. In fact, this is not really even a (quasi-) menu for a restaurant; it’s more about what might be offered in a special function dining hall that will only open if a truly large group of hungry people arrives (although we’re not sure how many have to show up before the chef and serving staff will come in to work). In short, this is not the menu for a restaurant that you’d want to count on when making plans to dine.

Hathaway’s pessimism is grounded on the severity of the refugee problem and the optional approach to which States undertake their obligations. A more binding document would have shown greater sincerity and commitment to human rights protection of refugee law as opposed to the GCR which he terms as “highly partial Compact”. His criticism is not without suggestions on issues he feels would have made a greater impact such as addressing access to asylum, model for reform in the asylum-seeking process, integration and finally making asylum ‘doable’ for poorer states.

James Cantor opines that it is too early to judge the GCR and that it should be given time and its success and failure can only be determined in relation to the existing refugee regime.<sup>45</sup> He is impressed of the fairness and equality concerns of the GCR in responsibility and burden sharing but at the same time wary on whether the same unfairness and inequalities of politics and regions will not find their way in the operations of the GCR. Chimni adds to the debate and addresses the GCR’s failure to mention third states in their role in causing conflict

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<sup>43</sup> Eunice Ndonga Githinji and Tamara Wood ‘Prospects for the Global Compacts in Africa: Combining International Solidarity with Home-Grown Solutions’ (2018) 30 *International Journal of Refugee Law* 2018 4, 699–703.

<sup>44</sup> James Hathaway, op cit note 26.

<sup>45</sup> David James Cantor ‘Fairness, Failure, and Future in the Refugee Regime’ (2018) 30 *International Journal of Refugee Law* 2018 4, 627–629.

when it addresses the issue of root causes.<sup>46</sup> He notes that the GCR places the role of addressing root causes with the country of origin and forgets the important role third states have played in displacement and rightly gives recent examples of the Rohingya refugees, the outflows from Afghanistan, Iraq, Libya, and Syria and the role of the Western countries.

In conclusion, there is rich academic scholarship on the GCR and the CCRF that seeks to better explain this framework. As noted above, different scholars hold different views on the potential of the GCR as well as the challenges. The fear is that the GCR will be another instrument that is beautiful to look at but will soon be piled with the other declarations, recommendations, concluding remarks to gather dust in many countries. My research will aim to add to this scholarship by looking at various case studies that embody the objectives of the GCR to be able to critically analyse whether the GCR offers a solution to the refugee crisis.

*(d) Research Hypothesis*

The assumption at the outset of this research is that the GCR provides an opportunity to equitable responsibility sharing however, this is hinged on political will. It is assumed that most countries do not feel obligated to take up their share of responsibility as evidenced by data on the number of countries hosting refugees as well as the countries contributing financially.<sup>47</sup>

It is therefore assumed that without political will, the GCR and the CCRF will not make a notable impact to the global refugee crisis. For instance, Tanzania, one of the countries that had enrolled in the CRRF, opted out alleging lack of donor support, where the country refused to take out a US\$50 million debt to support the refugees.<sup>48</sup> This incident was a key indicator on what is really envisaged by the GCR when it provides for financial support. It has also been suggested that this shows how the Global North does not treat the Global South as equals.<sup>49</sup>

*(e) Research Question*

This research aims to answer the following question,

Does the GCR provide practical solutions to the overburdened developing states hosting refugees?

To be able to answer this question, the following sub-questions will be asked and answered;

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<sup>46</sup> BS Chimni 'Global Compact on Refugees: One Step Forward, Two Steps Back'(2018) 30 *International Journal of Refugee Law*, 2018 4, 30–634

<sup>47</sup> UNHCR Global Trends 2016 op cit note 2.

<sup>48</sup> Alexander Betts 'Don't make African nations borrow money to support refugees' *Foreign Policy* 21 February 2018, available at <https://foreignpolicy.com/2018/02/21/dont-make-african-nations-borrow-money-to-support-refugees>, accessed on 26 March 2019.

<sup>49</sup> Ibid.

1. What are the solutions given?
2. From practice, do the solutions address the key challenges host states and communities face?
3. What could have been done differently?

*(f) Research Methodology*

This will be a desktop-based research. Materials shall be gathered from library and internet sources. Materials gathered will be analysed to understand the solutions and mechanics of implementation and reporting proposed by the GCR as well as to get a better understanding and feel of the already existing solutions.

*(g) Chapter breakdown*

1 Chapter 1

- a. Introduction*
  - b. Legal Framework*
  - c. Research problem statement*
  - d. Literature Review*
  - e. Research Hypothesis*
  - f. Research Question*
  - g. Research methodology*
- 2 Chapter 2: Unpacking the Global Compact on Refugees
- a. The process leading to the GCR*
  - b. The CRRF*
  - c. Key tenets of the GCR*
  - d. Indicators of success of the GCR*
  - e. Implementation and reporting mechanism of the GCR*
- 3 Solutions provided by the GCR through CRRF country analysis
- a. Introduction*
  - b. Wins and lessons from various countries past experiences*
    - i. Kenya*
    - ii. Jordan*
  - c. Analysis of the solutions and the case-studies*
4. Critique of the GCR
- a) Introduction*
  - b) Strengths and potential*

- c) *Challenges and weaknesses*
- d) *Tools of implementing the GCR*
  - i) *Judicial Interpretation*
  - ii) *Civil Societies*

5. Conclusion and Recommendations

## 2. UNPACKING THE GLOBAL COMPACT ON REFUGEES

The GCR is a creature of different processes and input from different stakeholders, the most notable being the report of the Secretary General that addressed the large movements of refugees and migrants,<sup>50</sup> upon which world leaders discussed and came up with the New York Declaration.<sup>51</sup> At the New York meeting, the CRRF was developed as a framework upon which the UNHCR was tasked to implement and use as a building block for the GCR. I briefly analyse these key milestones that led to the GCR.

### *a. Report of the Secretary General, 'In safety and dignity: addressing large movements of refugees and migrants' ('the Report')*

2015 was a significant year for refugee protection as this was the year that the UN General Assembly decided there was need to do something about the ongoing 'refugee crisis' by convening a high-level plenary meeting of the Heads of States on 19 September 2016. 'Refugee crisis' is in quotes as many have argued that the refugee issues have long been in play but in 2015 they were given more attention as the refugees and migrants were headed to Europe.<sup>52</sup> The Eurocentric nature of the crisis is seen for example in how the media's focus was on the pressure Europe was facing at that time, rather than the crisis that the refugees fleeing war-torn areas were facing.<sup>53</sup> To put matters into perspective, a non-European country like Lebanon had 20 percent of its population made up of refugees whereas refugees constituted only about 0.25 percent in the European Union during the highs of this crisis(2015-2016).<sup>54</sup>

The semantics of 'crisis' aside, the New York Meeting was convened and in preparation for this meeting, the Secretary General Ban Ki-moon prepared and issued his report addressing the large movements of refugees and migrants in May 2016. This report is important as it called for the global compacts and commitments from all States to deal with the issue of large movements of refugees and migrants in an equitable and predictable manner. It lay a foundation for the commitments that would follow in the New York Declaration and consequently in the GCR.

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<sup>50</sup> UN General Assembly, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*. Report of the Secretary-General, UN doc A/70/59 (21 April 2016).

<sup>51</sup> New York Declaration op cit note 3.

<sup>52</sup>Gurminder K. Bhambra 'The current crisis of Europe: Refugees, colonialism, and the limits of cosmopolitanism' (2017) *European Law Journal* 23(5) 395-405;

<sup>53</sup> Ibid.

<sup>54</sup>Eurostat, 'Asylum in the EU Member States', 4 March 2016, available at <https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6> accessed 10 June 2019.

The report is divided into five parts; it starts by an overview of the global trends, it then analyses the causes of the large movements, it continues to address the particular needs and challenges faced by those on the move en-route and on arrival, it builds on the long history of what has been achieved when States come together through cooperation and finally, it gives recommendations to the States in order to address the large movements.

‘Large movement’ is the emphasis of the GCR building on the tempo of the Report. The Report highlights that in order to characterize a movement as ‘large’ one has to look at the “geographical context, the capacities of the receiving States to respond and the impact caused by its sudden or prolonged nature on the receiving country” as opposed to the number of those migrating.<sup>55</sup> Following from this definition, it would encompass protracted refugee situation and not only new movements of people. Protracted refugee situations have been defined as situations where refugees find themselves in a long-lasting state of limbo where though their lives may not be at risk, they still have unfulfilled basic human rights<sup>56</sup> and this presents the reality of many refugees living in developing countries.

In discussing the overview trends of migration, the report notes that migration plays an important role in economic growth for example in addressing labour market shortages and skills at all levels. Migration is also vital in sustainable development and is one of the targets of the Sustainable Development Goals (SDGs).<sup>57</sup> Refugees and migrants are clearly distinguished due to the international protection regime of refugees and this distinction is critical due to the mixed nature of migration. Finally, the trends highlight that more than half of the refugees globally are children under the age of 18 whereas the other half is made up of women and girls. These statistics are important as children, women and girls are particularly vulnerable to sexual violence and exploitation.<sup>58</sup>

Conflict, violence, persecution, poor governance structures that perpetuate exclusion, marginalization and discrimination are identified as some of the causes of forced migration. The Report further highlights the often-neglected perils of climate change and environmental degradation that continues to displace people such as natural calamities and droughts.<sup>59</sup>

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<sup>55</sup> The Report, para 11.

<sup>56</sup> UNHCR, ExCom (2009a) ‘Conclusion on Protracted Refugee Situations’, No. 109 (LXI). The Preamble gives a period of where a refugee is in such a situation for more than 5 years.

<sup>57</sup> The Report, para 10.

<sup>58</sup> UNHCR, (UNFPA) and the Women’s Refugee Commission (WRC) ‘Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis’ available at <https://www.unhcr.org/569f8f419.pdf>, accessed on 15 June 2019.

<sup>59</sup> The Report, para 22-17.

Those on the move often result to dangerous routes of travel to escape persecution through the facilitation of criminal gangs and cartels.<sup>60</sup> The unseaworthy boats that often capsize in the Mediterranean and the dangerous road travels for example in the deserts leave the refugees and migrants degraded, living in inhuman conditions during their travels and often exploited. Although there have been different operations to rescue those at sea, more often than not the operations do not uphold the human rights of those rescued and there is lack of proper screening procedures that further violates their right to seek asylum.<sup>61</sup> Many are returned to the same places they were fleeing persecution while others are detained for unreasonable periods having in mind that the majority of those on the dangerous journeys are women, girls and children.

Once the refugees arrive at the borders of most States, they are frequently received with hostility and face challenges accessing the refugee determination process.<sup>62</sup> The Secretary General further expresses his disappointment with the new trend of countries erecting fences and walls as a response to those who come to their borders. For example, many countries in the European Union erected fences, such as Greece, Germany, Austria and Bulgaria, and this led to a significant drop of asylum seekers reaching Europe in the first quarter of 2016 as opposed to the last quarter of 2015.<sup>63</sup> He also notes that most refugees are held in detention centers for long periods and in very undignified circumstances. However, he correctly acknowledges that the receiving hosts are left to deal with the large movements solely as regional and international cooperation has been found wanting. The hosting states therefore strain financially, and this can be seen for example in the deficient screening processes.

The challenges are not only on arrival but also from a long-term perspective.<sup>64</sup> Whereas humanitarian assistance is very important on arrival, there is more assistance needed to ensure the refugees are socially included in their communities. He notes with concern the frequency and acceptability of xenophobic attacks that is often perpetuated by those in powers. He suggests that to counter this, there is need for hosting States to increase personal contact between its citizens with refugees as it has scientifically been proven that personal contact reduces prejudice and hostility.

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<sup>60</sup> The Report, para 28-32.

<sup>61</sup> Simone Marinai 'The interception and rescue at sea of asylum seekers in the light of the new EU legal framework' 2016) *Revista de Derecho Comunitario Europeo*, 55, 901-939.

<sup>62</sup> The Report, para 33-37.

<sup>63</sup> Gabriella Baczynska and Sara Ledwith 'How Europe built fences to keep people out' 4 April 2016 *Reuters Global Markets News* available at <http://www.reuters.com/article/us-europe-migrants-fences-insightidUSKCN0X10U7>, accessed on 26 June 2019.

<sup>64</sup> The Report, para 38-40.

The report continues to highlight that international cooperation has previously worked in addressing large movements of people.<sup>65</sup> This is just to reaffirm the importance of international cooperation and that it is possible to solve some of the problems if there is political will. He highlights the lessons learnt from operations such as the Comprehensive Plan of Action for Indo-Chinese Refugees that saw millions of South-East Asians Refugees resettled through the collaboration of the countries of origin, first asylum countries and countries of resettlement. One of the key lessons being that the processes are more likely to work if they have preparatory and follow up processes as opposed to a one-off conference where States come together and make pledges.

The Secretary General concludes by giving recommendations to States and this is divided into two broad pillars.<sup>66</sup> The first being to uphold the dignity and safety of refugees which entails the protection of their human rights en-route, on arrival and in the long term. He calls States to meet the SDGs to reduce the need for migrants to seek better lives elsewhere, to respond to human rights violations and build capacities to avoid conflicts and mitigate consequences of natural disasters. He notes that addressing the root causes of the large movements of people is without a doubt the cornerstone of addressing the large movements of people and that there is need for political will and resources.

The second pillar is in a comprehensive response framework for refugees. He highlights the key elements that should be part of the CRRF. International cooperation, multi-stakeholders involvement, refugee self-reliance are among the core elements he identifies, upon which the CRRF is actually built on.

In conclusion, the Report was key as it laid the foundations upon which the CRRF and the GCR were built on. The Report had a holistic approach on large movements looking at before, during and after the movement. He did this by stressing the need to deal with the root causes of the large movements and addressing the human rights issues that arise on the dangerous journeys many embark on to reach the countries of refuge. By also dealing with the situation once they reach their host countries, the Secretary General challenges the Head of States and Governments to deal with the real issues that refugees deal with such as the xenophobic rhetoric that impedes their access to other human rights and a dignified standard of living.

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<sup>65</sup> The Report, para 41-44.

<sup>66</sup> The Report, para 52-86.

*b. New York Declaration for Refugees and Migrants*

The New York Declaration is a political declaration as agreed upon by the Heads of States and High Representatives addressing the question of large movements of migrants and refugees on 19 September 2016. The Report of the Secretary General played a major role in informing the commitments made at this meeting.

Specific commitments were made to refugees and migrants as well as commitments that apply to both groups. At the outset, the Declaration made it clear that there is a legal distinction between the two groups, however, they often find themselves in the same situations in terms of travel.<sup>67</sup> There was emphasis on their universal human rights and freedoms. The Declaration pays homage to the centrality of the 1951 Refugee Convention as the cornerstone of refugee law and the States undertake to respect the right to seek asylum and the right to non-refoulement in their admission and rescue missions.

As per the Report of the Secretary General, the Heads of States commit to dealing with the root causes of forced displacement such as prevention of conflicts, peaceful resolution of conflicts, addressing human rights violations, dealing with bad governance and using preventive dialogue.<sup>68</sup> However, there was little mention of how this would be done, for example it would have been a good indicator if Heads of States called out some of the countries where human rights violations continue to be the number one factor of forced displacement, or an acknowledgment of the effect of external countries in certain outflows. This can however be understood to be the price of diplomacy having in mind it was a meeting of Heads of States.

States committed to reviewing their policies on encampment and detention of refugees on admission noting that detention should be an exception rather than the rule.<sup>69</sup> There was a commitment to attend immediately to the needs of special groups of people such as children, women and those who might be victims of abuse while in transit. Gender perspective through promotion of gender equality and dealing with gender based sexual violence was given emphasis. This comes after many reports of the vulnerability of women and children who often face gender-based violence in their dangerous journeys.<sup>70</sup>

The Declaration goes on to deal with human trafficking which is closely linked with the journeys many embark to safety and which cannot be left out in the conversation on large movements of people. The States committed to further enforcing the UN Convention against

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<sup>67</sup> New York Declaration op cit note 3, hereinafter referred to as the 'The Declaration', para 6.

<sup>68</sup> The Declaration, para 37 and para 64.

<sup>69</sup> The Declaration, para 33 and para 73.

<sup>70</sup> The Initial Assessment Report op cit note 58.

Transnational Organized Crime and its two relevant Protocols in preventing and combating human smuggling and trafficking.<sup>71</sup> States that have not yet ratified this treaty were called upon to do so and those that have ratified committed to streamlining their criminal and justice systems to combat human smuggling and trafficking.

The Declaration acknowledges that neighboring and transit countries often face a disproportionate burden when there are large movements of people, the notion commonly referred to as accidents of geography.<sup>72</sup> Unfortunately, most of the accidents of geography are developing countries. The States agreed that there is insufficient funding and the needs of the refugees do not meet the funding and resources available to the host states, leading to strained host states. This most of the time often leads to hostility towards the refugees. In response, the States committed to equitable sharing of the ‘burden’ and responsibility and called for a comprehensive refugee response which was developed and is annexed to the Declaration. It is noteworthy to mention that on the next day after the meeting, the United States Government, seven other member States and the Secretary General co-hosted the Leaders’ Summit on Refugees where about fifty States made financial and other resource commitments towards the realizing the commitment on responsibility sharing.<sup>73</sup>

States committed to further engaging in durable solutions to refugees such as resettlement, with countries that do not have resettlement programs being called to develop the same and those on board being called to further expand their capacity.<sup>74</sup> It was unfortunate that the Secretary General’s recommendation to resettle at least ten percent of the global refugee population did not make it to the commitments. Other programs such as temporary evacuation programs, arrangements to allow family reunification, labour mobility for refugees and education scholarships and student visas were to be considered by States. The language here was not as promising as in the other issues as States noted that they would ‘consider’ but did not commit to the same.

*c. Comprehensive refugee response framework*

The CCRF is an outline with key elements that each response to a large movement would entail. It is meant to provide a predictable way of dealing with large movements of people, recognizing that each large movement will have its own unique features but that certain key elements should

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<sup>71</sup> The Declaration, para 24.

<sup>72</sup> The Declaration, para 7.

<sup>73</sup> UN ‘Summary Overview Document Leaders’ Summit on Refugees’ 10 November 2016 available at [https://refugeesmigrants.un.org/sites/default/files/public\\_summary\\_document\\_refugee\\_summit\\_final\\_11-11-2016.pdf](https://refugeesmigrants.un.org/sites/default/files/public_summary_document_refugee_summit_final_11-11-2016.pdf) accessed on 20 June 2019.

<sup>74</sup> The Declaration, para 78.

remain constant.<sup>75</sup> It's to provide a framework for international cooperation and responsibility sharing that is people-centered. From the New York Declaration, the UNHCR was tasked to further develop the CRRF using a multi-stakeholder approach, and roll it out to different countries, from whose key learnings and outcomes would influence the Global Compact on Refugees. The CRRF was rolled out in fourteen countries in Africa and the Americas being; Ethiopia, Djibouti, Kenya, Uganda, Somalia, Rwanda, Zambia, and Chad and in the Americas; Mexico, Guatemala, Costa Rica, Belize, Honduras and Panama.<sup>76</sup>

The standard issues to be considered in each large movement are reception and admission,<sup>77</sup> support for immediate and ongoing needs,<sup>78</sup> support for host countries and communities<sup>79</sup> and durable solutions.<sup>80</sup> The CRRF thus collapses the conversations by the Secretary General and the Head of States into four key action points where international cooperation and responsibility sharing in a predictable manner should always be evident.

States' reception and admission of refugees should be in a humane and dignified manner, respecting the refugees' basic human rights and freedoms. It should be gender sensitive, responsive to children and victims of human trafficking and those who might have suffered abuse in different ways. Meeting basic needs such as water and food should be at the outset.

States should ensure that they are able to document refugees and do this in a timely manner as documentation is often a hindrance rather than an enabler in accessing other human rights.<sup>81</sup> This is where international cooperation comes in for example some States might need assistance in biometric technology and other financial assistance to make this more efficient. For instance, the countrywide biometric registration of refugees in Uganda that was done in 2018, saw better humanitarian assistance to the refugees, this was after a mass influx of Sudanese refugees that had resulted in multiple registrations as the systems were overwhelmed and this hindered administration of humanitarian aid.<sup>82</sup>

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<sup>75</sup> CRRF, para 1.

<sup>76</sup> UNHCR 'Two Year Progress Assessment of the CRRF Approach September 2016 - September 2018' UN Doc. ES/2018/07

<sup>77</sup> CRRF, para 5.

<sup>78</sup> CRRF, para 6-7.

<sup>79</sup> CRRF, para 8.

<sup>80</sup> CRRF para 9- 16.

<sup>81</sup> Fatima Khan 'The principle of non-refoulement' in Fatima Khan and Tal Schreier (Eds) *Refugee Law in South Africa* (2014) 14.

<sup>82</sup> UNHCR 'Uganda starts biometric verification of refugees' *UNHCR News* 2 March 2018 available at <https://www.unhcr.org/news/briefing/2018/3/5a9914ce4/uganda-starts-biometric-verification-refugees.html> accessed on 27 June 2019.

International and multi-stakeholder cooperation is required to finance and support hosting States in order to meet the immediate and ongoing needs of refugees. The CRRF envisages donor funding, grants, loan facilities that involves the States, civil societies, faith-based organizations and the private sector to make this a reality.<sup>83</sup> Whereas this is already happening, the CRRF calls for mobilization and re-commitment to ensuring financial assistance to host countries having in mind the cost of hosting refugees.

This will have a trickle-down effect in ensuring that refugees needs are met and that they are able to live a dignified life with access to basic human needs such as food, water and proper sanitation. It's a call to ensure that refugees have access to humanitarian aid, access to education, health, social services and child protection services in a manner that is gender and age sensitive.

At the anticipation of a large refugee movement, or at its beginning, the UNHCR and other relevant stakeholders should conduct and implement an impact assessment to identify where the host State might need assistance.<sup>84</sup> This helps the UNHCR and other relevant stakeholders prioritize where to assist the host State to ensure they are ready for the incoming refugees. This allows adequate resources to be dispensed to the host State in a manner that responds to the immediate and pressing needs of hosting the refugees that is also beneficial to the local communities.

Repatriation, local solutions, resettlement and complementary paths of admission are identified in the CRRF as the durable solutions.<sup>85</sup> The CRRF notes that dealing with the root causes of conflicts should be the main effort to restore peace to conflict and war-torn countries.<sup>86</sup> Repatriation should be voluntary, human and dignified including efforts to ensure reintegration into their community through socioeconomic empowerment and dialogue.

Integration of refugees into their host communities is tied to financial and other resource assistance by the international community to ensure self-reliance, access to health, education and labour markets.<sup>87</sup> It is noted that the decision to naturalization rests with any given country as this concerns the sovereignty of a country. That notwithstanding, self-empowering refugees is called upon to ensure refugees fully integrate in their host communities.<sup>88</sup>

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<sup>83</sup> CRRF, para 6.

<sup>84</sup> CRRF, para 8.

<sup>85</sup> CRRF, para 10.

<sup>86</sup> CRRF, para 11.

<sup>87</sup> CRRF, para 13 (b).

<sup>88</sup> CRRF, para 13 (e).

States are called to consider complimentary pathways of admission such as prospects for education, labour and skilled migration, family reunification and medical evacuation.<sup>89</sup> Further they are called to consider expanding their criteria for resettlement and humanitarian admission programmes, those that don't have such programs to establish the same and those that have them to expand the same. The UNHCR has estimated that close to 1.4 million refugees will need resettlement in 2019, with Syrians, DRC and South Sudanese refugees, respectively occupying the highest needs, this is despite the very limited resettlement opportunities.<sup>90</sup>

*d. Key tenets of the Global Compact on Refugees*

17 December 2018 will remain a memorable day in the history of international refugee law protection as it marks the day that the GCR was adopted by the UN General Assembly with 181 countries voting in favor, two in opposition, that is the United States of America and Hungary while Libya, Liberia and Eritrea abstained from voting.<sup>91</sup> As highlighted above, it was informed by the lessons and challenges of the 15 countries to which the CRRF was rolled out to, thematic discussions and six extensive consultation of its draft 'zero' before it was presented by the UNHCR to the UN General Assembly.<sup>92</sup>

The GCR is a not a legally binding document and this is highlighted in its introductory paragraphs.<sup>93</sup> It represents a political commitment to the acceptance and acknowledgement that there is need for international cooperation, burden and responsibility sharing in dealing with refugees. It is a global acknowledgement that certain States are unfairly burdened with scarce resources in hosting refugees while well-endowed countries watch and sympathize. Although many such as Hathaway have argued that it was a wasted opportunity to have a legally binding document,<sup>94</sup> perhaps another protocol to the 1951 Refugee Convention, it is still a key milestone.

At its core, are the principles of humanity and international solidarity and if effectively implemented, it is meant to operationalize the principles of burden and responsibility sharing with a focus on better protection for refugees.<sup>95</sup> It acknowledges the legal protection of the non-

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<sup>89</sup> CRRF, para 14 (a).

<sup>90</sup> UNHCR Projected Resettlement Needs 2019 available at <https://www.unhcr.org/5b28a7df4.pdf> accessed on 27 June 2019.

<sup>91</sup> UN 'General Assembly Endorses Landmark Global Compact on Refugees, Adopting 53 Third Committee Resolutions, 6 Decisions Covering Range of Human Rights' 17 December 2018 *Meeting Coverage* available at <https://www.un.org/press/en/2018/ga12107.doc.htm>, accessed on 29 July 2019

<sup>92</sup> UNHCR formal consultation op cit note 11.

<sup>93</sup> GCR, para 4.

<sup>94</sup> James Hathaway op cit note 26 at p 593.

<sup>95</sup> GCR, para 5.

refoulement principle, which is considered the cornerstone of international refugee law. That is, that no one should be turned back to where they may face persecution. As discussed by many authors, refoulement takes many shapes and forms including direct and indirect refoulement.<sup>96</sup>

The GCR aims to accomplish its objectives through a programme of action that is divided into two main pillars, that is, first coming up with arrangements and tools for effecting burden and responsibility sharing and secondly, by highlighting the areas for support. These are discussed in more detail below:

- i. Support arrangements for burden and responsibility sharing
  1. Global arrangement: Global Refugee Forum

At the global level, a Global Refugee Forum will be convened every four years, during which meeting, States through ministerial delegation will announce their contributions and accomplishments towards the objectives of the GCR.<sup>97</sup> The first meeting will be convened on 17 and 18 December 2019 and will focus on the arrangements for burden and responsibility sharing, education, jobs and livelihoods, energy and infrastructure, solutions, and protection capacity.<sup>98</sup>

This meeting will serve as the main follow up meeting for States to take stock of their accomplishment against the set commitments and pledges. This will be supplemented by a high-level officials' meeting every two years to provide a sort of mid-term review.<sup>99</sup> As will be discussed below, it will also serve as the platform through which States can activate and deactivate other support mechanisms such as the Support Platform.<sup>100</sup>

2. National Arrangements

Host States will be responsible to come up with national secretariats responsible in mobilizing and coordinating the different stakeholders in order to accomplish a comprehensive response for the refugees they are hosting. The secretariat will be assisted by the UNHCR but is solely independent to come up with policies that suit a host State's specific needs. In this regard,

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<sup>96</sup> Such as discussed by Khan in op cit note 63; James Hathaway and John Dent *Refugee Rights: Report On A Comparative Survey* (1995) Chapter 1.

<sup>97</sup> GCR, para 17.

<sup>98</sup> UNHCR 'Global Forum 17-18 December' available at <https://www.unhcr.org/global-refugee-forum.html>, accessed on 20 June 2019.

<sup>99</sup> GCR, para 19.

<sup>100</sup> GCR, para 26.

Uganda has been lauded so far as one of the most successful rollout CRRF countries and its national ownership of the project has been critical for this achievement.<sup>101</sup>

### 3. Support Platform

A Support Platform will be a group of persons drawn from the different stakeholders such as other States which is constituted to respond to a context specific request for assistance.<sup>102</sup> As such, these will not be fixed bodies and their progress will be monitored by the UNHCR and reported to the UNHCR Executive Committee, the UN General Assembly and the Global Refugee Forums.

A host State will be able to activate a Support Platform to offer it assistance in different forms for example in mobilizing financial, material and technical assistance, follow up and implementation of solutions such as resettlement.<sup>103</sup> It can offer assistance in pushing for political commitment.<sup>104</sup> Support Platforms can also play a support role where a host State has come up with policies that aim to achieve the GCR's objectives as well as facilitate political commitment towards the same.<sup>105</sup>

The GCR envisages two criteria for the activation of the Support Platform.<sup>106</sup> First is during a large-scale and or complex refugee situation and the host State anticipates being overwhelmed by the mass influx. Secondly, is in a protracted refugee situation and there is need for additional support and or when there is an opportunity for a solution for example in the case of large-scale voluntary repatriation. For example, this would have been very critical in 2016 when Kenya issued a directive to close down its refugees' camps claiming that time was up under the Kenya Somalia UNHCR Tripartite Agreement.<sup>107</sup> This directive was given despite the fact that the situation in Somalia had not improved and the process was not voluntary. Perhaps a Support Platform will have been instrumental in advising the Kenyan Government to ensure repatriation is voluntary and done in safety and in dignity in accordance with its international obligations under human rights as well as international refugee law.

### 4. Regional and sub-regional approaches

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<sup>101</sup> UNHCR 2 year progress report on the CRRF op cit note 57.

<sup>102</sup> GCR, para 25.

<sup>103</sup> GCR, para 24.

<sup>104</sup> GCR, para 23.

<sup>105</sup> Ibid.

<sup>106</sup> GCR, para 22-27.

<sup>107</sup> Human Rights Watch 'Kenya: Reverse Move to Close Refugee Camp: No Forced Returns of Refugees' available at <https://www.hrw.org/news/2019/03/27/kenya-reverse-move-close-refugee-camp>, accessed on 20 June 2019.

The GCR aims to build on regional and sub-regional approaches and initiatives that are already in place.<sup>108</sup> This is in appreciating that large movements of refugees often have regional characteristics and certain features unique to each region and sub-region. For example, in Africa, the European Union-Horn of Africa Migration Route Initiative and the African Union-Horn of Africa Initiative on Human Trafficking and Smuggling of Migrants (the Khartoum Process) have widely been referred to in the groundwork for the GCR.<sup>109</sup> Whereas the Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia held on 25 March 2017 and organised by Intergovernmental Authority on Development (IGAD) underscores the importance of regional concerted efforts.<sup>110</sup>

As such, regional and sub-regional mechanisms will play a critical role in Support Platforms and other assistance arrangements for concerned host State that require such assistance. Comprehensive responses will therefore also build on and work to supplement and complement the existing sub-regional initiatives.

ii. Key tools for effecting burden and responsibility sharing

Effective and efficient use of funding and resources, engaging the various stakeholders and use of data and evidence are the key tools that the GCR envisages to accomplish effective burden and responsibility sharing.<sup>111</sup> These are not new tools; however, the States aim to renew their commitment to these apparatuses.

Resources needed for the effective protection of refugees goes beyond funding and includes humanitarian assistance, development cooperation and the private sector contribution. The GCR calls for more mobilization of funds but at the same time more accountability to seal loopholes of misappropriation of funds. Humanitarian assistance needs to be timely and adequate to ensure the human rights protection of refugees in emergency as well as protracted situations. There is also a need to maximize the role of the private sector who through their investment create job opportunities and improve infrastructure for example through public-private partnerships.<sup>112</sup>

The GCR calls for all stakeholders to be engaged in every step of the process while respecting first and foremost the sovereignty of the host States. The refugees and their host communities play a pivotal role, especially the marginalized groups such as women, youth and

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<sup>108</sup> GCR, para 28-30.

<sup>109</sup> The Declaration, para 19.

<sup>110</sup> Olabisi Dare and Allehone M Abebe 'Regional Solutions and the Global Compact on Refugees: The Experience from Africa' (2018) 30 *International Journal of Refugee Law* 4, 704–706.

<sup>111</sup> GCR, para 32.

<sup>112</sup> Ibid.

persons living with disability. Other stakeholders such as humanitarian and development actors, the United Nations system, local authorities, faith-based actors, civil society, private sector, academics and sports and cultural activities. The importance of this multi-stakeholder approach is realizing the importance of each stakeholder and their contribution in improving the lives of refugees in line with the objectives of the GCR.

The availability of reliable and accurate data and evidence plays a critical role in assisting in planning and making of decisions in the equitable burden and responsibility sharing envisaged by the GCR. Data and evidence for example can also be used to foster better relationship between refugees and the host communities by dispelling the xenophobic rhetoric that is often based on inaccurate information.<sup>113</sup> For example in Uganda, there have been studies on how integrating refugees in the host communities has improved the lives of the host communities through refugees contribution in the improvement of the economy and providing a livelihood to the host community.<sup>114</sup> Contrary to popular belief that people living in refugee camps are just dependent and are more of a burden, various studies commissioned by the World Bank and the International Finance Corporation have shown how refugee camps such as the Kakuma and Dadaab camps in Kenya<sup>115</sup> and the Rwamwanja and Adjumani in Uganda contribute to the economy of their host community.<sup>116</sup>

iii. Areas in need of support

The grouping for the areas of support are informed by the CRRF and from its practical application. The areas are in reception and admission, meeting the specific needs and supporting the communities and the solutions. These broad pillars are further broken down to highlight the key areas that arise in the different phases from a refugee being received and admitted to a country to when they are offered either a temporary or a permanent solution.

a. Reception and admission

The GCR kickstarts reception and admission through early warning, preparedness and contingency plans, which are often in every country's framework of risk management.<sup>117</sup> The

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<sup>113</sup> International Labour Organization, International Migration Organization and the Office of the United Nations High Commissioner for Human Rights (OHCHR) *International Migration, Racism, Discrimination and Xenophobia* 2001.

<sup>114</sup> Edward Taylor et. al 'Economic Impact of Refugee Settlements in Uganda'(2016)

<sup>115</sup> Sorcha O'Callaghan and Georgina Sturge 'Against the odds: refugee integration in Kenya' (2018) *Humanitarian Policy Group Paper*.

<sup>116</sup> Op cit note 114.

<sup>117</sup> GCR, para 52-53.

GCR envisages international cooperation to not only have national but regional and global preparedness and contingency planning efforts.

There is need for evidence-based forecasting to be able to effectively have contingency plans. For example, drawing from the Secretary General's focus on internally displaced persons, internal displacement can be one of the indicators that can be used to prepare and subvert any further displacement of people.

Secondly, once the large numbers of refugees arrive in a host State, all stakeholders undertake to pull together resources and assist the host State to meet the immediate needs of the refugees.<sup>118</sup> This includes adequate and timely humanitarian assistance as well as technical and personnel assistance that other stakeholders can offer to the host State.

Third, the safety and security of the refugees as well as the host community is paramount.<sup>119</sup> This is in recognition that often in mass influx of refugees especially those fleeing war and conflict torn areas, there may be combatants masquerading as refugees.<sup>120</sup> The timely and dignified screening of refugees with sensitivity to women, children and victims of sexual and gender-based violence is critical. In this regard, there is need for support to ensure that the receiving State has the capacity to carry out the process in a dignified manner that respects the human rights of all involved, whether they are or not they are refugees.

Fourth, registration and documentation play a vital role in the protection of refugees as they need proper documents to be able to access their other rights such as access to education, healthcare and employment.<sup>121</sup> Realizing the important role of registration and documentation, the UNHCR and other stakeholders undertake to support receiving countries to strengthen the national capacities for registration and documentation and avoid the undue delays, fraud and corruption that often plagues the process. Corruption and fraud are not only at the national level but have also been at the UNHCR's level, for example despite the UNHCR having a robust framework to fight corruption and misappropriation of funds, there have been allegations of the UNHCR mismanaging donor funds.<sup>122</sup>

In addition, there is need for support to enhance the national capacities to address specific needs of certain groups of refugees who are vulnerable.<sup>123</sup> Unaccompanied or

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<sup>118</sup> GCR, para 54-55.

<sup>119</sup> GCR, para 56-57.

<sup>120</sup> Williams, Nathalie E 'Mixed and Complex Mixed Migration during Armed Conflict: Multidimensional Empirical Evidence from Nepal' (2015) *International Journal of Sociology*45(1), p.44-63.

<sup>121</sup> GCR, para 58.

<sup>122</sup> Ben Parker 'Audit finds UN refugee agency critically mismanaged donor funds in Uganda' 28 November 2018 The New Humanitarian available at <http://www.thenewhumanitarian.org/news/2018/11/28/audit-finds-un-refugee-agency-critically-mismanaged-donor-funds-uganda> accessed on 20 June 2019.

<sup>123</sup> GCR, para 59-60.

separated children, older persons, women, survivors and victims of sexual violence, human trafficking and smuggling, those in need of medical attention, illiterate, youth and adolescents need special attention. Having in mind that the receiving states are often strained in terms of resources during and emergency or protracted refugee situation, there is need for support to ensure the more vulnerable needs' do not fall through the cracks.

Finally, identifying international protection needs in accordance with international refugee law is paramount and there is need for technical support for the asylum processes.<sup>124</sup> In this regard, there is established an Asylum Capacity Support Group that is made up of experts from relevant technical areas that can be activated by a concerned State. The Asylum Capacity Support Group would come in to support the national authorities in order to strengthen the asylum processes and procedures gleaned from good practices from other States. For example, it can address the best practice on whether to have a simple asylum procedure or a complicated system with different structures and levels of appeal.<sup>125</sup>

b. Meeting needs and supporting communities

Hosting countries face difficulties in their own context to provide for their own citizens and it becomes burdensome to meet the needs of the refugees they host. More particularly for the developing countries that host more than 60 percent of the world's refugee population. As such, there is need for more focus on ways that the UNHCR, the other States and other stakeholders can assist the struggling host countries meet the needs of refugees and ensure that refugees live in a dignified manner.

The GCR calls for more support in education, ensuring refugees can access jobs and have livelihoods to be more self-sufficient, healthcare, meeting the specific needs and overcoming barriers that women, girls, children, adolescents and youth face.<sup>126</sup> The global community needs to up its commitment to support host countries provide accommodation, energy and manage natural resources that are often strained with large refugee populations. Food insecurity and malnutrition is constantly a battle refugees must fight once in host states, has it not become cliché that NGOs will always use a photograph of a malnourished child with flies on their face languishing in a refugee camp in order to get donor funding? The narrative clearly needs to change.

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<sup>124</sup> GCR, para 61-63.

<sup>125</sup> Discussing the South African refugee system, James Hathaway stated that he had argued for a simple asylum process during the Green Paper process consultation in 1996, as opposed to a complicated system with many levels of appeal. (A conversation with James Hathaway at the University of Cape Town held on 29 April 2019).

<sup>126</sup> GCR, para 64-67.

Data gathered from civil and birth registries is important to help host countries plan better as well as know the demographic population that influences the solutions engineered to protect refugees. Resources and expertise are needed to strengthen capacities of registries that also helps avoid statelessness in line with international efforts to end statelessness.

Finally, refugees live in communities and there is paramount urgency to foster good relationships between refugees and their host communities. The different stakeholders undertake to support different programs that facilitate better relationships between refugees and their host communities through initiatives that highlight the plight of refugees at the same time portraying that refugees can assist their host communities and reaching out to the human aspect of everyone. As discussed in the Kenya case-study, closer interaction between the refugees and the host community significantly fosters good relations.

### c. Solutions

The GCR aims to build on already existing solutions and to maximize their effectiveness through international cooperation and solidarity in line with its third and fourth objectives to expand access to third country solutions and to support conditions in countries of origin for return in safety and dignity. It therefore advocates for more support to maximize the three traditional solutions of voluntary repatriation, resettlement and local integration.<sup>127</sup> It also calls for complimentary pathways of admission.<sup>128</sup>

As stressed in the Secretary General's report and the CRRF, the GCR indicates that addressing the root cause of forced displacement is the best solution as many refugees want to go back to their lives, as they once knew it. However, there is the acceptance that addressing root causes usually takes a while hence the need to find other solutions.

Voluntary repatriation in safety and dignity remains the most preferred solution.<sup>129</sup> The GCR however correctly notes that this does not necessarily mean resolution of the root causes of the displacement but calls on all stakeholders to play their role in supporting countries of origin to make the situation conducive for returnees. This is to be done complementary with international frameworks such as the SDGs and the UNHCR plays a critical role through the tripartite agreements for repatriation.

The UNHCR has been clear that resettlement is a tangible way of showing international cooperation and solidarity.<sup>130</sup> To this end, it is working on a new three-year strategy (2019-

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<sup>127</sup> GCR, para 85-93.

<sup>128</sup> GCR, para 94- 96.

<sup>129</sup> GCR, para 87.

<sup>130</sup> UNHCR Projected Resettlement Needs op cit note 90 at p 9.

2021) to increase the effectiveness of resettlement as a durable solution. <sup>131</sup>It aims to expand the resettlement places, onboard countries that do not offer resettlement as well as mobilize countries that offer resettlement to increase their capacities. This will complement efforts already underway to increase resettlement for example the Emerging Resettlement Countries Joint Support Mechanism which is a joint initiative between the UNHCR and the International Migration Organization.<sup>132</sup>The initiatives' efforts have already started to bear fruits and is providing support to new resettlement countries such as Argentina, Brazil, Chile and Uruguay.<sup>133</sup>

Local integration is a prerogative of the host country and different countries have different policies on how to go about this, for example through naturalization. This process requires the refugees as well as the host community to be ready to accommodate the other for example the refugees have to learn the language as well as the cultures of their host communities while the host communities must have a positive attitude to learning and accommodating the refugees and their way of life.<sup>134</sup>

The GCR calls on States to show their solidarity by considering complementary pathways for admission to third countries through different schemes such as humanitarian, education and employment visas which will also be discussed in more detail in the UNHCR resettlement strategy. Complementary pathways present an interesting topic for follow up especially with studies showing that locals in host countries prefer high-skilled asylum seekers and students while look down upon low-skilled workers as well as extended family reunification, which are what are so envisaged.<sup>135</sup>A study by Bansak et.al for example noted the general public feeling in Europe that favours younger persons as they have potential for greater economic gain to their country.<sup>136</sup>Finally, contribution from member States can also be in the form of sharing good practices and any other technical assistance.

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<sup>131</sup> GCR, para 91.

<sup>132</sup> UNHCR, 'Emerging Resettlement Countries Joint Support Mechanism (ERCM)- Information sheet' available at <http://reporting.unhcr.org/sites/default/files/Information%20Sheet%20on%20ERCM%20September%202016.pdf>, accessed on 25 June 2019.

<sup>133</sup> UNHCR Projected Resettlement Needs op cit note 90 at p 68.

<sup>134</sup> Alexandra Fielden 'Local integration: an under-reported solution to protracted refugee situations' (2008) UNHCR Research Paper No. 158.

<sup>135</sup> Dr Scott Blinder William L Allen 'UK Public Opinion toward Immigration: Overall Attitudes and Level of Concern' (2016) *The Migration Observatory Briefing*.

<sup>136</sup> Kirk Bansak, Jens Hainmueller and Dominik Hangartner 'How economic, humanitarian, and religious concerns shape European attitudes toward asylum seekers' (2016) *LSE Research Online Political Science*, 354: 6309.

#### d. Follow up and review

In the introductory paragraphs, the GCR notes that it will glean lessons of regional cooperation initiatives<sup>137</sup> and one is that such initiatives works best with a preparatory and a follow up mechanism as opposed to a one-off pledging meeting. To this end, the GCR has various follow mechanisms, with the Global Refugee Forum as the main follow up mechanism.<sup>138</sup> Every four years, States come together and report on their progress and this is to be complimented by a high-level meeting every two years which acts as a ‘mid-term review’ as already highlighted above.

The UNHCR plays a very important role in the implementation of the GCR and will act as a catalyst. As such, the UN High Commissioner for Refugees will report to the UN General Assembly. <sup>139</sup>The report will indicate the progress towards the attainment of the objectives of the GCR as reported by the States in their annual reports of to the UNHCR.

As stressed throughout the GCR, a multi-stakeholder approach will be pursued by ensuring inclusivity during the Global Refugee Forum, seeking meaningful participation by all including women, youth and persons living with disability. The UNHCR further seeks to enhance participation through coming up with a digital platform to have a wider coverage and ensuring all voices are heard through the digital technology.<sup>140</sup>

#### Conclusion

In conclusion, the GCR has been a long journey in the making yet, it has only begun. From the Report of the Secretary General, to the New York Declaration, to the CRRF, it would be right to say that the birth of the GCR has been an eventful one. The focus of the GCR is the better protection of refugees through international solidarity and cooperation. After highlighting the GCR’s journey and its key tenets, the following chapters focus on whether the solutions offered are practical and doable.

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<sup>137</sup> GCR, para 28-30.

<sup>138</sup> GCR, para 101.

<sup>139</sup> GCR, para 105.

<sup>140</sup> GCR, para 106.

### 3. ANALYSIS OF THE GCR SOLUTIONS THROUGH SOME CRRF COUNTRY EXAMINATION

#### a) Introduction

The UN has defined a developing country as one with a relative low standard of living, an underdeveloped capital base and a moderate low Human Development Index (HDI)-this is an assessment of the human development component of development such as standard of living-, education and life expectancy.<sup>141</sup> By that definition, developing countries are already struggling as it is to uplift the standard of living of their citizens and issues such as unemployment and under-development are key on their agendas.<sup>142</sup> Turkey, Pakistan, Uganda, Sudan, Germany, Iran, Lebanon, Bangladesh, Ethiopia and Jordan, in that order, host the largest population of refugees.<sup>143</sup> From this list, German is the only developed country while the rest are developing countries indicating that developing countries continue to shoulder a disproportionate burden of refugees.<sup>144</sup>

To further put matters into perspective, countries such as Ethiopia and Uganda, have been categorized as part of the least developed countries, meaning they have the lowest indicators of socioeconomic development and the lowest HDI of all countries yet they host 33 percent of the world's refugee population with only 1.25 per cent of the world's gross domestic product.<sup>145</sup> Further, in relation to its own inhabitants, that is number of refugees per 1,000 inhabitants, Lebanon, Jordan, Turkey, Chad, Uganda, Sudan, Sweden, South Sudan, Malta and Djibouti have the highest refugee population.<sup>146</sup> Interestingly again, only Sweden is a developed country in that list.

The UNHCR has noted that 85 per cent of refugees often remain in countries in their region thus explaining the statistics above.<sup>147</sup> As such, countries neighboring refugee producing countries often act as the 'shock-absorbers' and hence the term accident of geography. That notwithstanding, most of these host countries have continued to be very generous and opened their countries to host refugees and asylum seekers. However, due to their own economic situations, most of these countries have become 'asylum-fatigued'.<sup>148</sup>

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<sup>141</sup> UN *World Economic Situation and Prospects (2019)* UN Publication.

<sup>142</sup> World Bank 'Desk Review on Livelihoods and Self-Reliance for Refugees and Host Communities in Kenya' (2019) World Bank Report

<sup>143</sup> UNHCR Global Trends 2018 op cit note 2 at p 143.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Volker Türk op cit note 6 at p 673.

This chapter looks at two countries that are hosting large number of refugee and are also part of the CRRF roll-out countries, that is Jordan and Kenya. Both countries had already come up with innovative ways to better protect refugees they were hosting before the CRRF and the GCR came into operation. I use the Jordan- EU Compact<sup>149</sup> in Jordan and the Kalobeyei Integrated Socio-Economic Development Plan (KISED P)<sup>150</sup> in Kenya to theoretically analyse the impact the GCR. In both case studies, I look at what aspects of the projects embody the principle of the GCR, what challenges are they facing that the GCR might address and lastly, what impact might the GCR had had on them, had it been in operation during their conceptual stages.

b) Kenya

Kenya hosts a significant number of refugees of 421,200 as at the end of 2018, majorly from South Sudan and Somalia.<sup>151</sup> It has two major refugee camps that is the Kakuma camp that borders South Sudan and hosts 40 percent of the refugee population, the Dadaab camp bordering Somalia that hosts 44 per cent and 16per cent are urban refugees.<sup>152</sup> Due to its close proximities with Somali and Sudan, it often experiences mass influxes whenever conflicts erupts in these two countries.

Historically, Kenya had an open and flexible policy when it came to asylum seekers, before the nineties when at this time, people were fleeing the ruthless administration of Idi Amin in Uganda.<sup>153</sup> These were asylum seekers who Kenya thought ‘profitable’ since many were businessmen and professionals mainly of African and Arab descent.<sup>154</sup> They were allowed free movement and easily integrated to the community. In the early 1990s, Kenya received a mass influx of refugees fleeing conflict and instability from Somalia, Sudan, Burundi, Ethiopia, and Rwanda.<sup>155</sup> This led to the government giving land to the UNHCR in the remote areas in the northern part of the country to set up the Kakuma and the Dadaab camps.

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<sup>149</sup> Government of Jordan ‘The Jordan- EU Compact: A New Holistic Approach between the Hashemite Kingdom of Jordan and the International Community to deal with the Syrian Refugee Crisis’ 8 February 2016 available at <https://reliefweb.int/report/jordan/jordan-compact-new-holistic-approach-between-hashemite-kingdom-jordan-and>, accessed on 30 June 2019.

<sup>150</sup> UNHCR *The Kalobeyei Integrated Socio-Economic Development Programme* UNHCR Publication.

<sup>151</sup> UNHCR Global Trends 2018 op cit note 71.

<sup>152</sup> UNHCR ‘Figures at a glance: Kenya’ available at <https://www.unhcr.org/ke/figures-at-a-glance>, accessed on 30 June 2019.

<sup>153</sup> Edwin Odhiambo Abuya ‘Past reflections, future insights: African asylum law and policy in historical perspective’ (2017) 19 *International Journal of Refugee Law* 51–95.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

The government was hesitant with the new breed of refugees as they did not seem as ‘profitable’ as the previous Ugandan refugees and often cited fears of insecurity and loss of jobs for its citizenry.<sup>156</sup> Further, the Kenyan Somalis had always been a minority and had been sidelined by the government as they had previously tried to secede and as such, the Somalis fleeing Somali faced the same hostilities as their counterparts in Kenya.<sup>157</sup> As such, the counties in which the two camps sit are less developed counties in Kenya and have legally been recognized in the 2010 Constitution of Kenya as marginalized areas.<sup>158</sup>

This brief historical background gives a glimpse at the issues that Kenya continues to grapple with to date. Despite the fact that it is a CRRF roll-out country, has been on the forefront of providing regional solutions to the Somalian refugees through the Nairobi Declaration and Plan of Action on Durable Solutions for Somali Refugees<sup>159</sup> and the innovative KISED P program, Kenya is in the process of closing down one of the refugee camps, the Dadaab camp that borders Somalia and continues to cite insecurity as its defence. This is the second time the government is attempting to close down the camp, the first attempt in 2016 was prevented by a court action.<sup>160</sup>

In light of this backdrop, we consider the KISED P project, a project that was rolled out in 2016 as one where refugees and the host community live together and focuses on improving the lives of both refugees and the host communities through targeted programs. The KISED P project offers great insights as it is still at the initial phases. The analysis first considers the legal and policy framework of refugees in Kenya, delves into understanding the project and finally analyses it vis a vis the GCR’s objectives.

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<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> *Constitution of Kenya*, 2010. It defines ‘marginalised communities’ to include pastoral persons and communities, the main economic activity of the inhabitants of Turkana county is pastoralism.

<sup>159</sup> IGAD ‘Nairobi Declaration On Durable Solutions For Somali Refugees And Reintegration Of Returnees In Somali, held in Nairobi, Kenya, 25th March 2017 available at <https://data2.unhcr.org/en/documents/download/58248>, accessed on 1 July 2019.

<sup>160</sup> *Kituo cha Sheria v Attorney General and others*, petition 19 of 2013, eKLR.

i) *Legal and policy framework*

At the international level, Kenya acceded to the 1951 Refugee Convention and its 1967 Protocol on May 16, 1966 and in 1981 respectively.<sup>161</sup> It however entered into reservations in respect of article 8,9, 17, 24 and 25 of the 1951 Refugee Convention. In respect to article 8 and 9, it provides that nothing in those articles prohibits it from taking any necessary measures when it considers its national security is at risk. Regarding the right to work provided in article 17 of the 1951 Refugee Convention, it modified the right of refugees to work once they have been in the country for four years as opposed to three years as per the Convention. The right to social security is left within the province of national law and thus refugees rights to social security such as employment injury, occupational hazards and other such contingency is not as per article 25 of the Convention rather as per its national laws.

At the regional level, Kenya has ratified the OAU Refugee Convention.<sup>162</sup> Refugees in Kenya are further complemented by Kenya's various obligations under human rights instruments such as under the ICCPR and the ICESCR which form part of the national law through article 2(4) of the Constitution of Kenya, 2010 that recognises that international law forms part of the laws of Kenya.<sup>163</sup>

However, it was only in 2006 that Kenya adopted domestic law governing refugee matters vide the Refugee Act of 2006 and its regulations.<sup>164</sup> It is currently in the process of amendments and was expected to be passed last year but the president sent it back to parliament as he cited that there had not been proper public participation in the amendment law.<sup>165</sup> The new law is expected to be more liberal and provide better access of refugees to the labour-force through issuance of work-permits.

The Refugees Act of 2006 provides for two categories of refugees, that is statutory and *prima facie* refugees. *Prima facie* refugees declaration are given by the minister during mass influx and as such no individual refugee determination is necessary.<sup>166</sup> A good recent example is the declaration of *prima facie* refugees of South Sudanese refugees in 2014 and the

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<sup>161</sup> UNHCR 'States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol' available at <https://www.unhcr.org/3b73b0d63.html>, accessed on 1 July 2019.

<sup>162</sup> African Commission on Human and Peoples' Rights 'Ratification Table: AU Convention Governing Specific Aspects of Refugee Problems in Africa' available at <http://www.achpr.org/instruments/refugee-convention/ratification/> accessed on 5 July 2019.

<sup>163</sup> *Constitution of Kenya* Op cit note 158.

<sup>164</sup> Refugees Act, No. 13 of 2006 Kenya Law Reports;

<sup>165</sup> Samuel Owino 'Uhuru rejects bill giving refugees right to jobs and land' 8 November 2017 *The Business Daily* available at <https://www.businessdailyafrica.com/economy/Uhuru-rejects-bill-giving-refugees-right-to-jobs-and-land/3946234-4178936-xf36adz/index.html>, accessed on 5 July 2019.

<sup>166</sup> Sorcha O'Callaghan op cit note 115 at p 3.

revocation of this status for Somali refugees in 2016.<sup>167</sup> Individual refugee status determination is done by the Department of Refugee Affairs that is a creation of the 2006 Refugee Act, before this, the UNHCR was solely responsible for the refugee status determination.<sup>168</sup>

a. Freedom of movement

The 1951 Refugee Convention provides refugees the right to movement depending on whether they are lawfully or unlawfully in the country.<sup>169</sup> Article 26 of the Refugee Convention provides for the freedom of movement for refugees lawfully in a country, however, this right is not absolute and is subject to any national restrictions or regulations that also apply to other non-nationals. Pursuant to article 31 of the Refugee Convention, the freedom of movement of refugees whose entry was unlawful, is not to be restricted and when there is a restriction, it should be necessary and only until their status to be regularized. Freedom of movement is also provided in article 12 (1) of the ICCPR to persons lawfully in a country.

At the national level, the Constitution of Kenya provides for the free movement of every person in article 39 as opposed to the right of every citizen to free movement. The right to movement is critical as it affects the other human rights of refugees such as the right to work, right to dignity and access to other social economic rights such as the right to health and education.

Kenya issued the first encampment policy in 2012, that resulted in the closure of reception and admission offices in urban centres and the arrest and detention of refugees and asylum seekers followed.<sup>170</sup> Refugees and asylum seekers were taken to the Kakuma and Dadaab refugee camps, others were taken there forcefully.<sup>171</sup> Although this was challenged in court<sup>172</sup> and found to be unconstitutional, Kenya's encampment policy was legally recognised through its Gazette Notice 1927 of 2014.<sup>173</sup>

As indicated earlier, most of the refugees in Kenya are encamped as Kenya favours an encampment policy as opposed to local integration.<sup>174</sup> Once in the camps, the refugees right to movement is limited and they are required to have passes to move out of the camps. The new policy only allows refugees with movement passes out of the camp for limited reasons such as

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<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) 39 *Michigan Journal of International Law* 19.

<sup>170</sup> UNHCR 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report-Universal Periodic Review: Kenya

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> The Kenya Gazette Notice No. 1927 (28 March 2014).

<sup>174</sup> Sorcha O'Callaghan op cit note 115 at p 1.

medical, higher education or security concerns.<sup>175</sup>The urban refugees also face restrictions in their human rights most particular, being profiled and harassed by state security mechanisms. In response to terrorist attacks, the Government carried out an operation dubbed ‘Usalama Watch’ and the Kenya National Human Rights Commission confirmed that six out of 359 people to be deported were refugees with valid refugee documentation, a clear violation of the non-refoulement principle.<sup>176</sup>

b. Right to work

When faced with the question of whether asylum seekers should work once in a host state, the South African Constitutional Court in *Minister of Home Affairs v Watchenuka* noted that the right to work is integral in the right to dignity and a person’s self-worth.<sup>177</sup> Article 17 of the Refugee Convention provides that refugees should be accorded the most favourable treatment accorded to foreigners in the same circumstances in respect to the right to work.

The Kenyan 2006 Refugee Act provides refugees the right to work as other non-nationals and as such, they are required to obtain a work permit as per the Kenya Citizenship and Immigration Act 2011.<sup>178</sup> Thus, although theoretically refugees can work, the formalities of obtaining a work permit limit most refugees to the informal sector.<sup>179</sup> That notwithstanding, a study commissioned by the World Bank evidences that refugees in the camps are engaged in the informal sector, noting that for example, the Kakuma camp has a gross turnover of about USD US \$ 56.2 million annually.<sup>180</sup> This study was significant in changing the refugee approach of the County Government of Turkana and coming up with KISEDUP.

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<sup>175</sup> Ibid.

<sup>176</sup> Kenya Human Rights Commission *Return of the Gulag: Report of KNCHR investigations on Operation Usalama Watch (2014)* KNHRC Publications.

<sup>177</sup> *Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003)

<sup>178</sup> Number 12 of 2011, *Kenya Law Reports*.

<sup>179</sup> Sorcha O’Callaghan op cit note 166 at p 5-6.

<sup>180</sup> World Bank ‘Yes in my backyard: The Economics of Refugees and Their Social Dynamics in Kakuma, Kenya’ (2016).

ii) What is KISED P

“Not in my backyard!” this phenomenon is widely used by economists and is attributed to have originated from Michael O’Hare and popularized by British politician Nicholas Ridley.<sup>181</sup> It refers to situations where locals object to the setting up of something as they perceive it will have negative effects on their survival.<sup>182</sup> However, the narrative in Turkana County, home to the Kakuma refugee camp is “Yes, in my backyard”, following the World Bank report on the overall positive impact refugees have had on this community.<sup>183</sup>

The KISED P is a project spearheaded by the UNHCR, the County Government of Turkana and the support of donors such as the European Union that seeks to capitalize on the positive effect refugees have on host communities. It is an area-based approach where refugees and locals live together freely and through targeted programs, improves the lives of refugees and the hosts.<sup>184</sup>

Although the discussions of the project had started in 2015 as spearheaded by the UNHCR and the Government of Kenya, the impetus came in 2016 with the New York Declaration and as such, KISED P is one of the CRRF roll-out programs in Kenya. It is noted in the executive summary that the plan is not only informed by the New York Declaration but also the SDGs and the Kenya’s regional commitments made as part of the 2017 Nairobi Declaration and Plan of Action organized by IGAD. The plan also aligns with Kenya’s economic policy documents such as its Vision 2030 and the County’s economic plan.

As noted in the introduction, Turkana is one of the counties with the most marginalized communities. To this end, it happens that refugees, who receive aid and have a means of survival often lead a better life than that of the hosts. However, as noted through the World Bank report and other reports, the refugees and the host community have developed a symbiotic relationship, for example locals sell firewood and foodstuff to refugees who also trade their aid food for other non- food items and as such a booming economy has been created.

In order to maximize on this synergy, KISED P aims to improve the livelihood of refugees and the host community through improving self-reliance, enhancing livelihood opportunities and promoting inclusive service delivery.<sup>185</sup> This is to be achieved strategically by first, creating a conducive environment that attracts private sector and financial services

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<sup>181</sup> Wexler Mark ‘A Sociological Framing Of The Nimby (Not-In-My-Backyard) Syndrome’(1996)  
26 *International Review of Modern Sociology* 91–110.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> UNHCR, KISED P, op cit note 50.

<sup>185</sup> Ibid, Executive Summary.

investment thereby promoting the local economy. Then, investing in basic socio-economic infrastructure, promoting financial inclusion to promote self-reliance and lastly through access to education and skills to prepare refugees and the host community for opportunities.

KISED P is already on the ground and running, currently in the second phase. The implementation will be in four phases; 2016-2017 representing the preparation stage, 2018-2022 is the alignment of the program with the county development strategies, 2023-2027 will be geared towards service provision and promotion of economic opportunities for refugees while building the resilience and reducing poverty for the host community, 2028-2030 anticipates that the conflict in countries of origin such as Sudan will have improved and refugees repatriated back home and aims at building the capacities of the remaining refugees and the host community.

KISED P has identified eight key areas where it will be employing resources in order to achieve its objectives. These are health, education, Water, Sanitation and Hygiene (WASH), protection, spatial planning and infrastructure, agriculture, livestock and natural resources management, sustainable energy solutions and private sector and entrepreneurship.

The project is in Kalobeyei area which is in a different location from Kakuma. Initially, it was constructed to ease pressure from Kakuma and Dadaab camps and the refugees were to voluntarily relocate there. However, the mass influx of Sudanese refugees resulted in it responding to an emergency and the new refugees settled there.<sup>186</sup>

What is different in the Kalobeyei settlement from Kakuma and Dadaab refugee camps? First, it is a highly planned settlement with the most distinguishing features being a market, shared public services to be shared between the refugees and the host communities and kitchen gardens for the refugees.<sup>187</sup> Bamba chakula is also another unique feature of Kalobeyei and it is a cash-based intervention developed by the World Food Programme where refugees receive some credit on their phones and can only redeem this in specified vendors within the settlement for food items.<sup>188</sup> This means that they are therefore able to have a wider variety of what they can purchase as food especially fresh food produce from other parts of the country.

Alexander Betts et.al in a study examining the self-reliance of refugees in Kalobeyei have noted that the KISED P model has resulted in better outcome in terms of income and food

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<sup>186</sup> Alexander Betts, Remco Geervliet, Claire MacPherson, Naohiko Omata, Cory Rodgers, Olivier Sterck *Self-Reliance in Kalobeyei? Socio-Economic Outcomes for refugees in North-West Kenya* (2018) Refugee Studies Centre.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

security for refugees while comparing refugees at Kalobeyei and those in Kakuma.<sup>189</sup> For example, refugees in Kalobeyei will have more meals as compared to those in Kakuma majorly because of the options given by the Bamba chakula and the kitchen gardens leading to better food security.<sup>190</sup>

Betts et. al provide a conceptual framework to self-reliance noting that this is influenced first by personal characteristics such as gender, marital status and age, secondly the environment be it the geographical environment or relationship with the host community.<sup>191</sup> Then access comes in play, for example access to public goods and services, access to sizeable markets and access to networks affect the economic activity that in turn provides the sustainable well-being of a person.

For example, in assessing access to the market, they note that refugees who are thriving are relying on their countrymen connections to get jobs.<sup>192</sup> Thus, despite the willingness of a refugee to work, the lack of opportunities is an obstacle as there is simply no jobs. To think about it differently, women in the camps rarely engage in any work and this is underlined by different social factors such as higher probability of sexual based violence and harassment.<sup>193</sup> Once fully operational, KISED P is expected to deal with the underlying legal, policy and social constraints in accessing the job market for refugees as well as expanding the jobs available at the settlement.

The Governor of Turkana County has been termed as a champion for the new model of thinking of refugees' survival from aid to development.<sup>194</sup> His commitment to the project indicates the promise and potential that an integrated approach can achieve in promoting refugees 'self-reliance. KISED P is conceptualized in such a way that it feeds into the County Government's development policy and as such, refugees are regarded as an integral part of the County Government of Turkana's community. This means that even as the County is building its infrastructure, the refugees will be considered, and this is highlighted in the second phase of the program where they have set the aligning of strategic goals of the program to that of the County as a strategic objective.

iii) Analyzing KISED P against the backdrop of the GCR

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<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

<sup>193</sup> UNHCR, KISED P, op cit note 50 at p 8.

<sup>194</sup> Alexander Betts and Paul Collier 'A self-reliance model for refugees' 18 June 2018 *The Washington Post* available at [https://www.washingtonpost.com/news/theworldpost/wp/2018/06/18/refugee-camp/?utm\\_term=.f6b86bccaa45](https://www.washingtonpost.com/news/theworldpost/wp/2018/06/18/refugee-camp/?utm_term=.f6b86bccaa45), accessed on 20 July 2019.

The KISED P program presents an interesting opportunity to theoretically analyse the impact the GCR will have as the program was incubated before the GCR but its implementation continues during the tenure of the GCR. At the outset, KISED P embodies the key tenets of the GCR on easing pressure on host communities and encouraging self-reliance of refugees. This further reinforces the importance of the GCR as a global commitment and acknowledgment of efforts that were already ongoing at the grassroots levels.

The model behind the KISED P reflects some of the key tools for effective burden and responsibility sharing in the GCR. First, on funding, KISED P received an initial funding of 5,000,000 euros from the European Union, this was in addition to other multi-agency funding that UNHCR received to support the refugees for this project.<sup>195</sup> The program also took a multi-stakeholder approach as anchored in the GCR as it is co-led by the County Government, the UNHCR and through its strategic objectives, it aims to attract investors from the private sector.<sup>196</sup> In addition, representative of refugees, the host community, civil society and faith based organizations took part in the consultative process in coming up with the program.<sup>197</sup> The GCR acknowledges the critical role played by the UN system and different agencies of the UN have been leveraged in KISED P, for example the UN Habitat played an important role in coming up with the planning of the settlement while the UNHCR also played a critical role in facilitating the process.

The GCR has identified the key role that data and evidence plays in not only improving the socio-economic conditions of refugees and the host community but also addressing the effect of the refugee population on the host community.<sup>198</sup> The research and reports carried out by the World Bank and the International Finance Corporation played an important role in highlighting the positive impact the refugees had in the economic welfare of the host community and spearheaded the conversation on how to leverage on this synergy.<sup>199</sup> As per Bett's research, members of the host community that have interacted with the refugees have better perspectives of refugees as compared to those who live far away from refugees and who have negative perceptions about refugees.<sup>200</sup> By collecting data and evidence, then there is

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<sup>195</sup> Ibid; EU Emergency Trust for Africa 'Piloting Private Sector Solutions for Refugees and Host Communities in North-West Kenya' available at [https://ec.europa.eu/trustfundforafrica/region/horn-africa/kenya/piloting-private-sector-solutions-refugees-and-host-communities-north-west\\_en](https://ec.europa.eu/trustfundforafrica/region/horn-africa/kenya/piloting-private-sector-solutions-refugees-and-host-communities-north-west_en), accessed on 11 July 2019.

<sup>196</sup> UNHCR, KISED P x.

<sup>197</sup> Ibid18.

<sup>198</sup> GCR, para 45.

<sup>199</sup> UNHCR, KISED P 5.

<sup>200</sup> Alexander Betts op cit note 186.

basis to refute xenophobic rhetoric that presents a key challenge in the integration of refugees to their host community as evidenced in Kalobeyei.

The programmatic components to which KISED P envisages to apply its resources also align with the key areas that the GCR highlights as needs to be met for the refugees and the host communities. Health, education, sustainable energy and food security are some of the overlapping themes in KISED P and the GCR. This highlights the common thinking on the most pressing needs that need to be addressed in order to have a more effective refugee protection regime that promotes a dignified standard of living for both refugees and the host community.

The GCR and all its building block take a gendered approach and provide specific measures for women and girls, a theme that is also a key focus in KISED P. Women and girls in Turkana County face challenges and obstacles such as sexual and gender-based violence while girls are at risk of early marriages.<sup>201</sup> The program has these issues in consideration and undertakes to take specific measures through partnership and cooperation with other stakeholders to strengthen the capacities and provide specialized services to women and girls. This is against the background of unaccompanied and separated children who are also at a higher risk of violence.

Having identified elements of the program advocated by the GCR, we now address the question of whether there is any additional impact that the GCR will have on this project from a theoretical perspective. First in terms of funding, this project presents a great opportunity for the development partners to get on board as it is a project that is already on the move and embodies the key objectives of the GCR. This project has placed Kenya on the map and is often discussed in success stories of the CRRF<sup>202</sup> and has seen Kenya receive 100 million USD from the World Bank through the World Bank's International Development Association refugee and local community sub-window (IDA 18) launched on 1 July 2017 that provided CRRF countries with more opportunities to access financing.<sup>203</sup> Kenya has also received donor pledges of GBP 35 million from the United Kingdom towards its CRRF approaches and there have been commitments from Netherlands and the Republic of North-Korea.<sup>204</sup>

The upcoming Global Refugee Forum will provide a good platform for Kenya to follow up on the funding commitments and would present an opportune case study for scholars and academics to see the mechanics of the Global Refugee Forum at work. Other than setting the

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<sup>201</sup> UNHCR, KISED P 41.

<sup>202</sup> Op cit note 57; UNHCR *From Commitment to Action Highlights Of Progress Towards Comprehensive Refugee Responses Since The Adoption Of The New York Declaration* (2018).

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

targets for the GCR, we hope that CRRF roll-out countries will take this opportunity to kick the ball rolling on the implementation of the GCR, for example through activation of a Support Platform.

The GCR calls for greater public-private partnership so does the KISED P program. The World Bank report highlighted the economic opportunity for financial and banking services at Kakuma and now at Kalobeyei and we can only hope that the private sector jumps at this opportunity. One of the key indicators of success for KISED P in achieving an enabling environment for business for refugees and the host community is ensuring a targeted number of 10,000 refugees and 5,000 host population households have access to and are using financial services such as loans, savings and credit. With the concerted efforts under the GCR, there is hope for greater impact and achievement of this indicator of KISED P.

In addition, lack of proper documentation and legal impediments is one of the key barriers of access that KISED P aims to deal with to facilitate self-reliance of the refugees and the host community. States under the GCR have undertaken to work with the UNHCR and relevant stakeholders to strengthen national capacities and contribute resources to improve documentation. The KISED P thus can leverage on this commitment to push its agenda.

As highlighted above, the KISED P immediate needs and action for refugees and the host community are aligned with those of the GCR such as education, health and energy. It is upon the Government of Kenya in close collaboration with the UNHCR to use the available forums under the GCR such as the Global Refugee Forum, the mid-term reviews and the Support Platforms to rally for international support and cooperation be it in terms of resources or expertise.

*c. Jordan*

Jordan hosts the second largest population of Syrian refugees,<sup>205</sup> and this is attributed to its proximity of approximately 265 miles from the border of Syria and its open-border policy as reiterated by its Prime Minister in 2013.<sup>206</sup> Other countries in the region that also host a significant number of Syrian refugees are Turkey-which hosts the largest number of refugees worldwide-, Lebanon and Egypt.<sup>207</sup> Out of all the Syrian refugees in Jordan, 84 per cent live in the urban areas whereas 16 per cent live in Jordan's three camps that is Za'atari, Emirati

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<sup>205</sup> UNHCR 'Jordan- Fact sheet' May 2019 available at <https://reliefweb.int/sites/reliefweb.int/files/resources/69826.pdf>, accessed on 25 July 2019.

<sup>206</sup> Sarah Bidinger, Aaron Lang, Danielle Hites, Yoana Kuzmova, Elena Noureddine 'Protecting Syrian Refugees: Laws, Policies, and Global Responsibility Sharing' *Boston University School of Law publication*

<sup>207</sup> UNHCR Global Trends 2018 op cit note 2 at p 3.

Jordanian Camp and Azraq.<sup>208</sup> Children make up 48 per cent of the refugee population in Jordan.<sup>209</sup>

Jordan is classified as a lower middle-income country,<sup>210</sup> has a 19 per cent rate of unemployment<sup>211</sup> and is generally a resource-challenged country as it is, notably one of the countries in the world with the highest water-shortages challenges.<sup>212</sup> That notwithstanding, Jordan has a long-standing history of hosting refugees such as the Iraqi, Palestinian and African refugees.<sup>213</sup>

i) *Legal and Policy framework*

Jordan is not a party to the 1951 Refugee Convention or its 1967 Protocol and this has been attributed to its political stand when it comes to Palestinian refugees.<sup>214</sup> As such, it does not have domestic legislation that specifically provides for refugees and their attendant rights, although the Constitution in article 21(1) provides that political refugees shall not be extradited for their political beliefs. In the absence of any domestic legislation on refugees, refugees and asylum seekers are dealt with like any other foreigners under Law No. 24 of 1973 concerning Residency and Foreigners' Affairs.<sup>215</sup>

There is danger in dealing with refugees and asylum seekers like any other foreigners, without any distinction as the hosting state ignores the special protection that the refugee regime affords them due to their circumstances and vulnerabilities. To this end, there have been various allegations of return of refugees, especially Palestinian Syrian refugees to Syria.<sup>216</sup> Despite Syria not being a signatory to the 1951 Refugee Convention, it is a signatory to the Convention against Torture that provides for the right to non-refoulement in article 3 which states 'No State Party shall expel, return ("refouler") or extradite a person to another State

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<sup>208</sup> Sarah Bidinger Op cit note 206 at p 55.

<sup>209</sup> Ibid.

<sup>210</sup> World Bank 'Jordan Country Reclassification - Questions and Answers' 6 July 2017 Brief available at <https://www.worldbank.org/en/country/jordan/brief/qa-jordan-country-reclassification>, accessed on 25 July 2019.

<sup>211</sup> World Bank 'Jordan's Economic Outlook- April 2018' 16 April 2018 *World Bank Publication* available at <https://www.worldbank.org/en/country/jordan/publication/economic-outlook-april-2018> , accessed on 29 July 2019.

<sup>212</sup> Jordan-EU Compact op cit note 148.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid.

<sup>215</sup> Law No. 24 of 1973 concerning Residency and Foreigners' Affairs, available at <http://www.e-lawyerassistance.com/LegislationsPDF/jordan/residencyLawAr.pdf> (in Arabic).

<sup>216</sup> UNHCR 'Return and Readmission of Palestinian Refugees from Syria (PRS) to Lebanon and Jordan' 6 December 2017 available at <https://www.refworld.org/pdfid/5ab8cf9d4.pdf>, accessed on 25 July 2019.

where there are substantial grounds for believing that he would be in danger of being subjected to torture.<sup>217</sup>

The guiding document for Jordan in its protection of refugees is the 1998 Memorandum of Understanding (“MoU”) with the UNHCR.<sup>218</sup> The MoU adopts the definition of a refugee as provided in the 1951 Refugee Convention without the geographical and the time limitation.<sup>219</sup> Jordan undertakes to respect the cardinal principle of non-refoulement,<sup>220</sup> in principle allows asylum seekers the right to work as long as the law allows,<sup>221</sup> to practice liberal professions in line with the law and regulations,<sup>222</sup> access to education for their children, access to courts and justice system that includes legal aid,<sup>223</sup> freedom to practice their religion<sup>224</sup> and right to social assistance.<sup>225</sup> The MoU envisages temporary protection of refugees and asylum seekers for six months and the UNHCR is supposed to obtain durable solutions for them in other countries.<sup>226</sup> However, the temporary nature of Jordan’s protection as envisioned has not translated in reality and there has been discussions to update the MoU on the general consensus that it is outdated.<sup>227</sup>

ii) *What is the Jordan- EU Compact?*

The Jordan- EU Compact is a political document where Jordan agreed to improve access of Syrian refugees into the work-force and provide more access to Syrian refugee children and in return, it would receive trade concessions, loans and grants from the EU.<sup>228</sup> Barbelet argues that its success can be attributed to having the right people at the right place at the right time as friendships and personal relationships were used to broker the deal.<sup>229</sup> Its birth is attributed to the WANA Institute- a Jordan Think-Tank-, as well as the publication of Betts and Collier

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<sup>217</sup> 1951 Convention op cit note 14.

<sup>218</sup> *Memorandum of Understanding between the Government of Jordan and UNHCR*, translated by UNHCR, REFworld (Apr. 5, 1998), available at [mawgeng.unblog.fr/files/2009/02/moujordan.doc](https://www.refworld.org/docid/513d90172.pdf) (Herein referred to as the MoU)

<sup>219</sup> Ibid.

<sup>220</sup> MoU, Article 2.

<sup>221</sup> MoU, Article 8.

<sup>222</sup> MoU, Article 9.

<sup>223</sup> MoU, Article 7.

<sup>224</sup> MoU, Article 6.

<sup>225</sup> MoU, Article 11.

<sup>226</sup> MoU, Article 5.

<sup>227</sup> UNHCR ‘Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report - Universal Periodic Review: Jordan’ 17<sup>th</sup> Universal Periodic Review Session available at <https://www.refworld.org/docid/513d90172.pdf>, accessed 26 July 2019.

<sup>228</sup> Jordan-EU Compact op cit note 148.

<sup>229</sup> Veronique Barbelet, Jessica Hagen-Zanker and Dina Mansour-Ille *The Jordan- EU Compact: Lessons learnt and implications for future refugee compacts* (2018) Overseas Development Institute Publication.

who wrote an influential piece of ‘helping refugees help themselves’<sup>230</sup> which is based on the two authors current book that advocates for a new way of refugee protection from an aid approach to a developmental approach that promotes refugees self-reliance.<sup>231</sup>

The main principles of the Jordan-EU Compact were agreed upon by King Abdullah of Jordan, World Bank President Jim Kim and the then UK Prime Minister David Cameron at the UN General Assembly in 2015.<sup>232</sup> The Compact was signed in 2016 in London at a conference that aimed at raising support and providing a way forward for the Syrian refugees.<sup>233</sup> Dubbed ‘Supporting Syria and the Region’, the conference has organized over the years and brings together stakeholders such as States, international humanitarian and development actors such as World Bank and the Jordan-EU Compact was signed at one of these conferences.<sup>234</sup>

The Jordan-EU Compact stipulates that Jordan will issue 200,000 work permits in specified sectors such as agriculture and the building sector.<sup>235</sup> Jordan undertook to loosen regulations surrounding work permits in order to facilitate refugees and asylum seekers obtain the work permits. For example, work permits were previously tied to a specific employer and this was a hindrance as many refugees wanted to be able to work different jobs to increase their income.<sup>236</sup> Further, the fees in obtaining a work permit, although should ideally be borne by the employer are often borne by the employee, and this was burdensome as the refugees and asylum seekers could not afford these fees. The Government of Jordan has since reduced the fees and issued work permits at no fee for a stipulated amount of time in 2016.<sup>237</sup>

Further, the EU undertook to relax its rules of origins thus facilitate trade with Jordan provided that the goods were produced in one of the eighteen designated Special Economic Zones (SEZ) and Industrial Zones. Further, there is a requirement that at least 15 per cent of the SEZ employees for the first two years are Syrian refugees and thereafter the refugees should be 25 per cent of the workforce.<sup>238</sup> The rules of origin determine when a good is considered to have been produced in Jordan and the key game-changer is that it reduced the percentage of the local content, allowing Jordan to source for cheaper raw materials from other developing

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<sup>230</sup> Alexander Betts and Paul Collier ‘Help Refugees Help Themselves: Let Displaced Syrians Join the Labor Market’ (2015) in *Foreign Affairs* available at <https://www.foreignaffairs.com/articles/levant/2015-10-20/help-refugees-help-themselves>, accessed on 27 July 2019.

<sup>231</sup> Alexander Betts and Paul Collier *Refuge: transforming a broken refugee system* (2017)

<sup>232</sup> Veronique Barbelet, op cit note 229 at p 3.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> Heliodoro Temprano Arroyo ‘Promoting Labour Market Integration of Refugees with Trade Preferences: Beyond the EU-Jordan- EU Compact’ (2018) *European University Working Paper*.

<sup>236</sup> Ibid, at p 10.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid, at p 6.

countries and therefore trade competitively with other economies such as China.<sup>239</sup> Arroyo notes that the Syrian war had an effect in Jordan's capabilities to manufacture goods as the road routes through Syria that supplied Jordan with cheap raw materials were disrupted making it more expensive to source raw materials.<sup>240</sup>

In respect to the right to access the right to education, prior to the Compact, Jordan allowed refugee children to go to school. However, due to strain on the school resources, refugee children had to attend the double shift classes where Jordan children attended the morning classes and the Syrian refugee children attended school in the afternoon.<sup>241</sup> This dissuaded many refugees from allowing their children to go to school as not only was the quality of education for the double shift classes in question, but it also exposed the refugee children to easy targeting for violence.<sup>242</sup> The Compact pledged that every refugee child would be in school by 2016/2017 and pledged US\$ 97.6 million to open and run an additional 102 double shift schools.

Since the Compact was signed, there has been significant improvements in the protection of refugees. For example, the number of work-permits as at 2018 was 51,000 compared to 4,000 in 2016, at the time of signing the Compact.<sup>243</sup> In terms of the goal on education, at the end of 2016/17 academic year, Jordan noted that there were 126,127 Syrian refugees in schools and this is a considerable achievement because in 2014 there were less than 45 per cent of refugee children in schools (approximately 85,000).<sup>244</sup> At the time of the statistics, there were still about 75,000 refugee children who were not attending school.<sup>245</sup> This was due to the long distances they had to cover to get to school that is associated with transport costs that refugees and asylum seekers are not able to afford as well as the security concerns of attending afternoon classes especially for girls.<sup>246</sup> The question to quality and exposure to violence is also still a key hindrance.<sup>247</sup>

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<sup>239</sup> Ibid, at p 8.

<sup>240</sup> Veronique Barbelet op cit note 229 at p 4.

<sup>241</sup> Ibid at p 3.

<sup>242</sup> Jessica Hagen-Zanker, Martina Ulrichs, Rebecca Holmes, Zina Nimeh and Hanna Roth 'Cash transfers for refugees: the economic and social effects of a programme in Jordan' (2017) *Overseas Development Institute Publication*.

<sup>243</sup> Veronique Barbelet op cit note 229 at p 2.

<sup>244</sup> Ibid at p 3.

<sup>245</sup> Ibid.

<sup>246</sup> Heliodoro Temprano op cit note 235.

<sup>247</sup> Ibid.

iii) *Analysing the Jordan- EU Compact vis a vis the GCR*

The Jordan- EU Compact has had its successes and many of its lessons influenced the CRRF and the GCR. In highlighting its successes, I consider the general aspects of the Jordan-EU Compact that are an embodiment of the GCR principles, while at the same time assessing the challenges it has faced and seek to answer the potential impact the GCR will have in its implementation to overcome those challenges, and finally, whether if the GCR was in place before the Jordan-EU Compact, would it have had a significant impact.

One of the major successes of the Jordan-EU Compact is the development geared approach it has taken with the Syrian refugees and asylum seekers it hosts. It embodies the first and second objectives of the GCR of easing pressure on Jordan as a hosting State and enhancing refugee self-reliance. In capping the number of refugees to be employed in the SEZs and the Industrial Parks, the Compact attempts to strike a balance between the needs of the refugees and the host community to avoid tensions over job competition. Alshoubaki correctly asserts that one of the main effects of hosting large numbers of refugees and asylum seekers is the tension between themselves and the local populace who feel that refugees and asylum seekers have come to take their jobs and the Jordan-EU Compact is couched in a way that balances out this tension.<sup>248</sup>

The Compact further embodies the guiding principles of the GCR on international solidarity and responsibility and burden sharing as it uses a multi-stakeholder approach engaging the EU and other developmental actors such as the World Bank. Funding remains a big area that hosting countries grapple with and the Compact addresses this through the pledges and commitments and more than that by improving the trading conditions to generally improve Jordan's economy. Through the trade concessions, it becomes easy for the local population to integrate the refugees and asylum seekers in their community as the narrative is changing to how having refugees and asylum seekers in Jordan is benefitting Jordan in general.

Education is highlighted as one of the key areas of support needed under the GCR. It is a general acknowledgement that refugee children are often disadvantaged and miss out on a chance to gain an education due to unfortunate circumstances that they find themselves in when they flee persecution. One of the key principles as stipulated by the Convention on the Rights of the Child is that of the child's rights to survival and development, and education is key in

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<sup>248</sup> Wa'ed Alshoubaki and Michael Harris 'The impact of Syrian refugees on Jordan: A framework for analysis' (2018) 11 *Journal of International Studies* 2, 154-179.

ensuring the full development of a child.<sup>249</sup> In order to ensure that refugee children enjoy their right to education, access is vital and the Compact undertaking to employ more resources into the double shift schools ensures that the Jordan children as well as the Syrian refugee children are able to access quality education.

The successes notwithstanding, the Compact has faced several challenges. One of them being the nature in which it was negotiated and drafted. As indicated earlier, it was a political document and as such key stakeholders such as the UNHCR, the refugees and the local communities were left out and only given the end product.<sup>250</sup> Barbelet notes for example that the impact of the Compact on the lives of the refugees has been slow and not as would ideally be expected as the Compact did not incorporate the refugees perspective.<sup>251</sup> For example, the Compact's indicator for success is issuing 200,000 work permits, however that does not necessarily translate to the transformation of refugees lives if they are unable to work due to other underlying factors.

One key example when it comes to the issuance of work permits is the lack of information and knowledge on the work permits and how they work in relation to the refugees. For instance, many refugees are afraid to take up work in the formal sector as they believe this limits their ability to take up several jobs, despite the fact that the Government of Jordan has amended the regulations so that a work permit is not tied to one employer.<sup>252</sup> On the other hand, most employers are wary to employ refugees as they feel this would open them up too much scrutiny from the authorities.<sup>253</sup> Therefore, the general lack of information about the work permits and how they apply to the refugees is an obstacle.

Further, many refugees are not willing to work in the SEZs and the Industrial Parks due to the distance they have to travel to get to these places of work which occasions on them unnecessary costs.<sup>254</sup> In coming up with the Compact, the cultural and religious backgrounds of the refugees was not taken into perspective, a key example being the position of the refugee women who have hardly taken up the opportunity to get work permits as most of them, their upbringing denotes that women should only work in the informal sector and not the formal sector and those who are ready to take up work in the formal sector fear of sexual and gender-based violence.<sup>255</sup> Had there been a multi-stakeholder engagement in coming up with the

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<sup>249</sup> Convention on the Rights of the Child, op cit note 18.

<sup>250</sup> Veronique Barbelet op cit note 229 at p 3.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid at p 4.

<sup>253</sup> Heliodoro Temprano op cit note 235 at p 9.

<sup>254</sup> Veronique Barbelet op cit note 229 at p 5.

<sup>255</sup> Ibid.

Compact as is envisaged by the GCR, it is probable that some of these challenges would have been addressed and the Compact would be more effective.

Going forward, Jordan as a CRRF roll- out country is in a unique position as it already has a very progressive project and it is positioned to enjoy the benefits of the GCR. Jordan can use the various mechanisms of the GCR such as the Global Refugee Forum to garner further support from other stakeholders. Since the Compact has been in operation for three years and it has already faced certain challenges in its implementation, it can activate a Support Platform for example to maximise the trade concessions and ensure that it has the desired effect not only for the protection of the refugees but to its economy.

The GCR presents Jordan with the opportunity to finally implement its commitment under the MoU to have a national machinery for refugee protection. Any State can call on to the other States for technical and financial support to strengthen national capacities for reception under the reception and admission facets of the GCR.<sup>256</sup> Further, the GCR provides for an Asylum Capacity Support Group that can be activated by a concerned state to strengthen their asylum systems.<sup>257</sup> At the moment, the UNHCR and the Government of Jordan often end up engaging in a dual system of registration of refugees and asylum seekers due to the fact that there is no single national system for the determination of refugee status.<sup>258</sup>

*e) Analysis of the solutions from the case studies*

The KISEDIP and the Jordan-EU Compact have various key learnings and indicators in relation to the vision of the GCR. They provide an indication that the goal as is envisioned by the GCR first of all, is possible. That the new model of development where refugee self-reliance is encouraged is feasible and workable as opposed to the aid reliance model that often has the hosting state over-stretched.<sup>259</sup> Refugees and asylum seekers had a normal life in their country of origin and most of them were productive citizens and given the opportunity, they are eager to work and make a livelihood for themselves and not live a life of reliance on aid.<sup>260</sup>

The two models also contribute largely to the discussion of uplifting the lives of the host community to tackle the underlying socio-political factors that make hosting States reluctant in allowing refugees and asylum seekers to integrate in their host communities.<sup>261</sup> The high levels of poverty and unemployment in most of the developing and host countries

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<sup>256</sup> GCR, para 54.

<sup>257</sup> GCR, para 62.

<sup>258</sup> Wa'ed Alshoubaki op cit note 248 at p 155.

<sup>259</sup> Alexander Betts op cite note 194.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

contribute to the growing xenophobic rhetoric that refugees and asylum seekers if allowed to work will take away the already scarce jobs and livelihoods.<sup>262</sup> Thus in order to ensure a more human rights based approach in refugee protection, all stakeholders must find ways to improve the lives of the host populace so that it can be a win-win situation. The KISED model is a good indicator that this is possible.

The Jordan-EU Compact provides a key learning on the importance of a comprehensive multi-stakeholder approach when coming up with solutions for the refugee and host community. It provides all States with a glimpse of the importance of the multi-stakeholder engagement as envisioned by the GCR and that States cannot downplay the important role that each stakeholder plays. Whereas for the State and the development actors the indicators for success may be issuance of work permits, understanding the underlying socio-economic and cultural factors from the refugees themselves and the host community is equally important to ensure more effective protective results.

A study done by Oxford University on what self-reliance means aptly puts the matter across that self-reliance initiatives have to go beyond the market place and just getting refugees formal jobs.<sup>263</sup> It highlights that jobs should not be the end goal and that there should be a holistic view of self-reliance beyond the economic question, to deal for example with underlying socio and cultural obstacles that refugees face.<sup>264</sup> It also notes that vulnerability and self-reliance are often looked at as two opposing issues and thus the programs focus on self-reliance as an alternative to vulnerability explaining the neglect to deal with issues such as gender and sexual based violence issues. It notes that these programs should start from the refugee's perspective and what self-reliance looks like to them rather than a top-bottom approach, which is the exact challenge faced by the Jordan-EU Compact.<sup>265</sup>

In conclusion, the two programs provide hope that with international cooperation and solidarity, refugees and asylum seekers can be better protected and can live a dignified life. There is need to however to start thinking of the GCR policies and commitments from the refugee's perspective as well as the host community in order to come up with solutions that best address the issues at hand. There is need to also look at already existing programs in the refugee hosting countries to identify areas of support and how to best compliment the ongoing efforts. This is in acknowledging that the GCR is not a novel document with new ideas rather,

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<sup>262</sup> Ibid.

<sup>263</sup> Evan Easton-Calabria 'Refugee Self-Reliance: Moving Beyond the Marketplace' (2017) *Oxford University Refugee Studies Centre Research in Brief* 7.

<sup>264</sup> Ibid, at p 2.

<sup>265</sup> Ibid, at p 3.

it is a global commitment to work on programs and best practices that have already been in force although in different forms and programs in the different countries. Whereas this chapter has only focused on select programs in Kenya and Jordan, there are other worthwhile projects that embody the GCR principles in other countries such as Uganda, Ethiopia and Lebanon to mention but a few.

#### 4. CRITIQUE OF THE GCR

In discussing the GCR, optimists look back to the success stories of the Conferences that resettled the Indo-Chinese refugees while critics and pessimists look not so far back to the flopped Uganda Solidarity Summit on Refugees of 2017 that represents a failed initiative.<sup>266</sup> The adoption of the GCR is welcomed with much hope as with pessimism that we could have done better. As early as 1999, refugee law experts Hathaway and Neve were already envisioning a new model for refugee protection, one that moves from the individualistic aspects of hosting states that are often left to shoulder the lion's share of responsibility, to one in which all the States take part and contribute resources.<sup>267</sup>

The GCR is to be understood under the lens of politics, diplomacy and the ever-dominant principle of sovereignty that leads international consensus. Whereas many refugee law experts would have wanted to see many aspects captured in the GCR, the reality of world politics and interests made that impossible, and like many other legally binding international instruments, there had to be compromise for there to be consensus. The analysis of the potentials and strengths of the GCR as well as its limitations and challenges are against that backdrop of the political realities and interests that govern international law and relations.

*a) Strengths and potential*

*i) Consensus as a starting point*

From the outset, one of the key positive things about the GCR was the consensus of all States that there was a problem and that States could not no longer operate in oblivion. The GCR received overwhelming support of 181 countries, only the United States and Hungary objected while Eritrea, Libya and Liberia abstained in voting.<sup>268</sup> The fact that most refugees are likely to remain in the region of their country is no excuse for the international community to turn a blind eye to the ongoing misery and hardships of refugees. The fact therefore that States were ready and willing to have a sit down and discuss a way forward is a first step towards perhaps a shift in how States view refugee issues.

*ii) Towards a new model of development*

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<sup>266</sup> Alexander Bett 'The Global Compact on Refugees: Towards a Theory of Change?' (2018) *International Journal of Refugee Law* 30 4, Pages 623–626.

<sup>267</sup> James C Hathaway and R Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harvard Human Rights Journal* 115.

<sup>268</sup> UN Media coverage, Op cit note 91.

Enhancing refugees' self-reliance is critical as it enables them to live a life that is dignified and they are able to enjoy their other basic human rights as human rights are interrelated, interdependent and indivisible. This represents a shift in refugee protection, where host States preferred temporary protection of refugees as to do otherwise would be to give refugees a ticket to stay in the host countries. The drafters of the Refugee Convention had this in mind, as noted during the drafting process that the Refugee Convention "...was intended to give refugees a minimum number of advantages which would permit them to lead a tolerable life in the country of asylum."<sup>269</sup> However, the realities of protracted refugee situation calls for a different approach in refugee protection. A model that advocates for refugee self-reliance, and not a narrow interpretation of self-reliance but one that addresses self-reliance from the refugee perspective, offers a win-win situation for both the refugees and the host State.

It is important however, that in the application and implementation of the GCR, there is an understanding of political interests and how to best apply the principle of reciprocity.<sup>270</sup> In order to ensure that the GCR objectives in regards to self-reliance are achieved, there is need to delicately balance the competing rights of refugees and the security of host communities who might feel threatened by the implications of refugees being integrated in the society and their ability to earn a livelihood. As indicated from the Jordan- EU Compact, the UNHCR in its catalytic role must find ways of ensuring that the interests of the host state are aligned to it offering refugees an opportunity of self-reliance.

iii) *Focus on funding*

The GCR's goal on easing pressure on host state offers a great area of impact as hosting State are often left to fend for the refugees all by themselves. The UNHCR budget vis a vis its spending is an indicator of the need for international cooperation especially on funding and expertise.<sup>271</sup> By choosing to focus on this critical element in refugee protection, there is hope that things will be different especially as there are follow up mechanisms mainly through the Global Refugee Program, the mid-term reviews, the Support Platforms and the Solidarity Conferences. Providing a follow-up mechanism is key in ensuring that the GCR does not fall into the category of the many documents adopted at the end of conferences that do not have a real impact.

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<sup>269</sup> Statement of the Chairman of the Ad Hoc Committee on Statelessness and Related Problems, Mr. Chance of Canada, U.N. ESCOR, at 4, U.N. Doc. B/AC.32/SR.22 (1950).

<sup>270</sup> Thomas Gammeltoft-Hansen 'The Normative Impact of the Global Compact on Refugees' (2018) 30 *International Journal of Refugee Law* 4, 605-610.

<sup>271</sup> Guy S Goodwin-Gill 'The Global Compacts and the Future of Refugee and Migrant Protection in the Asia Pacific Region' (2018) 30 *International Journal of Refugee Law* 4, 674-683.

iv) *Indicators of success*

The success of the GCR is to be measured as against the progress made in relation to its four objectives and indicators for each objective will be developed ahead of the first Global Refugee Forum in 2019.<sup>272</sup> Whereas others have also argued that the specific needs to which the GCR aims to meet, that is education, jobs and livelihood, health, women and girls, children and food security exist within legal frameworks to which there already exists indicators, the envisioned indicators present an opportunity to translate the GCR from another document to a reality.<sup>273</sup>

Indicators will be key in measuring international cooperation and solidarity as this will provide concrete steps that need to be taken as the GCR is merely aspirational at the moment. However, lessons from the Millennium Development Goals have taught us that having indicators does not necessarily translate to positive action.<sup>274</sup> That notwithstanding, in coming up with the indicators for the GCR, the relevant stakeholders can draw from the lessons and challenges from the indicators of the MDGs and SDGs and build on that wealth of knowledge to determine what works and what does not, and more importantly, what is effective.<sup>275</sup>

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<sup>272</sup> GCR, para 102.

<sup>273</sup> Geoff Gilbert 'Indicators for the Global Compact on Refugees' (2019) 30 *International Journal of Refugee Law* 4, 635–639.

<sup>274</sup> *Ibid.*, at p 638.

<sup>275</sup> *Ibid.*

b) *Challenges and weaknesses*

i) *Non-binding nature of the GCR*

The first key criticism of the GCR is its non-binding nature. Many have argued that having in mind the level of non-compliance with the already existing refugee legal regime, there is very little impetus for State to comply with soft-law.<sup>276</sup> States respond when they are legally bound and even then, many States remain non-compliant with their legal obligations under international law. This presents a dual argument in that it can be argued that since most States are already lagging behind in their obligations under international law, there was no need to add another legally binding convention which would probably be ignored. Those in favour of a legally binding document ignore how long it would have taken to get consensus of another document and that notwithstanding, States would still have to willingly accept to be bound by such a document through the signing and ratification process.

On the other side of the coin, non-compliance of States with their legal obligations under international instruments can be used to argue the need then for a non-binding document that places less pressure on the States. Proponents of this argument note that soft-laws have been used in other human rights protection systems and have been quite effective, for example the UN Declaration on the Rights of Indigenous People has been cited as an important soft-law.<sup>277</sup>

Whether binding or non-binding, what stands out is the political will that is part and parcel in the protection of refugees and asylum seekers through the GCR. There is need for political will to translate the commitments into realities.

ii) *Language of the GCR*

Following closely from the non-binding nature of the GCR, is the fact that the GCR does not make specific references to international refugee law and human rights law as one would expect.<sup>278</sup> The 1951 Refugee Convention is only referred to in paragraph 2 and 5 in discussing international cooperation and noting that the GCR is grounded in the cardinal principal of non-

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<sup>276</sup> James Hathaway, op cit note 26 at p 594.

<sup>277</sup> UN General Assembly Resolution 61/295 (13 September 2007); Mauro Barelli 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International and Comparative Law Quarterly* 4 957-983.

<sup>278</sup> Annick Pijnenburg 'The Global Compact on Refugees and International Law: A Missed Opportunity?' 5 February 2019 *Refugee Law Initiative Blog: School of Advanced Study University of London* available at <https://rli.blogs.sas.ac.uk/2019/02/05/the-gcr-and-international-law-a-missed-opportunity/>, accessed on 29 July 2019.

refoulement. Whereas the GCR is ‘grounded’ in the international refugee protection regime, it is only ‘guided’ by the relevant international human rights instruments.<sup>279</sup>

This presents a missed opportunity in providing the legal framework when discussing the socio-economic rights of refugees when the GCR discusses the commitments to provide for the specific needs. The ICESCR specifically provides for the right to education in article 13, right to work in article 6, right to the highest attainable standard of health in article 12 and the right to an adequate standard of living that includes the right to adequate food, clothing and housing in article 11.<sup>280</sup> Women and girls are extensively referred to and their vulnerable position discussed yet there is no reference to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) which has elaborative provisions of women and girls.<sup>281</sup> Children are particularly vulnerable and exposed in refugee situations with unaccompanied and separated children often constituting a big percentage of refugees in any situation and thus reference to the Convention on the Rights of the Child would signal the States obligations to protect the refugee children.<sup>282</sup> Despite the non-binding nature of the GCR, the specific needs of refugees and the host communities it aims at addressing are legal rights and acknowledging them as such would reinforce the obligations that States owe to the refugees.

However, the UNHCR has been categorical that leaving out the legal language was intentional as the GCR was not meant to reinforce and recall the legal obligation of the States rather was to bring out the commitment to international cooperation and solidarity.<sup>283</sup> Further, it might be argued that reinstating States obligations under human rights law brings back the focus to the individual hosting States as refugees are human rights bearers in regards to the State they are in making the host states the right bearers. It then removes the discussion from the concerted obligation of all states to provide for the refugees.

*iii) Silence on the spatial allocation of refugees and the unattainable objective of expansion of the third country solutions*

At the heart of the GCR is the unequal burden and responsibility that a select few countries shoulder in hosting refugees. As such, the GCR is critiqued that it did not provide for concrete plan of action such as the spatial allocation and redistribution of refugees.<sup>284</sup> Further, it would

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<sup>279</sup> GCR, para 5.

<sup>280</sup> ICESCR, op cit note 34.

<sup>281</sup> GA res. 34/180, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980).

<sup>282</sup> Convention on the Rights of the Child, op cit note 14.

<sup>283</sup> Volker Türk op cit note 6 at 580.

<sup>284</sup> Randall Hansen, op cit note 4.

seem that States are left to cherry pick what to invest and contribute in as per paragraph 4 of the GRC that provides “These contributions will be determined by each State and relevant stakeholder, taking into account their national realities, capacities and levels of development, and respecting national policies and priorities”.

To this end, the immediate commitments seem to be around self-reliance of refugees and easing pressure on host State through funding and resources, but little effort surrounding resettlement and relocation of refugees to the other countries. Michael Doyle therefore suggests that the States should have adopted a formula that takes into account the number of people displaced by conflict or rather the number of refugees in the world vis a vis each country’s resources to estimate how many refugees each country shall host.<sup>285</sup> Using this formula initially developed by the EU, the United States would for example have to host 29,000, China 26,000 and Japan 15,300 refugees displaced by the Syrian conflict.<sup>286</sup> Such a formula would be very ideal however, with states such as the United States cutting down on the number of resettlement places it offers,<sup>287</sup> it is no wonder that such an idea did not make it to the GCR.

Further, it is quite disappointing that the GCR did not take a definitive and quantitative commitment towards expanding third country solutions. For example, the Secretary General’s suggestion for the global community to undertake to resettle at least 10 per cent of the refugees did not make it past his report. Although there have been initiatives such as the Emerging Resettlement Countries Joint Support Mechanism that the UNHCR and the IOM are actively working on, very few developed countries have actively taken up this commitment on resettlement, with the exception of Canada that is currently working with the UNHCR to resettle more refugees.<sup>288</sup>

On the complementary pathways for admission, the language used in the commitments flowing from the New York Declaration if its anything to go by, is quite disheartening. The States did not make positive commitments towards these pathways but rather were called to ‘consider’ such pathways. That notwithstanding, the UNHCR undertook to strategically consider complimentary pathways as it undertakes its three-year strategy on resettlement.<sup>289</sup>

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<sup>285</sup> Michael W Doyle ‘Responsibility Sharing: From Principle to Policy’ (2019) 30 *International Journal of Refugee Law* 4, 618-622.

<sup>286</sup> Ibid.

<sup>287</sup> Todd Scribner ‘You are Not Welcome Here Anymore: Restoring Support for Refugee Resettlement in the Age of Trump’ (2017) 5 *Journal on Migration and Human Security* 2, 263-284.

<sup>288</sup> UNHCR Resettlement needs, op cit note 90.

<sup>289</sup> GCR, para 95.

iv) *Unrealistic nature of the objective to support repatriation*

The objective to support conditions in country of origin that focuses on the traditional durable solution of repatriation can be said to be over ambitious and oblivious of the current situations. First, the GCR did not call out modern day perpetrators of human rights violations that cause instability in their countries such as the case in Syria and in Sudan. Secondly, the GCR was silent on the role that all States have to play in addressing root causes of conflict for example where countries from the Global North continue supplying arms and weapons to the areas in conflict.<sup>290</sup> Without these bold steps of calling out the role of governments in causing persecutions, the GCR turns a blind eye and loses its opportunity to make commitments that can effectively improve the countries of origin. Randall Hansen in giving a commentary of the GCR for example notes that whereas the first two objectives might give durable solutions, the last two on third country solutions and repatriation are not grounded on realistic facts.<sup>291</sup> This is also on the face of the fact that displacement is on the rise each day, with new bouts of civil strife all over the world.

c) *Tools for implementation*

Despite the non-binding nature of the GCR, this section argues that there are several tools that refugee law experts can use to ensure its implementation and discusses two of these tools that is judicial interpretation, regional mechanisms and the role of civil society. As the GCR is grounded in the international refugee protection regime, the various principles that govern refugee law continue to be important and judicial interpretation can be pursued to protect refugees. This can be through the domestic and regional levels. The GCR presents a multi-stakeholder approach and as such the role of civil society is acknowledged and I discuss the various levels at which the civil society can be involved to ensure the effective implementation of the GCR.

i) *Judicial interpretation*

Courts and other judicial organs play an important role in protecting human rights and holding states accountable for their actions as well as their inaction. However, courts rely on legal claims that arise out of legal obligations and as already stated the GCR is not a legally binding document. This section focuses on how we can use the already existing legal documents to protect refugees and use the GCR as a norm-setting document, while referring to it as a

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<sup>290</sup> BS Chimni op cit note 46 at p 630.

<sup>291</sup> Randall Hansen op cit note 4 at 132-133.

persuasive document. For example, the various projects that will be undertaken under the guidance of the GCR or the CRRF have to respect and uphold the principles of refugee law and human rights and as such, the GCR cannot be divorced from the legal framework it will be operating in. As such, the GCR has noted that it is grounded in the international refugee protection regime and guided by the international human rights regime. It is therefore upon the refugee and human rights advocate to bring the GCR to the forefront by finding ways to make it a useful soft-law norm-setting document.

### 1. *Domestic courts*

At the domestic level, different countries have different legal frameworks that protect refugees and asylum seekers and one of the most effective ways has been through constitutional litigation. South Africa is one among such key examples where refugees have effectively been protected through litigation.

Human rights and refugee advocates have found ways to couch refugee matters and reference them to the Bill of Rights which often provides the fundamental freedoms and basic human rights to ‘everybody’ as opposed to ‘citizens’. For example, in regard to the right to work, the Constitutional Court in South Africa has on various occasions noted that this right is directly linked to the right to dignity and found regulations that prohibited asylum seekers from working for the first 180 days unconstitutional having in mind that the State does not provide any social assistance to asylum seekers.<sup>292</sup>

In the absence of the right to work for a livelihood, the asylum seeker would be left to beg or turn to crime to survive.<sup>293</sup> Lord Simon Brown correctly captures the situation and notes that the asylum seekers have ‘. a bleak choice: whether to remain here destitute and homeless until their claims are finally determined or whether instead to abandon their claims and return to face the very persecution they have fled’.<sup>294</sup>

The Constitutional court has also held that arbitrary restrictions to the right of work for refugees and asylum seekers to be a violation of domestic law and also of South Africa’s international obligation.<sup>295</sup> This was the issue in *Larbi- Odam v MEC for Education (North-West Province)* where the court found a regulation that restricted the appointment of permanent

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<sup>292</sup> Op cit note 171, the *Watchenuka case*.

<sup>293</sup> *Ibid*, para 32.

<sup>294</sup> *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 287 (CA) at 296.

<sup>295</sup> Daven Dass, Kaajal Ramjathan-Keogh and Fatima Khan ‘The Socio-economic rights of refugees and asylum seekers in South Africa’ in Fatima Khan’s *Refugee Law in South Africa* (eds) , op cit note 81.

teachers to citizens only to constitute unfair discrimination.<sup>296</sup> The issue of unfair discrimination also arose in *Khosa v Minister of Social Development; Mahlaule and others v Minister of Social Development and others* that challenged the Social Assistance Act that reserved social grants for the older citizens and child welfare support to citizens only.<sup>297</sup> The *Khosa case* was landmark as it opened up social grants for the older persons and the welfare grants to refugees in South Africa.

The South African courts have also been very progressive in interpreting the Refugee Act and the 1951 Refugee Convention in more broad terms that is protection based.<sup>298</sup> For example, article 31 of the 1951 Refugee Convention provides for the non-penalization of illegal entry as long as the asylum seeker expresses an intention to apply for asylum, does so without delay, is coming directly from the country of origin and has a good cause. In *Ersumo v Minister of Home Affairs* while determining the time limit within which an asylum seeker who has illegally entered the country had to make their claim, the court noted that ‘there is nothing to indicate that a meritorious application may be refused on grounds of delay in making the application’.<sup>299</sup>

In *Ruta v Minister of Home Affairs*, the applicant had entered the country 15 months before he made an application for asylum, and he only made this application when he was faced with deportation charges after being arrested for a traffic violation.<sup>300</sup> In making its finding, the court relied heavily on article 3 of the 1951 Refugee Convention that provides for the non-refoulement principle noting that “For our Constitution requires us, when interpreting any legislation, to prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with it”.<sup>301</sup> The court found that the applicant could apply for asylum because the alternative would be to allow deportation and expose the applicant to persecution. The court adopted a very human rights-based approach in the matter and referred to the centrality of the non-refoulement principle in refugee protection.

There has been very encouraging jurisprudence from the Constitutional court of South Africa, and this is just but an example of how national courts can be used to enforce and protect refugee rights. At the center of using constitutional litigation is the idea that all human rights are interrelated, interdependent and indivisible. Thus, when dealing with the GCR, it can be

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<sup>296</sup> 1998 (1) SA 745 (CC).

<sup>297</sup> 2004 (6) SA 505 (CC).

<sup>298</sup> Fatima Khan ‘Outside the country of nationality’: A territorial limitation’ in *Refugee Law in South Africa* (eds) op cit note 81.

<sup>299</sup> 2012 (4) SA 581 (SCA).

<sup>300</sup> 2018 ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC).

<sup>301</sup> Ibid, para 31.

interpreted under existing legal obligations and principles of State responsibility to better protect refugees and asylum seekers.

## 2. *Regional Mechanisms and structures*

Different regions have different human rights instruments that often provide for mechanisms for individual complaints. The African system has the African Charter on Human and Peoples Rights,<sup>302</sup> in Europe the European Convention on Human Rights<sup>303</sup> and the American Convention for Human Rights.<sup>304</sup> In addition to the overall human right conventions, there are other conventions that protect specific groups of people for example in the African system, we have the African Charter on the Rights and Welfare of the Child(ACRWC)<sup>305</sup>, OAU Refugee Convention<sup>306</sup>, as well as the Protocol to the African Charter on Women's Rights.<sup>307</sup> The different mechanisms under the regional systems have been used for the promotion of refugee and asylum seekers rights and I briefly highlight how the African system can be used as a tool for implementing the GCR.

The African human rights system has the African Commission on Human and Peoples Rights (African Commission),<sup>308</sup> the African Court on Human and Peoples Rights (African Court)<sup>309</sup> and the African Committee of Experts on the Rights and Welfare of the Child (African Committee).<sup>310</sup> The African Commission and the African Court are creatures of the Banjul Charter whereas the African Committee is a creature of the ACRWC.

In interpreting the African Charter, the African Commission is mandated by article 60 of the African Charter to draw inspiration from international human rights instruments such as the UN Charter, UDHR, other instruments adopted by the UN as well as the various instruments adopted within the specialised agencies of the UN in the field on human and peoples' rights. Whereas it cannot be argued that the GCR is one of such instruments, as per the rules of interpretation, it refers to Convention and Treaties, the fact that it is a document that sheds more light on the human rights of refugees, it can be used as a persuasive document. In discussing the role of soft-law in the work of the African Commission, focus is mostly on

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<sup>302</sup> African Charter, op cit note 38.

<sup>303</sup> American Convention, op cit note 39.

<sup>304</sup> OAU Refugee Convention op cit note 16.

<sup>305</sup> OAU, African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990).

<sup>306</sup> OAU Refugee Convention op cit note 39.

<sup>307</sup> Maputo Protocol op cit note 19.

<sup>308</sup> Established by article 30 of the African Charter.

<sup>309</sup> Established by the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights adopted by the Assembly of Heads of State and Government, 34th ordinary session, Ouagadougou, Burkina Faso, 8-10 June 1998.

<sup>310</sup> Established by article 32 of the ACRWC.

the recommendations and resolutions made by the African Commission as they are not legally binding and they are themselves soft-law.<sup>311</sup> With the GCR, it would be interesting to see it being referred to by the parties before the African Commission as a persuasive document and the African Commission referring to it in its findings.

The African Commission considers the different communications from individuals and NGOs if they are couched in non-disparaging language, are not anonymous and the applicants has exhausted the local remedies. The African Commission has had occasion to deal with matters brought to it by refugees and asylum seekers. First, it has interpreted the rule on exhaustion of local remedies broadly so that a refugee or an asylum seeker is not required to have exhausted local remedies in their country of origin especially where the State was the persecutor as the remedies would not be said to have been ‘available’. This was the gist in finding the communications admissible in *Jawara v The Gambia*,<sup>312</sup> *Rights International v Nigeria*,<sup>313</sup> *Ouko v Kenya*<sup>314</sup> and *Shumba v Zimbabwe*.<sup>315</sup>

Secondly, on the specific rights of refugees, the African Commission has taken a human-rights based approach.<sup>316</sup> For instance, in *Rencontre Africaine pour la Défense des Droits de l’Homme v Zambia*, a case that involved the mass expulsion of 517 West African nationals on grounds of being in the country illegally, the African Commission noted that state parties were under an obligation to ensure the human rights of everyone in their jurisdiction, whether nationals or foreigners.<sup>317</sup> The African Commission has found a violation of the right seek asylum, right to non-discrimination, the rights to liberty and security of the person the right to have their cause heard as well as the prohibition against the mass expulsion of non-nationals in cases of expulsion of refugees.<sup>318</sup>

It has also had an opportunity to consider cases dealing with repatriation of refugees and the attendant human rights violation that occur in such cases. One such case is *Sudan Human Rights Organisation and Another v Sudan* that included among other issues, the treatment of returnees after voluntary repatriation.<sup>319</sup> The African Commission noted ‘all

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<sup>311</sup> Debra Long, Rachel Murray ‘The Role and Use of Soft Law Instruments in the African Human Rights System Debra Long, Rachel Murray’ in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone *Tracing the Role of Soft Law in Human Rights* (eds) 2016.

<sup>312</sup> (2000) AHRLR 107 (ACHPR 2000).

<sup>313</sup> (2000) AHRLR 254 (ACHPR 1999).

<sup>314</sup> (2000) AHRLR 135 (ACHPR 2000).

<sup>315</sup> Communication 430/12 adopted by the African Commission during the 13<sup>th</sup> Extra-ordinary session.

<sup>316</sup> Gina Bekker ‘The protection of asylum seekers and refugees within the African regional human rights system’ (2013) 1 *AHRLJ* 1-29.

<sup>317</sup> (2000) AHRLR 321 (ACHPR 1996).

<sup>318</sup> Op cit note 311.

<sup>319</sup> (2009) AHRLR 153 (ACHPR 2009).

necessary and urgent measures to ensure protection of victims of human rights violations' be taken, including the restoration of 'economic and social infrastructure, such as education, health, water, and agricultural services ... in order to provide conditions for return in safety and dignity for the IDPs and refugees'.<sup>320</sup> This case provides a good tool for the different stakeholders in regards to objective four of the GCR in supporting conditions in countries of origin in order to ensure return in safety and dignity.

Finally, the African Commission created the mechanism for a Special Rapporteur on Rights of Refugees, Asylum Seekers and Internally-Displaced Persons in 2004<sup>321</sup> and this mandate was extended to include migrants in 2006.<sup>322</sup> Although it started out as a two year mandate, the African Commission has continued to renew this mandate with the duties of the Special Rapporteur including evaluating domestic laws and their compliance with international standards, conducting visits to host States, and studying relevant human rights conditions or situations.<sup>323</sup> Despite challenges to this mandate due to lack of funding and budgets, this mechanism also presents a key opportunity for the implementation of the GCR by localising the different initiatives and giving them visibility at the AU using the Special Rapporteur's activities.

The second mechanisms are the African Court which is established by a protocol to the African Charter and was adopted in 1998 but only entered into force in 2004.<sup>324</sup> The court's access is direct and indirect. For direct access, the State party that the applicant hails from has to have accepted the jurisdiction of court and lodged a declaration allowing the direct access of individuals to the court.<sup>325</sup> Indirect access is through the African Commission which can refer a matter to the court e.g. when there is non-compliance with its findings after the adjudication of a matter.

As of June 2019, the African Court had received a total of 217 communications and settled 58 of them.<sup>326</sup> The African Court has not yet finalized any matter that deals with refugee rights issue. However, the court offers a great opportunity as its decisions are binding and execution of its judgement monitored by the Executive Council of the African Union (AU) on

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<sup>320</sup> Ibid, para 229 (e).

<sup>321</sup> Resolution on the Special Rapporteur on Refugees, Asylum Seekers and IDPs, ACHPR/Res.72 (XXXVI).

<sup>322</sup> ACHPR/Res.95 (XXXIX)06.

<sup>323</sup> Gina Bekker op cit note 316.

<sup>324</sup> OAU, Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10 June 1998

<sup>325</sup> Ibid, article 5.

<sup>326</sup> African Court on Human and Peoples Rights 'Contentious Matters' available at <http://en.african-court.org/index.php/cases/2016-10-17-16-18-21>, accessed on 30 July 2019.

behalf of the AU Assembly which can impose sanctions or take ‘other measures of a political or economic nature’ against States that do not comply with the court’s decisions.<sup>327</sup>

Lastly, the ACRWC is an important human rights instrument as it specifically refers to the protection of refugee children in article 23, expanding this protection to internally displaced children. The African Committee has both a protection and promotional of children’s rights mandate. In its protective mandate, it can receive communications from any person, group or non-governmental organisation (NGO) recognised by the AU, a state, or the UN in relation to the ACRWC.

The African Committee has not considered any communication regarding refugee children and their rights under the ACRWC. It has however carried out missions in South Sudan and in Congo in its promotional mandate. For example, in its mission in South Sudan, it found violation of children’s rights and addressed pertinent issues such as children being recruited as child soldiers, killing of children, killing of children and their caregivers, abduction and sexual violence.<sup>328</sup> In this regard, the work of the African Committee plays a vital role in achieving the objectives of the GCR from a children centered perspective. The African Committee is a key stakeholder that can be utilised in its promotional and protective mandate to achieve the objectives of the GCR especially for the refugee children.

In conclusion, the African system has shown dedication to the protection of refugees and asylum seekers. There is an opportunity to use the already existing mechanisms and procedures in the regional system to not only give refugee issues addressed by the GCR visibility, but to give them political traction. If the GCR as a policy document is constantly used as a guiding document in the existing mechanisms, it can become an important norm-setting document, and this might go a long way in improving its effectiveness in the lives of refugees and asylum seekers.

#### *b. Role of the Civil Societies Organisations (CSO)*

The GCR takes a ‘whole-of society’ approach and the Civil Societies’ role is continuously highlighted in the GCR. However, there is a tendency and possibility of the CSOs to be left behind unless they progressively take up the opportunities under the GCR to advocate for its implementation as well as a human rights-based approach in ensuring that the rights of refugees and asylum seekers are protected. There must be a consistent effort by the CSOs to be part of

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<sup>327</sup> Article 23, AU Constitutive Act, came into force on 26 May 2001.

<sup>328</sup> African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *Report on the Advocacy Mission to assess the Situation of Children in South Sudan*, August 2014, available at <https://www.refworld.org/docid/545b4e384.html>, accessed on 30 July 2019.

the process and the journey, despite murky waters that may come along for example backlash from governments that may not agree with the CSOs speaking up against human rights violations of refugees.

Flowing from this, CSOs must be at the forefront in holding the different stakeholders accountable. There is a probability that pledges will be made but not honoured, or political interests overtake humanitarian interests. Through proper planning and organizations, CSOs must find a way to get a seat at the table. During the Global Refugee Forums, different stakeholders and states are invited to the meeting, but questions such as who decides the types of CSOs that are invited to the meetings? Is it the states? And if so, won't they be inclined to invite organizations that are pro-government? Is it the UNHCR, and if so, on what criteria will it decide who makes it to Geneva or New York?

Secondly, CSOs must be involved in the national and regional frameworks in order to actively engage in the policy setting. A great opportunity is in the coming up of the indicators ahead of the 2019 Global Refugee Forum. The case from Jordan provides a good case study on the importance of a multi-stakeholder approach. If CSOs were engaged in coming up with the Compact, they would probably have identified the problems that refugees, and asylum seekers face on the ground and provided important inputs that would have addressed the underlying issues thus making the Compact more effective.

Thirdly, there is need to encourage grass-root participation and embracing of the GCR. Whereas the work of the CSOs cannot be overlooked, the GCR highlights an important issue on the effective participation of women, youth and children. In employing the various initiatives at the grassroots level, the CSOs should focus more on engaging with these groups to further build on the output and feedback that they share in the various engagements under the GCR. The CSOs have an opportunity to share best practices and the results of their work at the ground and aligning it to the language of the GCR and the voice of women, children and the youth is heard.

Finally, there is an opportunity in the upcoming Global Refugee Forum in December 2019 and coming up with indicators.

### 3. CONCLUSION AND RECOMMENDATIONS

This research set out to analyse the GCR as a solution document and aimed to answer the following questions; What are the solutions given? From practice, do the solutions address the key challenges host states and communities face? What could have been done differently? I have analysed the provisions of the GCR in depth and highlighted the key tenets of the GCR addressing the key issues it seeks to address centered on international cooperation and solidarity and the equitable burden sharing of responsibility to better protect refugees.

The case studies have been very helpful in answering the second question from a practical perspective. The programs in Kenya and Jordan shed light at analysing the GCR from a hands-on perspective as they embody the general principle of the GCR such as enhancing refugees 'self-reliance and easing the burden on host country. From the lessons and challenges of the programs and it is indicative of the positive impact the GCR will have and already has had from the CRRF that has been on the ground from 2016, on the lives of refugees and the host states. The challenges of the programs provide a snippet of things that need to be done differently.

A new model that emphasizes self-reliance is possible as highlighted in the case studies, it works for both refugees and the host community but to be able to make it effective, resources are needed to make it a reality. If the global community comes together to support the hosting countries, there is hope that the GCR will indeed be a solution document.

As highlighted throughout the research paper, there is need for a bottom-up approach of engaging the refugees and the host community as programs and initiatives are conceptualized and developed in order to deal with the issues that these communities face.<sup>329</sup> The whole-society approach is recommended, and all stakeholders should claim their rightful position and responsibilities to make it happen.

In addition, accountability is key in the success of the GCR and the UNHCR has a great role to play in its catalytic role to in ensuring accountability. The CSOs have to keep their governments accountable and at the global level, political will remains the key component in implementing the GCR.

In conclusion, this research has highlighted that the GCR has very good ideas, and the model behind the GCR is remarkable as it involved different stakeholders, it was developed over time and using best-practices on what works, what does not and the key areas that host states need support in. It holds promise for a better protection regime as there is consensus and

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<sup>329</sup> Op cit note 259.

whether it succeeds or not, unfortunately still lies with each state and their willingness to contribute to the global movement towards international cooperation and solidarity, grounded in the international refugee system.

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