

NOTE

THE GLOBAL COMPACT COMMISSION: TAKING THE NECESSARY STEP TO REALIZE THE COMMITMENTS BEHIND THE NEW YORK DECLARATION

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ABSTRACT

In an era of unprecedented human mobility, states struggle to meet their obligations to the United Nations High Commissioner for Refugees (UNHCR) under the 1951 Refugee Convention. Australia, for example, detains asylum seekers off-shore on neighboring Nauru, rather than providing protection while processing their asylum claims.

United Nations member states came together and signed the New York Declaration in 2016, a renewed commitment to protecting refugees, and tasked UNHCR with proposing a Global Compact on Refugees. However, it remains to be seen whether a commitment alone is sufficient to change state practices toward refugees, and given UNHCR's limited supervisory capacity, many are skeptical of the Global Compact's uncertain success.

This Note argues that the UNHCR should create a supervisory body tasked with overseeing implementation of the New York Declaration and its Global Compact on Refugees as a means of ensuring that states adhere to their commitments. It further contends that this Commission is needed to support states, rather than blame states, to facilitate a collaborative and holistic approach to our current refugee crisis. Using Australia as an illustration, this Note will demonstrate how and why this Commission is the necessary step to realizing the commitments behind the Global Compact on Refugees and the New York Declaration.

I. INTRODUCTION

In August 2018, a twelve-year-old refugee attempted to end her life by lighting herself on fire because she viewed death as better than life on Nauru.¹ According to her father, she has still not received medical care for the injuries she sustained, and despite

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1. See Ben Doherty, *Nauru Self-harm 'Contagion' as 12-year-old Refugee Tries to Set Herself Alight*, GUARDIAN (Aug. 22, 2018), <https://www.theguardian.com/australia-news/2018/aug/23/nauru-self-harm-contagion-as-12-year-old-refugee-tries-to-set-herself-alight> [<https://perma.cc/F7HM-7YSE>].

doctors repeated calls for her transfer from Nauru, the Australian Border Force has kept her on the island.² In the recently released Nauru Files, thousands of incident reports from the Nauru detention center, located off of Australia's northeastern coast, reveal the harrowing conditions refugees endure while waiting for Australia to process their refugee applications.³ Refugees detained on Nauru suffer from human rights violations, not only at the hands of their country of origins' governments, whom they fled based on their well-founded fear of persecution, but at the hands of the Australian government.⁴ In over 2,100 reports spanning three years, 524 reports describe incidents of child abuse and assaults and 417 reports involve hunger strikes and self-harm,⁵ though other reports maintain this number is underreported. The prevailing theme, however, is one of desperation, frustration, and helplessness.⁶

Australia provides a useful illustration of one of many countries that are failing to fulfill their obligations to refugees under international law, but its practice of detaining refugees and asylum seekers off-shore has attracted global attention and condemnation. Since 2013, the Australian government has intercepted arriving boats carrying refugees seeking asylum and detained them for 'off-shore processing' on Nauru, a small island country, that has neither the means nor power to challenge Australia.⁷ Refugees living in these

2. See Ben Doherty, *12-year-old on Nauru Who Tried to Set Herself Alight Not Getting Medical Treatment, Father Says*, GUARDIAN (Aug. 31, 2018), <https://www.theguardian.com/australia-news/2018/sep/01/12-year-old-on-nauru-who-tried-to-set-herself-alight-not-getting-medical-treatment-father-says> [https://perma.cc/8PQE-N3H6].

3. See Nick Evershed et al., *The Lives of Asylum Seekers in Detention Detailed in a Unique Database*, GUARDIAN (Oct. 15, 2015), <https://www.theguardian.com/australia-news/ng-interactive/2016/aug/10/the-nauru-files-the-lives-of-asylum-seekers-in-detention-detailed-in-a-unique-database-interactive> [https://perma.cc/ZX6Q-XLVM].

4. See *Australia Should Not Coerce Vulnerable People to Return to Harm*, UNHCR (Sept. 4, 2017), <http://www.refworld.org/docid/59ad58d34.html> (the majority of refugees fled from countries including: Islamic Republic of Iran, Sri Lanka, Syria and Afghanistan and the Australian government has perpetrated human rights violations by denying them the ability to seek asylum, and basic access to healthcare) [https://perma.cc/2N94-5DJM].

5. See Evershed et al., *supra* note 3.

6. See generally David Marr & Oliver Laughland, *Australia's Detention Regime Sets Out to Make Asylum Seekers Suffer, Says Chief Immigration Psychiatrist*, GUARDIAN, (Oct. 4, 2014), <https://www.theguardian.com/world/2014/aug/05/sp-australias-detention-regime-sets-out-to-make-asylum-seekers-suffer-says-chief-immigration-psychiatrist> (explaining how Australia's immigration detention system deliberately harms vulnerable detainees) [https://perma.cc/YBU2-SL78].

7. See Ben Doherty, *A Short History of Nauru, Australia's Dumping Ground for Refugees*, GUARDIAN (Aug. 9, 2016), <https://www.theguardian.com/world/2016/aug/10/a-short-history-of-nauru-australias-dumping-ground-for-refugees> [hereinafter Doherty, *Short History of Nauru*] (Nauru is "broke, barren and beholden to its neighbor.") [https://perma.cc/B2GN-J7U4].

closed detention centers have no privacy, insufficient water supply, scarce coverage from sun, and dust exposure or inadequate access to healthcare, which amount to flagrant human rights violations inconsistent with international law.⁸ Australia has not processed some detainees' asylum applications for over four years, meaning that these asylum seekers have waited in limbo, on a barren, brutally hot island, with little to be optimistic about.⁹

By sending incoming refugees to nearby Nauru and Papua New Guinea, Australia does not relieve itself of its responsibilities; it must see that the processes in these off-shore processing detention centers are consistent with Australia's obligations under the 1951 Convention Relating to the Status of Refugees (1951 Convention) and the 1967 Optional Protocol Relating to the Status of Refugees (1967 Protocol).¹⁰ Like all asylum seekers, under the 1951 Convention, detainees on Nauru are entitled to fair and efficient processing of asylum applications.¹¹ Further, while asylees' applications are pending, Australia is obliged to provide them with a minimum standard of living which is humane and dignified.¹² Instead, the Nauru Files document distressing abuses of human rights, including violence against detainees by guards and local police, untreated instances of self-harm, and sexual exploitation of children.¹³

8. See *UNHCR Monitoring Visit to the Republic of Nauru*, UNHCR (Nov. 26, 2013), <http://www.refworld.org/docid/5294a6534.html> [<https://perma.cc/UQ4E-5ELW>]; UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees on the Inquiry into the Serious Allegations of Abuse, Self-harm and Neglect of Asylum-seekers in Relation to the Nauru Regional Processing Centre, and any like Allegations in Relation to the Manus Regional Processing Centre Referred to the Senate Legal and Constitutional Affairs Committee, 1, 8 (Nov. 12, 2016), <http://www.refworld.org/docid/591597934.html> [hereinafter UNHCR Inquiry] [<https://perma.cc/5QQM-D94R>].

9. See *Australia Should Not Coerce Vulnerable People to Return to Harm*, *supra* note 4.

10. See *Munaf v. Romania*, Communication 1539/2006, U.N. Human Rights Committee, ¶ 9.3 (2009) (finding that a State's obligations apply extraterritorially when the State has effective control over individuals to whom the State is responsible for their protection).

11. See *Australia Should Not Coerce Vulnerable People to Return to Harm*, *supra* note 4.

12. See *id.* While Australia's practices arguably violate other international treaties, like Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, this discussion is beyond the scope of this note, which focuses on the 1951 Convention.

13. One report, for example, expressed a trend of children trading sexual favors for two extra minutes of shower-time. See Nick Evershed et al., *The Nauru Files: Cache of 2,000 Leaked Reports Reveal Scale of Abuse of Children in Australian Offshore Detention*, GUARDIAN (Aug. 10, 2016), <https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention> [<https://perma.cc/3S2K-THBB>].

Despite universal condemnation from the United Nations (U.N.), dozens of states, Amnesty International, and Human Rights Watch, Australia continues to arbitrarily and indefinitely detain asylum seekers off-shore while processing their claims,¹⁴ even though off-shore detention costs Australia approximately \$1.2 billion,¹⁵ fifteen times more than detention in Australia.¹⁶

Australia is not the only country that fails to meet its obligations of fair and efficient processing and providing a minimum standard of living under the 1951 Convention; states all over the world have reeled in response to the unprecedented 25.4 million refugees worldwide, opting to secure borders instead of complying with their obligations under the 1951 Convention.¹⁷ This is largely because the U.N. High Commissioner for Refugees' (UNHCR) obligations are voluntary and state implementation of UNHCR policies is ultimately a domestic endeavor.¹⁸ Nevertheless, the U.N. General Assembly hosted a summit in New York in 2016, where it recognized that in a time of increased mobility, which shows little signs of slowing, states' refugee problems are not going to be resolved without unified support.¹⁹ The New York Declaration for Refugees and Migrants (Declaration or New York Declaration) and its framework for a Global Compact on Refugees, adopted unanimously by U.N. member states, are the global response to this problem.²⁰ The non-binding Declaration affirms and enhances refugee protection through renewed commitments to the 1951 Convention and tasked the UNHCR with creating a Compact for more equitable responsibility-sharing for both hosting and supporting states in light of the current refugee crisis.²¹

14. See Doherty, *Short History of Nauru*, *supra* note 7.

15. Ben Doherty, *Australia's Offshore Detention Cost \$1.2bn in 2014-15*, *Senate Estimates Told*, *GUARDIAN* (Dec. 8, 2015), <https://www.theguardian.com/australia-news/2015/dec/09/offshore-detention-cost-12bn-senate-estimates-asylum-seekers-charter-flights> [<https://perma.cc/8BYV-SSG4>].

16. See *Australia Should Not Coerce Vulnerable People to Return to Harm*, *supra* note 4.

17. See UNHCR, Contribution to the Fifteenth Coordination Meeting on International Migration, U.N. Doc. UN/POP/MIG-15CM/2017/14 (Feb. 10, 2017); *Figures at a Glance*, UNHCR (June 19, 2018), <http://www.unhcr.org/en-us/figures-at-a-glance.html> [<https://perma.cc/5PW5-K46R>].

18. See Volker Turk, *UNHCR's Supervisory Responsibility*, in UNHCR, *NEW ISSUES IN REFUGEE RESEARCH 4* (UNHCR, Dep't Int'l Protection, Working Paper No. 67, 2002).

19. See G.A. Res. 70/1 (I), *New York Declaration for Refugees and Migrants* (Sept. 19, 2016) [hereinafter *New York Declaration*].

20. See *id.* This Note focuses only on the Global Compact on Refugees, though under the *New York Declaration* there is a second Global Compact, the *Global Compact for Migration*.

21. See Volker Turk, *The New York Declaration: Once-in-a-Lifetime Opportunity to Enhance Refugee Protection*, *KALDOR CTR.* (Oct. 11, 2016), <http://www.kaldorcentre.unsw.edu.au/>

This Note argues for reaffirmation of the 1951 Convention and that promises of enhanced protection are not enough to motivate states to act consistently with the New York Declaration and its Global Compact on Refugees. While the New York Declaration establishes an impressive commitment to address the ongoing global refugee crisis, it does not encompass supervisory mechanisms to ensure its realization. The UNHCR needs to establish the Global Compact on Refugees Commission (hereinafter GCR Commission), a supervisory body, to oversee implementation of and compliance with the Global Compact on Refugees' framework, because promises alone do not guarantee change. The Global Compact on Refugees needs a supervisory body tasked with overseeing state compliance with its commitments to assist states, create bridges between stakeholders and states, and ensure that the promises accorded in the New York Declaration are realized. The GCR Commission should be structured as an independent group of experts in international refugee law equipped to issue advisory opinions, general comments, and requests for review in regard to the Global Compact on Refugees. The GCR Commission would mobilize technical support to states in need of assistance while simultaneously assisting state interpretation of their obligations under the Global Compact on Refugees.

Part II of this Note first provides an overview of UNHCR and its legal framework, with a focus on its limited supervisory functions. This Note then illustrates the failure of UNHCR's supervisory capabilities through a discussion of Australia's ongoing refugee policy and elaborates on the dire situation asylum seekers face while being detained in Nauru. Next, it discusses the New York Declaration, and its Global Compact on Refugees, which could either be a turning point in the global refugee crisis or a continuation of soft commitments without state compliance. Lastly, a brief discussion of scholars' previous recommendations for expanding UNHCR's supervisory authority illuminates the foundation for the proposed GCR Commission. Part III of this Note recommends the creation of the GCR Commission to oversee the implementation of the Global Compact on Refugees, to work with states, relevant stakeholders, and the Comprehensive Refugee Response Task Force toward the realization of the Global Compact on Refugees and New York Declaration commitments. Finally, this Note will use Australia's off-shore detention policy as an illustration of how the

proposed GCR Commission could help Australia fulfill its commitments under the New York Declaration.

II. BACKGROUND

Though the UNHCR is hailed as the refugee protection agency, its supervisory powers are considerably limited. The following sections elaborate on how and why the UNHCR's supervisory authority is limited and, by using Australia as an illustration, what that means for member states.²² Next, this Note will reintroduce the New York Declaration, and cautiously posit it as a new hope for refugee protection on the condition that the UNHCR can appropriately supervise its implementation. Lastly, a discussion of scholars' ideas for strengthening the UNHCR's supervisory power will be used to set the framework for the proposed GCR Commission.

A. UNHCR's Legal Framework

The U.N. General Assembly created the UNHCR "as *the* global refugee institution," tasked with providing international protection and seeking permanent solutions for refugees in the aftermath of the Second World War.²³ Originally, the UNHCR's mandate was to last only three years.²⁴ As a result of its temporary stature, the UNHCR was organized with a lean, vertical leadership structure, with power stemming from the High Commissioner to his thirty-four staff members.²⁵ However, as wars and natural disasters continued, so did mass migrations.²⁶ Because UNHCR was the only international body suited to protect and support mass migrations of individuals fleeing their home countries due to persecution or conflict, its mandate was renewed every five years.²⁷ Only in 2003 did the General Assembly remove the temporal restriction and

22. It should be noted, however, that Australia is but one of many states failing to meet its obligations to UNHCR. The author uses Australia as an illustration, but could arguably have selected many other states that are experiencing emerging refugee situations, while not protecting the human rights of the individuals who cross their borders.

23. UNHCR, Note on the Mandate of the High Commissioner for Refugees and His Office, 1 (2013), <http://www.unhcr.org/en-us/protection/basic/526a22cb6/mandate-high-> (emphasis in original) [<https://perma.cc/XM2F-ZGP9>]; G.A. Res. A/RES/428(V), Statute of the Office of the High Commissioner for Refugees (Dec. 14, 1950) [hereinafter Statute], amended by G.A. Res. 58/153, 1 (Dec. 3, 2003).

24. See B.C. Nirmal, *UNHCR After Six Decades and Beyond*, 10 ISIL Y.B. INT'L HUMAN. & REFUGEE L. 182, 183 (2010).

25. The original mandate based had a \$300,000 budget. See *id.* at 188–89.

26. See *id.* at 183–84.

27. See *Facts and Figures*, UNHCR (2004), <https://www.unhcr.org/3fc754593.pdf> [<https://perma.cc/W9DF-LB95>].

grant the UNHCR's mandate to last "until the refugee problem is solved."²⁸ Now, sixty-eight years later, UNHCR has expanded to a staff of almost 17,000 and operates in 138 states.²⁹

In response to global migration needs, the UNHCR's operations have expanded beyond its mandate of refugee protection under the 1951 Convention, to protect stateless and internally displaced individuals as well as mandate refugees.³⁰ The UNHCR is able to cater its services to new migration problems because of its "dynamic character," which "emanates essentially from the UNHCR's operational practice and the practice of states in providing protection to millions of refugees."³¹

The General Assembly established the UNHCR as a non-political subsidiary of the U.N., but ensured that UNHCR would enjoy a special independent status within the U.N., with the requisite degree of autonomy and prestige to effectively perform its functions.³² UNHCR's legal foundations lies in its mandate and international treaty law, which, taken together, direct its supervisory authority over states.³³ Article 8 of the UNHCR Statute outlines its authority to supervise the implementation of all international refugee conventions.³⁴ UNHCR's supervisory role enjoys a wide scope; under its legal authority, UNHCR works with states to design operations responsive to their needs, reports to governments on protection concerns, consults and advises on refugee issues, submits *amicus curiae* briefs to courts, and advocates through public

28. G.A. Res. 58/153, U.N. Doc. A/RES/58/153, at 9 (Dec. 22, 2003).

29. See *Figures at a Glance*, *supra* note 17.

30. See UNHCR, Executive Committee Conclusions, No. 78 (XLVI) (1995); GA Res. 50/152, ¶¶ 14–16 (Dec. 21, 1995) (expanding mandate to include stateless persons by implementing Conclusion on the Prevention and Reduction of Statelessness and the Protection of Stateless Persons); G. A. Res. 1167 (xii), 1501 (XV), 1671 (XVI), 1673 (XVI), 1959 (XVIII), 2958 (XXVII), 3454 (XXX) (referring to individuals protected by UNHCR but who do not fall under the 1951 Convention); UNHCR, *UNHCR's Operational Experience with Internally Displaced Persons*, 3–11 (Sept. 1994) (action to assist internally displaced persons has received widespread approval, including by the General Assembly, despite UNHCR lacking such authority in its mandate).

31. Turk, *supra* note 18, at 2.

32. See UNHCR, Note on the Mandate of the High Commissioner for Refugees and His Office, *supra* note 23, at 1 (citing U.N. Secretary-General, ¶ 11, U.N. Doc. A/C.3/527 (Oct. 26, 1949)).

33. See *id.* at 1–2.

34. See Statute, *supra* note 23, art. 8 ("The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto . . .").

statements, among other responsibilities.³⁵ By signing and ratifying the 1951 Convention and the 1967 Protocol, states undertake to cooperate with UNHCR.³⁶ Article 35, which was agreed to by all member states to the 1951 Convention, creates an “explicit contractual link between the 1951 Convention and the UNHCR Statute.”³⁷ A look at the 1951 Convention’s *travaux préparatoires*, or negotiating history, further confirms that state responsibilities to cooperate with the UNHCR do not end at their obligations under the 1951 Convention, but extend to carrying out UNHCR’s directives more generally, and to duties accepted under international law.³⁸

However, despite UNHCR’s impressive operational reach and protective functions, there are blatant holes in its legal authority in terms of implementation of its supervisory role.³⁹ While Articles 35 and 36 of the 1951 Convention establish UNHCR’s supervisory role over international refugee conventions, they do not explain how this supervisory function manifests when states do not comply with its obligations under the 1951 Convention.⁴⁰ Though UNHCR’s Executive Committee (ExCom) and its Standing Committee serve as executive and administrative aids to the High Commissioner and the UNHCR’s internal workings,⁴¹ there is no body tasked with externally supervising the implementation of state commitments to the UNHCR.⁴²

35. See UNHCR, *Summary Conclusions: Supervisory Responsibility, in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 667, 668–69 (Erika Feller et al. eds., 2003) [hereinafter UNHCR, *Summary Conclusions*].

36. See UNHCR, Note on the Mandate of the High Commissioner for Refugees and His Office, *supra* note 23, at 2.

37. Turk, *supra* note 18, at 6; *see generally*, Convention Relating to the Status of Refugees art. 35, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (1954) [hereinafter 1951 Convention] (“Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees . . . [to] facilitate its duty of supervising the application of the provisions of this Convention.”).

38. See Turk, *supra* note 18, at 7 (an examination of various drafts of Article 35 reveals “an evolution in the deliberations starting from lesser forms of cooperation and resulting in a more elaborate, open and evolutionary role for the UNHCR”).

39. See *id.* at 4. (Neither UNHCR’s mandate nor Articles 35 or 36 of the 1951 Convention delineate any supervisory responsibility or mechanism of enforcement to UNHCR).

40. See *id.* at 10.

41. ExCom serves an executive and administrative role, meeting once per year in Geneva, to discuss budgets and funding, and advise the High Commissioner. See *Executive Committee*, UNHCR, <http://www.unhcr.org/en-us/executive-committee.html> (last visited Jan. 26, 2019) [<https://perma.cc/4QED-733D>].

42. See James C. Hathaway et al., *Supervising the Refugee Convention*, 26 J. REFUGEE STUD. 323, 326 (2013).

State compliance with the 1951 Convention wholly depends on an individual state's decision to adhere to its obligations under the treaty.⁴³ After all, approximately eighty-seven percent of UNHCR's budget comes from individual state and European Union contributions each year.⁴⁴ As a result, states may choose to unilaterally deviate from its commitments to UNHCR or manipulate the refugee definition to be consistent with their national and foreign policy interests.⁴⁵ Israel, for example, excludes Palestinians from meeting the definition of a refugee, and plans to deport thousands of Eritrean and Sudanese asylum seekers because they are considered "infiltrators" under Israeli law.⁴⁶ Domestic implementation of the 1951 Convention does not result in consistent interpretation.⁴⁷ This is not a new problem; in 1994, UNHCR expressed concern that the increased demands for international protection operations had outgrown the UNHCR's legal authority to address them.⁴⁸ The following section is just one example of how the UNHCR's supervisory reach is inadequate, even in the face of flagrant international human rights abuses.

B. *Australia as an Illustration: UNHCR's Limited Supervisory Authority Allows States to Disregard their Obligations to Refugees and UNHCR*

Australia is a member of the U.N. and party to the 1951 Convention and its 1967 Optional Protocol, and thus undertakes to comply with all their provisions and cooperate with UNHCR.⁴⁹ Yet, like every U.N. member state, Australia faces unique issues related to refugees. Despite maintaining a prominent seat at the interna-

43. See Turk, *supra* note 18, at 1 (explaining that "domestic implementation [of the 1951 Convention] . . . allows states unilaterally to manipulate the refugee definition," thereby avoiding treaty obligations).

44. UNHCR, *Global Report*, 32 (2016), http://reporting.unhcr.org/sites/default/files/gr2016/pdf/02_Funding.pdf [<https://perma.cc/AX2V-C5UY>].

45. See Turk, *supra* note 18, at 1 (citing Elizabeth J. Lentini, *The Definition of Refugees in International Law: Proposals for the Future*, 6 B.C. THIRD WORLD L.J., 183, 195 (1985)).

46. See, e.g., Tally Kritzman-Amir, *Otherness as the Underlying Principle in Israel's Asylum Regime*, 42 ISR. L. REV. 603, 623 (2009); Miriam Berger, *Inside Israel's Campaign to Deport Tens of Thousands of African Migrants*, VOX (Mar. 6, 2018), <https://www.vox.com/world/2018/3/6/17059744/israel-deport-african-migrants-asylum> [<https://perma.cc/FPP6-DNS8>].

47. See Elizabeth J. Lentini, *The Definition of Refugees in International Law: Proposals for the Future*, 6 B.C. THIRD WORLD L.J., 183, 195 (1985).

48. See UNHCR, 1994 Note on International Protection, ¶ 68, U.N. Doc. A/AC.96/830 (Sept. 7, 1994).

49. See 1951 Convention, *supra* note 37, art. 35.

tional table, Australia attracts negative attention for its policy of detaining refugees for off-shore processing.⁵⁰

In 2013, Australia's Liberal-National Coalition won the federal election with a successful "stop the boats" campaign,⁵¹ a slogan grounded in historical fears of incoming boats leading to uncontrolled, unplanned migration.⁵² The new Coalition government created Operation Sovereign Borders, which put the military in charge of maritime border protection, "to ensure a whole-of-government effort to combat people smuggling and protect Australia's borders."⁵³ Under this policy, any individual arriving by boat without documentation "will be turned back to their point of departure, returned to their home country or transferred to another country", and would never resettle in Australia.⁵⁴ This policy is in stark contrast to the opportunity open to individuals arriving by any other means to resettle in Australia.⁵⁵ Australia uses its off-shore detention policy and refuses to resettle those detained off-shore as a tactic to deter asylum seekers from traveling to Australia by boat.⁵⁶

Australia's Department of Immigration and Border Protection policies of stopping "boat people," or asylum seekers arriving on boats,⁵⁷ and detaining them in off-shore centers are inconsistent with its obligations under the 1951 Convention.⁵⁸ Shortly after it began, UNHCR found that Australia's policy and practice of detaining all asylum-seekers off-shore "on a mandatory and open-ended basis, without an individualized assessment as to the necessity, reasonableness and proportionality of the purpose of such detention" amounted to arbitrary detention, and was inconsistent

50. See UNHCR Regional Representation in Canberra, *UNHCR Urges Australia to Stop Unfolding Humanitarian Emergency*, UNHCR (Nov. 2, 2017), <http://www.unhcr.org/en-us/news/press/2017/11/59e6b5c77/unhcr-urges-australia-to-stop-unfolding-humanitarian-emergency.html> [<https://perma.cc/H3P5-MHYJ>].

51. *Australia Asylum: Why Is It Controversial?*, BBC NEWS (Oct. 31, 2017), <http://www.bbc.com/news/world-asia-28189608> [<https://perma.cc/D6WP-MUG8>].

52. See Geraldine Cremin, *Mandatory Detention, Turn-Backs, and Australia's Complicated History with Refugees*, PAC. STANDARD (Nov. 6, 2017), <https://psmag.com/social-justice/australia-has-a-tough-history-with-refugees> [<https://perma.cc/FLS3-EA3L>].

53. *People Smuggling and Human Trafficking*, AUSTL. GOV'T DEP'T HOME AFFAIRS, <https://www.homeaffairs.gov.au/about-us/our-portfolios/criminal-justice/people-smuggling-human-trafficking/people-smuggling> (last visited Jan. 26, 2019) [<https://perma.cc/6P37-59CG>].

54. See *Operation Sovereign Borders*, AUSTL. GOV'T DEP'T HOME AFFAIRS, <https://osh.homeaffairs.gov.au/outside-australia> [<https://perma.cc/62F3-SXJQ>].

55. See *id.*

56. See Cremin, *supra* note 52.

57. See *id.*

58. See UNHCR Regional Representation in Canberra, *supra* note 50.

with international law.⁵⁹ UNHCR found violations of refugees' rights to liberty,⁶⁰ freedom of movement,⁶¹ and freedom from punitive treatment.⁶² UNHCR visited detention centers on Nauru and Papua New Guinea multiple times since their operations began in 2013.⁶³ In 2016, pursuant to its supervisory role with respect to the 1951 Convention, UNHCR "publicly called for the immediate movement of asylum-seekers and refugees to humane conditions with adequate support and services."⁶⁴

However, Australia has ignored these reports and continues its arbitrary and indefinite detention practices,⁶⁵ despite its concession that over 1,034 individuals detained on Nauru and Manus Islands are recognized refugees.⁶⁶ Australia's behavior illustrates how a state can obfuscate responsibility to the UNHCR without any concern for international accountability. Reports and site visits are not incentive enough to revise domestic policies grounded in a state's national interest, even when such reports illuminate egregious human rights violations.

C. *Asylum Seekers Face Dire Circumstances While Detained Off-Shore in Nauru and Manus Island*

Reports from UNHCR and non-governmental organizations (NGOs) document horrific circumstances asylum seekers detained in Nauru or Manus Island endure while waiting for their claims to be processed by the Australian government, including instances of

59. UNHCR Inquiry, *supra* note 8, at 2.

60. See UNHCR Monitoring Visit to the Republic of Nauru, *supra* note 8, at 13.

61. See *id.* at 6; see, e.g., 1951 Convention, *supra* note 37, art. 26 ("Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.").

62. See 1951 Convention, *supra* note 37, art. 31 (prohibiting states from restricting movement of refugees beyond that which is "necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country").

63. See UNHCR Inquiry, *supra* note 8.

64. UNHCR Regional Representation in Canberra, *UNHCR Calls for Immediate Movement of Refugees and Asylum Seekers to Humane Conditions*, UNHCR (May 2, 2016), <http://www.unhcr.org/en-au/news/press/2016/5/5810087d4/unhcr-calls-for-immediate-movement-of-refugees-and-asylum-seekers-to-humane.html> [<https://perma.cc/M57C-CVNR>].

65. See UNHCR Regional Representation in Canberra, *supra* note 50.

66. See Press Release, Australian Border Force, Operation Sovereign Borders Monthly Update: April 2017, <https://newsroom.abf.gov.au/channels/Operation-Sovereign-Borders/releases/operation-sovereign-borders-monthly-update-april-3> (last visited Feb. 26, 2019) [<https://perma.cc/U89J-LAZ6>].

violence, serious deterioration of mental health, and a concerning increase in the frequency of self-harm.⁶⁷

When asylum seekers demonstrated in the Lombrum Regional Processing Centre in February 2014, in an effort to bring attention to their isolated detention, they were attacked by Papua New Guinea authorities and locals.⁶⁸ One asylum seeker named Reza Barati died and seventy-seven others were treated for serious injuries like slashed throats, critical basal skull fractures, and gunshot wounds.⁶⁹ Australia acknowledged the tragedy, but largely blamed the “unrest” on the detainees who had been demonstrating against their detention.⁷⁰ The Papua New Guinea Supreme Court ordered the Centre to close,⁷¹ but violence against refugees remains rampant; in October 2018, an Iranian refugee on Manus Island was attacked and beaten unconscious by a local.⁷²

UNHCR Director for Asia and the Pacific, Indrika Ratwatte, visited the Nauru detention facility and reported that the mental health conditions of the detained refugees were “very, very shocking.”⁷³ He warned that the growing trend of self-harm, especially by children attempting suicide, illustrates the “despair and hopeless-

67. See, e.g., UNHCR Inquiry, *supra* note 8; Amnesty Int'l, *Report 2017/2018: The State of the World's Human Rights* (2018), <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.pdf> [<https://perma.cc/3M2L-AB3N>].

68. See Senate Standing Comm. on Legislation & Constitutional Affairs, *Factors contributing to allegations of abuse, self-harm and neglect, in SERIOUS ALLEGATIONS OF ABUSE, SELF-HARM AND NEGLECT OF ASYLUM SEEKERS IN NAURU REGIONAL PROCESSING CENTRE, AND ANY LIKE ALLEGATIONS IN THE MANUS REGIONAL PROCESSING CENTER*, 53 (Apr. 21, 2017), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report/c03 [<https://perma.cc/XLM3-TRR6>]; Helen Davidson & Oliver Laughland, *Manus Island: One Dead, 77 Injured and Person Shot in Buttock at Australian Asylum Centre*, *GUARDIAN* (Feb. 18, 2014), <https://www.theguardian.com/world/2014/feb/18/manus-island-unrest-one-dead-dozens-injured-and-man-shot-in-buttock> [<https://perma.cc/LY7W-ZH9U>].

69. See *id.*

70. See *id.*

71. See Belden Norman Namah MP v. Rimbink Pato, PNGLR 1497 (2016); Nicole Hasham, *Manus Island Detention Centre to Close, PNG Prime Minister Says Following Court Bombshell*, *SYD. MORN. HER.* (Apr. 28, 2016), <https://www.smh.com.au/politics/federal/manus-island-detention-centre-to-close-png-prime-minister-says-following-court-bombshell-20160427-gogbyo.html> [<https://perma.cc/3PAP-6JMU>].

72. Helen Davidson, *Iranian Refugee on Manus Island Violently Assaulted*, *GUARDIAN* (Oct. 21, 2018), <https://www.theguardian.com/australia-news/2018/oct/21/manus-island-refugee-reportedly-in-a-critical-condition-after-violent-assault> [<https://perma.cc/9YAX-8XXX>].

73. See Paul Karp, *Dutton Should Prioritise Refugees on Nauru, Not White South Africans, UNHCR Says*, *GUARDIAN* (Mar. 26, 2018), <https://www.theguardian.com/australia-news/2018/mar/27/dutton-should-prioritise-refugees-on-nauru-not-white-south-africans-unhcr-says> [<https://perma.cc/98T4-95WM>].

ness prevailing there.”⁷⁴ In January 2018, a ten-year-old boy repeatedly attempted to take his own life in Nauru by overdosing on drugs, strangling himself, and stealing a knife, which had to be wrestled from him.⁷⁵ The deterioration of his mental health resulted from his separation from his father on Nauru, and from being denied access to medical care.⁷⁶ Although he was recommended for transfer to Australia in June 2017, Australia did not respond for five months and ultimately rejected the transfer in December.⁷⁷ Psychiatrists testified in court to the urgent necessity of transferring him and his mother, who had also attempted suicide, to receive proper treatment in Australia.⁷⁸ Australia fought the transfer, arguing that Nauru has sufficient healthcare and citing the substantial costs of transferring and caring for the mother and son.⁷⁹ For the second time in two months, an Australian judge rejected these arguments, citing the complete absence of child psychological care on Nauru, and ruling that Australia owed a duty of care to the boy and his mom, as the responsible party for forcing them into the detention center and keeping them there.⁸⁰ In February 2018, another Australian judge granted the transfer of a fourteen-year-old girl to Australia for psychiatric care after ruling that there was an “extreme risk this unfortunate girl will commit suicide.”⁸¹

Unfortunately, these stories are not unique: eighty-three percent of Nauru detainees suffer from depression or post-traumatic stress disorder,⁸² and eighty-eight percent of asylum seekers on Manus Island suffer from depression, anxiety disorders or post-traumatic stress disorders, despite an overwhelming majority not having pre-existing psychological conditions.⁸³ Men, women, and children

74. See *id.*

75. See Ben Doherty, *Court Orders That Boy, 10, at Risk of Suicide on Nauru be Treated in Australia*, GUARDIAN (Mar. 26, 2018), <https://www.theguardian.com/australia-news/2018/mar/21/court-orders-that-boy-10-at-risk-of-suicide-on-nauru-be-treated-in-australia> [<https://perma.cc/VW3Y-GDBZ>].

76. See *AYX18 v Minister for Home Affairs* [2018] FCA 283, ¶¶ 17–20 (Austl.), <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2018/2018fca0283> [<https://perma.cc/UH24-NH5K>].

77. See Doherty, *supra* note 75.

78. See *AYX18 v Minister for Home Affairs*.

79. See Doherty, *supra* note 75.

80. See *AYX18 v Minister for Home Affairs*.

81. *FRX17 as Litigation Representative for FRM17 v Minister for Immigration and Border Protection*, [2018] FCA 63, ¶ 9 (Austl.), <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2018/2018fca0063> [<https://perma.cc/ZA2M-PFS5>].

82. See UNHCR Inquiry, *supra* note 8, at 13.

83. See *id.* at 10.

named family separation, violence in detention, lack of long-term solutions, isolation, and hopelessness stemming from the inability to care for one's family as significant contributing factors to the deterioration of their mental health.⁸⁴ Reports from asylum seekers and service providers made clear that increasing mental health issues contributed to the spike in attempted self-harm and self-harm in 2016.⁸⁵ This spike has not since dissipated; as of August 2018, over half of the 110 remaining children detained on Nauru have been given medical referrals to receive overseas hospital care.⁸⁶ However, the Australian government has not acted upon these recommendations; Australia's continued refusal to resettle them or their families further exacerbates the pain they endure.⁸⁷

D. *The New York Declaration: An Opportunity for Hope
and for Skepticism*

In response to the global refugee crisis, all 193 member states of the U.N. adopted the New York Declaration, which reaffirms and posits historic and expansive commitments by member states to respect the human rights of refugees and migrants and to support the states that welcome them.⁸⁸ The commitments not only reinforce the 1951 Convention, but draw a new focus “to a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking into account the unique capacities of each state.”⁸⁹

The New York Declaration tasked UNHCR to “develop and initiate” a Global Compact on Refugees to carry out these commitments.⁹⁰ The Global Compact consists of two parts: the Comprehensive Refugee Response Framework (hereinafter CRRF) and its program of action, which facilitates the CRRF's application.⁹¹ The CRRF contains four main objectives: “to ease pressures on countries that host large number of refugees, to enhance refugee self-reliance, to expand access to third-country solutions, and

84. *See id.*

85. *See id.* at 14.

86. *See* Doherty, *supra* note 2.

87. *See id.*

88. *See New York Declaration for Refugees and Migrants*, UNHCR <https://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html> (last visited Aug. 18, 2019) [<https://perma.cc/9SRT-Q6D2>].

89. New York Declaration, *supra* note 19, ¶ 69.

90. *See id.*

91. *See* UNHCR, *The Global Compact on Refugees, Zero Draft, 2* (Jan. 31, 2018), <http://www.unhcr.org/Zero-Draft.pdf> [hereinafter *Global Compact on Refugees Draft*] [<https://perma.cc/G5HS-DFNN>].

to support conditions in countries of origin for return in safety and dignity.”⁹²

UNHCR released its proposed Global Compact on Refugees in August 2018, which outlines the roles UNHCR, states, and stakeholders may have in facilitating the CRRF.⁹³ Notably, the Compact proposes convening a Global Support Platform, serviced by the UNHCR and composed of states and stakeholders, to respond to specific refugee situations.⁹⁴ This Platform could connect host states with states that pledged financial support to mobilize “more equitable and predictable burden- and responsibility-sharing,” through concrete financial, material, and other contributions.⁹⁵ The Global Compact on Refugees will build on the CRRF, and establish specific measures states should take to achieve the goals of the New York Declaration.⁹⁶

However, it is unclear whether these commitments alone are sufficient to mobilize states toward compliance with the New York Declaration.⁹⁷ Fifteen NGOs issued a joint response to UNHCR’s Zero Draft program of action (Zero Draft), which expressed concern for the ambiguous and vague descriptions of collective accountability, and urged UNHCR to incorporate a robust monitoring and evaluation system into the Global Compact on Refugees.⁹⁸ The NGOs’ response further emphasized their disappointment in the Zero Draft as being more of the current approach without necessary specifications of how to realize the New York Declaration’s commitments.⁹⁹ The final Global Compact invites states to decide how they hypothetically “could” involve

92. *Comprehensive Refugee Response Framework*, UNHCR <http://www.unhcr.org/comprehensive-refugee-response-framework-crrf.html> (last visited Feb. 26, 2019) [https://perma.cc/YL6R-CMYJ].

93. UNHCR, *Global Compact on Refugees*, U.N. Doc. A/73/12 (Aug. 2, 2018), http://www.unhcr.org/gcr/GCR_English.pdf [hereinafter *Global Compact on Refugees*] [https://perma.cc/FRR6-LKKV].

94. *See id.* ¶ 22.

95. *Id.* ¶ 15.

96. *See Towards a Global Compact on Refugees*, UNHCR, <http://www.unhcr.org/towards-a-global-compact-on-refugees.html> (last visited Jan. 26, 2019) [https://perma.cc/JRZ8-HMPL].

97. *See* NGO REACTION TO THE ZERO DRAFT OF THE GLOBAL COMPACT ON REFUGEES’ PROGRAMME OF ACTION (Feb. 12, 2018), <https://www.nrc.no/news/2018/february/ngo-reaction-to-the-zero-draft-of-the-global-compact-on-refugees-programme-of-action/> [https://perma.cc/T67E-W7AL].

98. The NGOs included Action Against Hunger, CARE International, DanChurchAid, International Rescue Committee, Lutheran World Federation, Oxfam International, Refugees International, Save the Children, among others. *See id.*

99. *See id.*

themselves in the Global Compact on Refugees, but no concrete organizational structure is offered.¹⁰⁰

As a party to the New York Declaration, Australia thus reaffirmed its commitment to the 1951 Convention.¹⁰¹ Australia committed \$130 million in funding toward the Global Compact on Refugees, while maintaining its annual refugee cap at 18,750 admissions.¹⁰² Though aid agencies criticized Australia for not increasing the number of refugees admitted into the country,¹⁰³ the commitment is ultimately voluntary, leaving Australia to decide what its commitment should be, and later on, whether to comply with it at all.¹⁰⁴ Without some accountability mechanism, the UNHCR will have the same problems with the Global Compact on Refugees as it does with the 1951 Convention. This is an example of the inherent tension within the UNHCR between implementation of the 1951 Convention, on one hand, and its supervision on the other. As long as the Global Compact on Refugees' success turns on how states choose to engage and involve themselves, meaningful reform of the protection of refugees will be limited.¹⁰⁵

E. *Debated Expansion of UNHCR's Supervisory Authority*

The noticeable absence of oversight included within the New York Declaration and the Global Compact on Refugees raises concern as to UNHCR's limited supervisory authority.¹⁰⁶ Such discussions, however, are not new. Recognizing UNHCR's supervisory limitations, some scholars have called for the adoption of additional mechanisms for enhancing its supervisory authority.¹⁰⁷

100. See *id.*; see e.g., Global Compact on Refugees Draft, *supra* note 91, ("These arrangements *could* take the form of a steering group . . .") (emphasis added).

101. See New York Declaration, *supra* note 19, ¶ 65 (declaring that the parties to the New York Declaration reaffirm the importance of full and effective implementation of the 1951 Convention relating to the Status of Refugees).

102. See Stephanie Anderson & Dan Conifer, *UN Refugee Summit: Australia to Take in Central Americans and Maintain Annual Intake*, ABC NEWS (Sept. 20, 2016), <http://www.abc.net.au/news/2016-09-21/un-refugee-summit-australia-intake-upped-to-19,000-per-year/7863712> [<https://perma.cc/NSU2-8EDM>].

103. See *id.*

104. See *id.*

105. See KHALID KOSER, A GLOBAL COMPACT ON REFUGEES: THE ROLE OF AUSTRALIA 2 (Lowy Inst. 2017) https://www.lowyinstitute.org/sites/default/files/documents/Koser_A%20Global%20Compact%20on%20Refugees_WEB_1.pdf [<https://perma.cc/25G4-6XL5>].

106. See Jeff Crisp, *New York Declaration on Refugees: A One-Year Report Card*, NEWSDEEPLY (Sept. 18, 2017), <https://www.newsdeeply.com/refugees/community/2017/09/18/new-york-declaration-on-refugees-a-one-year-report-card> [<https://perma.cc/ZR2F-78ER>].

107. See, e.g., James C. Hathaway et al., *Roundtable on the Future of Refugee Convention Supervision*, 26 J. REFUGEE STUD. 323, 328–29 (2013); Alysia Blackham, *A Proposal for*

Supervisory mechanisms can take shape in various forms, but they share in common procedures for collecting and assessing information related to state application of treaty provisions and a mechanism for ensuring compliance by the states concerned.¹⁰⁸

In 2001, Professor Walter Kälin proposed the creation of a “Sub-Committee on Review and Monitoring” within the ExCom’s framework to supervise compliance with the 1951 Convention, as well as to identify and resolve obstacles to its full implementation.¹⁰⁹ Another proposal envisaged the UNHCR’s establishment of an international judicial commission to produce authoritative, non-binding decisions in an effort to harmonize interpretations of the 1951 Convention.¹¹⁰ Still, other scholars believed a new, completely independent treaty body should be formed to supervise the 1951 Convention and UNHCR.¹¹¹

Over ten years later, in 2012, scholars hosted the Roundtable on the Future of the Refugee Convention Supervision, which was inspired by UNHCR’s Director of International Protection (and soon to be Assistant High Commissioner for Refugees) declaration of the need to “revisit the various ideas and suggestions that have been made over time and to examine them in the light of today’s challenges.”¹¹² At the culmination of the Roundtable, scholars recommended the creation of “a Special Committee of Experts [within the UNHCR] tasked with issuing Advisory Opinions on the interpretation and application of the Refugee Convention.”¹¹³ A group of experts consisting of “judges and other persons with recognized expertise in international refugee law”¹¹⁴ would consider

Enhanced Supervision of the Refugee Convention, 26 J. REFUGEE STUD. 392 (2013); Walter Kälin, *Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, *supra* note 35, at 614–15.

108. See Turk, *supra* note 18, at 9–10.

109. Kälin, *supra* note 107, at 657.

110. See Anthony M. North & Joyce Chia, *Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees*, 25 AUSTL. Y.B. INT’L L. 105, 105–106 (2006).

111. See Tracey Glover & Simon Russell, *Coordination with UNHCR and States*, 38 (Int’l Council Voluntary Agencies & Program Refugee & Asylum Law Univ. Mich., Working Paper No. 7, 2002).

112. Hathaway, *supra* note 107, at 330 (quoting Volker Turk, UNHCR’s Role in Supervising International Protection Standards in the Context of its Mandate, Keynote Address at the Int’l Conference on Supervising the 1951 Convention (May 17–20, 2010)).

113. *Id.* at 328.

114. *Id.* at 329.

complaints related to state compliance with the 1951 Convention.¹¹⁵

However, despite continued discussion surrounding UNHCR's inadequate supervisory power, these scholars' suggestions have not yet been adopted and the UNHCR's supervisory authority is still weak.¹¹⁶ It is the position of this Note that it is now time to reconsider and build on these scholars' recommendations within the context of the New York Declaration and enhance UNHCR's supervisory power to fully realize the Declaration's commitments to refugee protection.

III. ANALYSIS

For Volker Turk, Assistant High Commissioner for Protection, the New York Declaration is "nothing short of a miracle," because it was passed unanimously in a time when states fortified their borders to keep refugees out.¹¹⁷ This may be true, but skeptics point to restricting border controls in leader states, like the United States, as well as the hostilities asylum seekers face when fleeing their home countries or attempting to seek asylum elsewhere as serious hurdles to the realization of the New York Declaration commitments.¹¹⁸

The Compact Zero Draft posits itself as a solution to the "perennial gap" in refugee protection, which it identifies as the lack of responsibility-sharing among states and stakeholders.¹¹⁹ Yet, without explaining how a system of responsibility-sharing will be supervised or operated, the Global Compact reminds a wary reader that the commitments behind the New York Declaration is more of the same from UNHCR.¹²⁰ The creation of the GCR Commission, a supervisory body tasked with uniformly overseeing the implementation of the Global Compact on Refugees, is in the interest of all parties involved, including states, individuals, and other stakehold-

115. See Blackham, *supra* note 107, at 392.

116. See Hathaway, *supra* note 107, at 330.

117. Turk, *supra* note 21.

118. See Crisp, *supra* note 106.

119. Global Compact on Refugees Draft, *supra* note 91, ¶ 1.

120. See IRAP's Response to Zero Draft of Global Compact on Refugees, INT'L REFUGEE ASSISTANCE PROJECT (Feb. 2018), <http://www.unhcr.org/en-us/events/conferences/5a9921b57/iraps-response-zero-draft-global-compact-refugees.html> (finding it "difficult to be optimistic about this menu of positive steps," when the Zero Draft failed to outline specific steps for responsibility-sharing among states) [<https://perma.cc/J4HX-PFW4>].

ers, because it will provide guidance and necessary assistance to states and help implement a global solution to a global problem.¹²¹

Drawing on scholars' proposed mechanisms for enhancing UNHCR's supervisory authority generally, this Section recommends the creation of the GCR Commission within the UNHCR to oversee state compliance with the Global Compact on Refugees. This Section is divided in two parts: (A) a discussion of how the GCR Commission would be structured and (B) an illustration of how the GCR Commission would serve state, individual, and stakeholder interests by supervising the Global Compact on Refugees and interpreting the New York Declaration's commitments, within the context of Australia's ongoing policy of off-shore detention.

A. *The Global Compact on Refugees Commission*

The GCR Commission must provide high-level interpretative guidance like implementing the Global Compact and supporting individual states as it encounters emerging refugee situations.¹²² The GCR Commission's purpose "is not to punish states, but to offer guidance to states and help them to fulfil their obligations."¹²³ Moving away from a culture of blame, the body will facilitate conversations among states and stakeholders toward achieving collaborative, practical solutions to refugee and migration issues.

Given the unique character of the UNHCR and the 1951 Convention, there is no existing treaty monitoring body structure that can be copied.¹²⁴ However, the various proposals made for increasing the UNHCR's supervisory capacity, generally, are useful tools in considering the composition and function of a monitoring body for the New York Declaration.¹²⁵ All of the proposals share the idea of "a system by which an independent third party may investigate the compliance of a state with its obligations under the relevant Convention—including in times of emergency—and report its findings."¹²⁶ As will be discussed below, the GCR Commission

121. See Kälin, *supra* note 107, at 657.

122. See New York Declaration, *supra* note 19, ¶ 69.

123. Glover & Russell, *supra* note 111, ¶ 50 (explaining that an independent supervisory body of UNHCR would be most effective to remedy states' non-compliance with the 1951 Convention because it would provide uniformity and consistent interpretations of state responsibility).

124. See UNHCR, *Summary Conclusions: Supervisory Responsibility*, *supra* note 35, at 668–69.

125. See, e.g., Hathaway, *supra* note 107, at 330; Blackham, *supra* note 107, at 415; Kälin, *supra* note 107, at 657.

126. Blackham, *supra* note 107, at 403.

should be created under UNHCR's supervisory mandate, composed of independent experts, and be equipped to issue advisory opinions, general comments, and requests for review in regard to implementation of the Global Compact on Refugees.

1. Legal Basis and Composition of the GCR Commission

To serve its practical functions, the GCR Commission should be created under UNHCR's supervisory mandate, which member states must comply with according to Article 35(1) of the 1951 Convention.¹²⁷ Because the UNHCR is tasked with creating the Global Compact on Refugees and carrying out the New York Declaration's commitments,¹²⁸ the GCR Commission should fall under the UNHCR's mandate, so it can continue to monitor states' progress under the Declaration. The GCR Commission would harmonize with UNHCR's existing guidance and administrative structures, alleviating practical difficulties of creating a new independent body and building on the UNHCR's experience as it pertains exclusively to the New York Declaration.¹²⁹ With its legal foundation within UNHCR, the GCR Commission would be able to easily coordinate with UNHCR, thus avoiding overlapping and inconsistent interpretations.¹³⁰ Additionally, the structure of the GCR Commission ensures that guidance with respect to the New York Declaration will come from one voice,¹³¹ which is "firmly anchored in standards of international law, transparently reasoned, and experientially informed."¹³²

The GCR Commission should be composed of independent experts, such as judges and other experts in international refugee law.¹³³ It is important that these experts act in their personal capacities, as opposed to representatives of their respective states, to ensure impartiality and to strengthen the body's legitimacy.¹³⁴ Supervisory body members could be selected in a number of different ways, but under a simple, resource-saving regime, the ExCom

127. See Glover & Russell, *supra* note 111, ¶¶ 41–48 (explaining that UNHCR followed this process when establishing ExCom, as did the United Nations Economic and Social Council (ECOSOC) in the creation of Committee on Economic, Social and Cultural Rights (CESCR)).

128. See *Towards a Global Compact on Refugees*, *supra* note 96.

129. See Blackham, *supra* note 107, at 395.

130. See *id.*

131. See *id.*

132. Hathaway, *supra* note 107, at 330.

133. See *id.* at 328.

134. See Blackham, *supra* note 107, at 398–99.

could appoint members according to specific criteria.¹³⁵ The supervisory members, in turn, would elect a president and vice president to represent the body before the UNHCR.¹³⁶ Nevertheless, to assure all state interests are represented in the GCR Commission, it should be curated with a mind toward incorporating widespread and diverse geographic distribution,¹³⁷ as well as universally held and culturally particular viewpoints.¹³⁸ Because the Global Compact on Refugees prioritizes global participation and widespread responsibility-sharing, it is imperative that the composition of the GCR Commission members represent various perspectives, including those of departure and destination states.

Some scholars warn that a supervisory body under the UNHCR's control presents concerns of impartiality, and ultimately of politicization, which might undermine the body's legitimacy.¹³⁹ While such a risk cannot be entirely eradicated due to the UNHCR's dependency on state action, it would be severely curbed by the creation of an independent body, effectively removed from state control.¹⁴⁰ The risk of politicization is much smaller in an independent group than in the Draft Compact's proposed Global Support Platform, for example, which would be led by states and serviced by the UNHCR.¹⁴¹ The GCR Commission's direction would prevent politicization in the Global Support Platform because arrangements would be facilitated by an impartial independent body instead of the UNHCR.

Furthermore, despite increasing nationalistic and anti-globalization sentiments throughout the world, the New York Declaration signaled a change in states' recognition of the refugee crisis and their willingness to support a global response.¹⁴² The UNHCR should utilize this time of unity to establish a body to help realize the commitments behind the New York Declaration.

On the other hand, critics may wonder why UNHCR would be interested in outsourcing its limited supervisory capacity to a group of independent experts. As a preliminary matter, the

135. See *id.* at 399 (suggesting criteria, "including expertise, relevant experience, independence, impartiality, personal integrity, and objectivity").

136. This is similar to the process followed by the International Court of Justice. See *Presidency*, INT'L CT. JUST., <http://www.icj-cij.org/en/presidency> (last visited Jan. 26, 2019) [<https://perma.cc/U7S6-JBV6>].

137. See Kálin, *supra* note 107, at 657.

138. See Glover & Russell, *supra* note 111, ¶ 55.

139. See Blackham, *supra* note 107, at 395.

140. See *id.*; *supra* Part II.A.

141. See Global Compact on Refugees, *supra* note 93, at 5.

142. See Turk, *supra* note 21.

UNHCR would not forfeit any of its current supervisory capacities, like reporting on refugee situations or working with states to design operations responsive to their needs.¹⁴³ Instead, it would be expanding its supervisory authority by creating this Commission, like it did when it created the ExCom.¹⁴⁴ Furthermore, by taking some decision-making power from UNHCR, the independent Commission would relieve UNHCR of political pressures from member states. The GCR Commission may be willing to engage with negotiations among Australia, Nauru, and Papua New Guinea, for example, in a fashion that UNHCR would be unable to do based on its tether to state consent and support.

Recognizing that the establishment of the GCR Commission would require substantial funds, critics may ask how this flexible, operation-oriented Commission would be funded. Because the GCR Commission is within the UNHCR, it would likely receive funding in the same manner as other UNHCR activities: through the ExCom.¹⁴⁵ However, to sustain its independence, the GCR Commission should receive the majority of its funding from agencies like the International Monetary Fund and the World Bank, which have already pledged their commitment to the Global Compact.¹⁴⁶ In the absence of such funds, the UNHCR could fundraise through its Global Appeal process, or divert existing resources from the Global Compact to the GCR Commission.¹⁴⁷ Because the GCR Commission would propose and implement targeted pragmatic assistance and solutions regarding state commitments to the Global Compact on Refugees, it would be an efficient use of the Compact funds. The GCR Commission's position within the UNHCR allows for much easier funding than if the Commission did not have such institutional support.

2. Functions of the GCR Commission

Various scholars have debated different supervisory capacities that might serve UNHCR, generally, noting the possibility of state party meetings and peer reviews, enhancing the authority of the ExCom,¹⁴⁸ filing inter-state or individual complaints, issuing non-binding advisory opinions, state reporting or special procedures.¹⁴⁹

143. See UNHCR, *Summary Conclusions*, *supra* note 35, at 668–69.

144. See Glover & Russell, *supra* note 111, ¶¶ 41–48.

145. See Blackham, *supra* note 107, at 399.

146. See U.N. Doc. A/71/978, 4–5 (July 17, 2017).

147. See Blackham, *supra* note 107, at 399.

148. See *id.* at 396.

149. See *id.* at 403; Hathaway, *supra* note 107, at 328.

Drawing on these suggestions, and considering the demands unique to the New York Declaration, the GCR Commission's main functions should include issuing advisory opinions and general comments, receiving requests for review, and mobilizing operational assistance. Advisory opinions and general comments would provide high-level interpretative assistance, while requests for review and operational assistance would involve individualized assessment and collaboration with a given state or states.

The issuance of advisory opinions or general comments would provide useful guidance on issues specifically related to implementation of the New York Declaration and its Global Compact on Refugees.¹⁵⁰ Treaty bodies on global and regional scales write advisory opinions to provide direction on treaty interpretation.¹⁵¹ For the purposes of the Global Compact on Refugees, states may want clarification or guidance on their responsibilities under the Compact, which could be obtained through submitting a request to the GCR Commission for an advisory opinion. States may request advisory opinions about an issue unique to them, or more generally related to the New York Declaration. For example, Australia could seek assistance in negotiating deals with other states willing to resettle some Nauru or Manus Island refugees.

The advisory opinions should be of a non-binding, authoritative nature. Although binding opinions have the benefit of commanding compliance, it is difficult to incentivize states to bring cases forward knowing they will be bound by the decision.¹⁵² Non-binding advisory decisions are commonplace in international law, and have the advantage of allowing for a legitimate, experienced, and impartial commission to answer relevant questions about a concerned treaty, effectively preserving a snapshot of how a treaty body interpreted certain provisions at a point in time.¹⁵³

General comments are useful to the supervisory body because they allow for widespread dissemination of interpretive guidance on current issues as they pertain to the New York Declaration.¹⁵⁴ There should be a system created where the GCR Commission will answer requests for general comments from U.N. agencies, states, treaty bodies, and NGOs. The body should consult with the inter-

150. See *Towards a Global Compact on Refugees*, *supra* note 96.

151. See Kálin, *supra* note 107, at 649 (referencing the International Court of Justice (ICJ) and Inter-American Court of Human Rights).

152. See Blackham, *supra* note 107, at 394.

153. See Joanna Whiteman & Claire Nielsen, *Lessons from Supervisory Mechanisms in International and Regional Law*, 26 J. REFUGEE STUD. 360, 366 (2013).

154. See Blackham, *supra* note 107, at 398.

ested parties throughout the process of drafting the general comments to ensure that it is addressing the precise question at issue with an appropriate level of specificity.¹⁵⁵

On a narrower scale, the GCR Commission should accept requests for technical and operational assistance in responding to emerging refugee situations. Such a model would facilitate direct assistance by the Commission to a state, or a group of states, that are struggling to meet obligations under the New York Declaration. The GCR should oversee the Global Support Platform, introduced in UNHCR's Draft Compact,¹⁵⁶ by providing necessary oversight to mobilize technical support on ground and by engaging relevant stakeholders for strategic support.

A review mechanism could be organized in the following way: the GCR Commission will examine an issue, inviting affected states to submit memoranda explaining their policies.¹⁵⁷ A further investigation might be desirable where the GCR Commission could instruct UNHCR personnel to visit the states in question.¹⁵⁸ The GCR Commission should publish a concluding report during a public meeting where stakeholders, including NGOs, would be invited for comment.¹⁵⁹ Once all voices are heard and considered, the GCR Commission would instruct relevant parties of the actions they should take to mitigate the emerging refugee issue. A final report should be widely distributed as instructive guidance to the public in addition to the affected states.

The GCR Commission should be flexible, given its independence and purpose of tailoring itself to the needs of the New York Declaration. Flexibility is paramount to the GCR Commission because it must be prepared to assist each member state in interpreting its individualized commitments under the Global Compact on Refugees and to facilitate innovative responses to significant refugee situations. As such, it would be well-prepared to address contemporary issues states encounter while implementing their commitments to the Global Compact on Refugees.¹⁶⁰

An important consideration is whom, or what entities, may request review by the GCR Commission. For streamlined access to the GCR Commission, the body should hear requests from states,

155. *See id.*

156. *See supra* Parts II.C, III.A.1.

157. *See Kälin, supra* note 107, at 657.

158. *See id.* at 658.

159. *See id.*

160. *See Blackham, supra* note 107, at 394.

the High Commissioner, body members, NGOs, and other U.N. agencies. As an initial matter, it might be desirable to allow the GCR Commission to use its discretion in selecting issues it should address.¹⁶¹ However, given the inclusive nature of the New York Declaration, which seeks to mobilize all players in the field of refugee protection, it is in the GCR Commission's interest to hear questions and requests from states, NGOs, and other U.N. agencies.

States may request review of an emerging refugee situation that does not necessarily directly impact that state because the New York Declaration emphasizes the need for a global responsibility-sharing response to a global problem.¹⁶² NGOs should be welcome to bring requests because they are often in a position to know when a state is not properly following its obligations under the UNHCR, and moving forward, under the Global Compact on Refugees.¹⁶³ Similarly, to encourage uniformity in interpretation of state obligations under the New York Declaration and to ensure the U.N. speaks with one voice, other U.N. agencies should have access to the GCR Commission's request mechanism as well.¹⁶⁴

The GCR Commission will issue a final report with its findings and its suggested course of action. Critics may ask what happens should a state refuse to cooperate, either at the initial collaboration stage, or with the GCR Commission's final report. This report will be published with or without the concerned state's participation, because although cooperation is important to produce the most effective and efficient report, there is still value in providing the international community with the GCR Commission's findings. However, the Declaration's collaborative focus and the context of cooperation that made the Declaration a reality suggests that state reluctance might not be as prevalent. Any state concern should be further alleviated by the GCR Commission's priority of working with states to address and mitigate problems, rather than identifying the problem and leaving it to the state to find a solution. To prevent frivolous complaints submitted by third-party states, the GCR Commission might consider requiring the alerting state to commit to participating in the discussions toward a solution for the state under review.

Also of note are those who are excluded from accessing the GCR Commission's complaint mechanism: individuals. Allowing indi-

161. See *id.* at 397.

162. See New York Declaration, *supra* note 19, ¶¶ 1–3.

163. See Blackham, *supra* note 107, at 407.

164. See *id.* 403.

vidual complaints poses problems, at least at the GCR Commission's beginning stages, because the sheer number of complaints filed would yield an impracticable caseload.¹⁶⁵

To understand how this proposed model will operate, it is valuable to test how it would operate in the face of an actual supervision issue.

B. *Australia as an Illustration: The GCR Commission at Work*

Consider a scenario where an Australian NGO consults the GCR Commission about Australia's continued detention of asylum seekers on neighboring Nauru and Manus Island.¹⁶⁶ The NGO would submit a memorandum to the GCR Commission, highlighting Australia's failure to meet its commitments under the 1951 Convention, and how local resettlement options are not feasible. The NGO's memo should include detailed descriptions of the problem at hand, such as the hostile conditions within the detention center and the severe mental health problems developed by the asylum seekers from prolonged off-shore detention. The NGO's memo should also explain why the current procedures are not sufficient to ensure compliance with the Australia's commitments under the Global Compact on Refugees, and how it envisions the role of the GCR Commission in improving this situation.¹⁶⁷

The GCR Commission would have the discretion to decide to address the issue or not. However, given this problem's urgency and severity, this is the type of issue that would likely interest the Commission. The GCR Commission would then alert all affected parties, including Australia, Nauru, Papua New Guinea, and NGOs that have reported on the off-shore detention policy of its involvement.

Australia would then submit a memorandum explaining either why it believes its policy is in compliance with the Global Compact on Refugees or any obstacles it is facing to adhere to its obligations under the Compact, and articulating its capacity to resolve the inconsistencies between its current policy and its commitments. The other affected parties would have the opportunity to submit

165. *See id.* at 404.

166. In theory, Australia's policy could be introduced to the GCR Commission in several ways, including from a different state, U.N. agency or the Australian government. However, an Australian NGO's reporting to the GCR Commission serves the purposes of an illustration, because it will demonstrate the review procedure, address concerns, and exhibit the value of the GCR Commission.

167. *See infra*, Part III.B.

memoranda to the GCR Commission as well, ensuring the Commission has additional context and perspectives on the issue.

After a full briefing, the GCR Commission would consider the proper course of action to address the issue and work toward a solution. In this case, the Commission might request a team from the UNHCR to investigate the conditions in the off-shore detention facilities, interview relevant Australian government officials, and compile a report with first-hand information.¹⁶⁸

Next, the GCR Commission could reach out to interested parties, in addition to the affected parties, to request assistance in collaborating toward resolving Australia's non-compliance. Ideally, many states, NGOs, and other stakeholders would volunteer to participate in discussions and negotiations with the Australian government because they recognize that Australia is not alone in failing to meet its obligations to refugees within its borders, and a global solution is needed to a global problem.

Once all the interested parties and stakeholders have come together, the GCR Commission shall facilitate negotiations toward a practical solution. The Commission would maintain a collaborative, consultative approach throughout its review of Australia's off-shore detention program. The GCR Commission should prioritize being pragmatic, over bureaucratic, to achieve practical solutions.

It is important to emphasize that Australia is not left alone to keep up with its commitments under the Global Compact on Refugees. Instead, the Australian government would have the support of the international community. Moving away from a culture of blame and isolation, the GCR Commission would draw from actual experiences and successes on the international level to create innovative solutions. To answer the skeptics who question whether amicable negotiations and outcomes are realistic, such settlements are common, especially when all interested parties agree on prioritizing working toward a solution.¹⁶⁹

At the culmination of the GCR Commission's review of Australia's policies, the body would publish a final report, complete with the solutions that were adopted, and those that were not. Though it is difficult to speculate on the GCR Commission's possible rec-

168. See Kälin, *supra* note 107, at 658 (proposing a similar methodology for obtaining first-hand information in the field of a relevant issue area).

169. For example, the Friendly Settlement Procedure implemented by the Inter-American Commission on Human Rights has been widely regarded as a successful system to engage with parties in a non-adversarial setting to work toward a solution. See Inter-Am. Comm'n H.R., *Impact of the Friendly Settlement Procedure*, OEA/Ser.L/V/II. Doc. 45/13 (Dec. 2013).

ommendations for the Nauru asylum seekers, given its access to interested states and stakeholders, the GCR Commission will have vast resources to aid Australia's asylum seekers detained off-shore. For example, the GCR Commission might reach out to and work with other states willing to resettle the asylum seekers and facilitate arrangements between Australia and these interested states.¹⁷⁰ Alternatively, the GCR Commission might work with Australia to compromise by resettling the asylum seekers within its borders and then helping the Australian government develop a network of states safe for resettlement of asylum seekers arriving to Australia's borders by boat, as a mechanism for responsibility-sharing.

Even if Australia fails to cooperate with the GCR Commission's conclusions, the ideas discussed throughout the collaborative process would contribute to the establishment of best practices that will guide states and stakeholders as they work to implement their own commitments to the Global Compact on Refugees. These conclusions might prove insightful to other affected parties like Nauru, Papua New Guinea or Australian NGOs that may take action consistent with the GCR Commission's conclusions, even if Australia does not.

For example, Nauru or Manus Island could follow-up with the GCR Commission to ask how it can cooperate with neighboring Australia, while protecting the human rights of asylum seekers within their borders. Recognizing that individual state policies are not isolated, but are reactions to a global problem of unpreparedness to manage large human mobility and migration flows, will help to reinforce the value of the GCR Commission's work on a smaller scale.

IV. CONCLUSION

The New York Declaration stands as a symbol of hope in an era of unprecedented human mobility, where states falter under their obligations to the UNHCR. Yet, the Declaration and its Global Compact on Refugees will be more of the same—where states choose to cooperate with UNHCR when convenient—unless the

170. This could result in an agreement similar to that facilitated by the U.S., where Australia would resettle the Nauru and Manus Island asylum seekers to Central America. However, it would have the benefit of consistency, unlike the U.S. facilitated agreement, which came to a grinding halt once the Trump Administration took over. See Katharine Murphy & Ben Doherty, *Trump Lashes 'Dumb Deal' with Australia on Refugees After Fraught Call with Turnbull*, GUARDIAN (Feb. 1, 2017), <https://www.theguardian.com/australia-news/2017/feb/02/trump-told-turnbull-refugee-agreement-was-the-worst-deal-ever-report> [<https://perma.cc/9KQ9-ZELP>].

UNHCR strengthens its supervisory capabilities. Humanity owes it to the asylum seekers on Nauru and Manus Islands, and to the other 22.5 million refugees who risk their lives every day to find safety and freedom, to ensure the New York Declaration is a workable, global solution to a global problem.

By establishing the GCR Commission, the UNHCR will take the necessary step toward realizing the commitments behind the Declaration. Should the Commission prove successful, its model could easily adapt to serve the Global Compact for Migration or UNHCR more generally. After decades of debate with no action, the time is ripe for change.