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**Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms**

## Human rights and international solidarity

### Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Independent Expert on human rights and international solidarity, Obiora Chinedu Okafor, submitted in accordance with Human Rights Council resolution [35/3](#).

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\* [A/74/50](#).



## **Report of the Independent Expert on human rights and international solidarity\*\***

### *Summary*

This is the second report prepared for the General Assembly by the Independent Expert on human rights and international solidarity, Obiora Chinedu Okafor. In this report, submitted pursuant to Human Rights Council resolution [35/3](#), the Independent Expert discusses the issues and problems raised in global refugee protection by the enjoyment, or lack thereof, of human rights-based international solidarity.

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## I. Introduction

1. In his first report to the General Assembly ([A/73/206](#)), the Independent Expert considered the place and functioning of human rights-based international solidarity in the global migration context. In this second report to the General Assembly, he engages with a similar – though distinct – theme, namely, the enjoyment, or lack thereof, of human rights-based international solidarity in global refugee protection. Given the serious refugee protection issues that currently face the world, and in the light of the recent adoption of a global compact on refugees,<sup>1</sup> the Independent Expert considered it timely and important to focus on this theme.

2. This is mainly because, as the former Secretary-General, Ban Ki-Moon, noted recently, although approximately 285 million people in total have fled their homes since the world has had reliable data on such population movements (only 60 million or so of whom have managed to appear on official registers as refugees and internally displaced persons), the world does not in fact face “a crisis of numbers” but instead faces “a crisis of solidarity”.<sup>2</sup> Given the relative puniness of the total number of persons around the world who have attempted to seek refuge within or outside their home countries over the past few years (only about 0.3 per cent of the world’s population),<sup>3</sup> the contemporary refugee protection “crisis”,<sup>4</sup> as it is characterized in the media and academe,<sup>5</sup> cannot be logically understood as a crisis of numbers. For as relatively tiny as the global numbers of refugees actually are,<sup>6</sup> this “crisis” is clearly much more a function of the unwillingness of all too many States to accept as many refugees as they could and should, rather than a consequence of the perceived magnitude of the overall numbers of those who need protection. Moreover, while just 10 global North States provide 75 per cent of the United Nations refugee protection budget, only eight global South countries host 90 per cent of the world’s refugees.<sup>7</sup> In sum, the current refugee protection “crisis” is clearly a crisis of “equitable responsibility-sharing”,<sup>8</sup> and thus a crisis of international solidarity par excellence.

3. The report is divided into six sections. This first section introduces the report. In section II, a brief background on human rights-based international solidarity in global refugee protection is provided. Section III is devoted to a discussion and analysis of positive expressions of human rights-based international solidarity in global refugee protection. In section IV, key human rights-based international solidarity gaps in global refugee protection are identified and analysed. Section V focuses on the abusive deployment of international solidarity in global refugee protection. Section VI offers brief concluding remarks and recommendations for human rights-based reform of the global refugee protection regime. The Independent Expert uses the term “refugees” to refer to both accepted refugees and asylum seekers.

<sup>1</sup> See *Official Records of the General Assembly, Seventy-third Session, Supplement No. 12 (A/73/12 (Part II))*.

<sup>2</sup> See Ban Ki-Moon, “Refugees and migrants: a crisis of solidarity”, 9 May 2016 (accessed on 10 January 2019).

<sup>3</sup> See B. S. Chimni, “The global refugee crisis: towards a just response”, Global Trends Series No. 3 (2018), Bonn, Germany, Stiftung Entwicklung und Frieden. See also Amnesty International, *Tackling the Global Refugee Crisis: From Shrinking to Sharing Responsibility* (London, Amnesty International, 2016), p. 6.

<sup>4</sup> See Itamar Mann, *Humanity at Sea* (Cambridge University Press, 2016), p. 3.

<sup>5</sup> See Ibrahim Awad and Usha Natarajan, “Migration myths and the global south”, *The Cairo Review of Global Affairs* (summer 2018) (accessed on 10 January 2019).

<sup>6</sup> See Usha Natarajan, “Governing migration in an era of climate change: authority, legitimacy and the contestation through international law” (on file with the author).

<sup>7</sup> See footnote 2 above.

<sup>8</sup> *Ibid.*

## II. A brief background on human rights-based international solidarity in global refugee protection

4. The concept of international solidarity is not new in the context of international refugee protection. It was articulated in the Convention relating to the Status of Refugees, of 1951.<sup>9</sup> The drafters of the Convention recommended “that Governments ... act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement”.<sup>10</sup> Similarly, in the fourth preambular paragraph of the 1951 Convention, the drafters again underscored the imperative necessity of international solidarity in helping to ease the responsibility of providing international protection to refugees.<sup>11</sup>

5. International solidarity is therefore a foundational principle undergirding the provision of international protection to refugees. It is based on the understanding that the challenge of refugee flows is international in scope,<sup>12</sup> the resolution of which required a true spirit of unity of purpose, even beyond the contractual scope of the obligations that States assumed under the 1951 Convention and other international human rights instruments. The drafters of the Convention understood that international solidarity and the international protection of refugees are part of the normative value system affirmed in the Charter of the United Nations and the Universal Declaration of Human Rights, adopted in 1945 and 1948, respectively.<sup>13</sup>

6. In the global refugee protection context, there is certainly no doubt that the solidarity principle imposes – at the very least – a soft international legal obligation on United Nations Member States. Thus, Türk and Garlick stand on firm ground when they point to the Declaration concerning Friendly Relations, of 1970, as an important interpretive tool in international law that allows us to read several treaties as containing an international obligation to cooperate in the social, political and economic spheres, including the global refugee protection area.<sup>14</sup> As the draft declaration on the right to international solidarity prepared by my predecessor acknowledges, international cooperation is one aspect of international solidarity, and the logic is applicable to at least one dimension of the latter.<sup>15</sup> As Türk and Garlick correctly observe, the formally non-binding preamble to the Convention relating to the Status of Refugees implies a duty among States to cooperate to ameliorate “unduly heavy [refugee protection] burdens on certain countries”.<sup>16</sup> Furthermore, the Executive Committee of the Programme of the United Nations High Commissioner for Refugees has repeatedly referred to the role of international cooperation as an essential principle that States should adhere to.<sup>17</sup> Its conclusions can be properly

<sup>9</sup> United Nations, *Treaty Series*, vol. 189, No. 2545.

<sup>10</sup> *Ibid.*, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. Held at Geneva from 2 July 1951 to 25 July 1951.

<sup>11</sup> See footnote 9 above.

<sup>12</sup> See General Assembly resolution 319 (IV) of 3 December 1949.

<sup>13</sup> First preambular paragraph of the 1951 Convention (see footnote 9 above).

<sup>14</sup> See Volker Türk and Madeline Garlick, “From burdens and responsibilities to opportunities: the comprehensive refugee response framework and a global compact on refugees”, *International Journal of Refugee Law*, vol. 28, No. 4 (2016), p. 659; see the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex).

<sup>15</sup> [A/HRC/35/35](#), annex.

<sup>16</sup> See Türk and Garlick, p. 659. See also the preamble to the 1951 Convention relating to the Status of Refugees: considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of [this] problem ... cannot therefore be achieved without international cooperation.

<sup>17</sup> Türk and Garlick, p. 660.

characterized as soft international law. Several formally non-binding General Assembly resolutions also reinforce this conclusion.<sup>18</sup> Perhaps even more importantly, Türk and Garlick are also correct to argue that the pledge by all Member States in Articles 55 and 56 of the Charter to “take joint and separate action in cooperation” in order to achieve such human rights goals as global refugee protection, imposes a hard “legal obligation for states to cooperate with each other in regard to refugee matters, directly among themselves and via cooperation with the Office of the United Nations High Commissioner for Refugees (UNHCR)”.<sup>19</sup> In the context of the more general formulation of the international solidarity obligation in global refugee protection, including in relation to responsibility-sharing, this Charter argument also applies. Regional hard law international solidarity obligations also exist in relation to Africa<sup>20</sup> and the European Union.<sup>21</sup> In addition, several soft international law instruments explicitly provide for similar obligations, including the General Assembly Declaration on Territorial Asylum of 1967 and a number of Executive Committee conclusions.<sup>22</sup> A similar regional soft international law obligation exists in relation to the Americas.<sup>23</sup>

7. Against the background of the existence of hard and soft international solidarity obligations in relation to refugee protection at the global and regional levels, it is noteworthy here as well that, although applicable only in one domestic context, the recent decision of the French Constitutional Court holding that the French farmer Cedric Herrou was not guilty of smuggling migrants, including asylum seekers, into France because he acted under “the principles of fraternity [i.e. solidarity]”, is highly instructive on a number of fronts.<sup>24</sup> First, it was the very first time that a top-level French court such as this one, or any other court that the Independent Expert knows of, has found that “fraternity [i.e. solidarity] is a constitutional principle”.<sup>25</sup> Second, the case is also remarkable for its close relevance to global refugee protection: it has deeply positive implications for the safety from prosecution or other forms of suppression of persons in one major country of destination who show solidarity to undocumented asylum seekers and, therefore, for the struggle against the criminalization of such people in all too many countries around the world. Third, the case can help to catalyse change in how state and society alike in major destination countries tend to deal with those who stand with and express solidarity towards those who seek refuge in those lands. Fourth, the case may inspire top-level courts in similarly situated countries to find similarly, leading to significant expansions in the sociolegal and geopolitical zones of safety for persons who express solidarity with asylum seekers. Lastly, these developments may in turn result in a corresponding decrease at the global level in the ranks of the opponents of the view that the international solidarity principle can, and does, impose certain legal obligations on States and other actors.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> See Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, of 10 September 1969 (United Nations, *Treaty Series*, vol. 1001, No. 14691), art. II.

<sup>21</sup> See Consolidated version of the Treaty on the Functioning of the European Union (Official Journal of the European Union, C 326/47), art. 80.

<sup>22</sup> See General Assembly resolution 2312 (XXII) of 14 December 1967, Declaration on Territorial Asylum, art. 2 (2); and, for example, Executive Committee conclusion No. 52 (XXXIX), 1988, on international solidarity and refugee protection (see *Official Records of the General Assembly, Forty-third Session, Supplement No. 12A (A/43/12/Add.1)*), paras. 3 and 4.

<sup>23</sup> See Cartagena Declaration on Refugees of 1984 (and follow-up Declarations and Plans of Action). Available at [www.oas.org/dil/refugees\\_pertinents\\_legal\\_instruments.htm](http://www.oas.org/dil/refugees_pertinents_legal_instruments.htm).

<sup>24</sup> Conseil constitutionnel, Décision n° 2018-717/718 QPC du 6 juillet 2018: M. Cédric H. et autre [Délit d’aide à l’entrée, à la circulation ou au séjour irréguliers d’un étranger], paras. 7–15.

<sup>25</sup> Ibid.

8. The imperative of providing international protection to refugees enjoins States to embrace international solidarity as a core value that drives and enhances their coordinated efforts, in collaboration with other actors, in promoting and respecting the rights of refugees. While the 1951 Convention guarantees certain rights to refugees that are consistent with their special situation or circumstances, the rights of refugees and the obligation of States to protect members of this group extend beyond the protections guaranteed in the 1951 Convention to include rights guaranteed under other international and regional human rights instruments, applicable to all persons.<sup>26</sup> For example, international human rights instruments such as the International Covenant on Civil and Political Rights,<sup>27</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>28</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>29</sup> the International Convention on the Elimination of All Forms of Racial Discrimination<sup>30</sup> and the Convention on the Rights of the Child<sup>31</sup> contain principles, standards and norms that enhance the protection of the rights of refugees, including their rights to life, to seek and enjoy protection from persecution in other countries, and family unity.

### **III. Positive expressions of human rights-based international solidarity in global refugee protection**

#### **A. Country-level laws and practices**

##### **Refugee-specific national legislation as acts and drivers of international solidarity**

9. Refugee-specific national laws that incorporate the standards of international refugee law are critical to effective global refugee protection and are positive demonstrations of human rights-based international solidarity. The protections guaranteed refugees in the 1951 Convention, such as protection against refoulement (article 33) and non-penalization for irregular entry into or presence in the territories of States (article 31) become effective in some jurisdictions only when incorporated in one way or the other into national legislation. Some States, for example, have national refugee-specific legislation that explicitly prohibits the extradition of a refugee,<sup>32</sup> while others have extradition legislation that does the exact same thing.<sup>33</sup> In addition, many States around the world have national legislation that provides that refugees should not be penalized for irregular entry into the country.<sup>34</sup> Indeed, several countries have enacted laws and developed practices aimed at ensuring the effective provision of international protection to refugees within their territories. Moreover, several States parties to the 1951 Convention and other international refugee protection treaties and instruments have enacted national legislation that incorporates the international standards set forth in those instruments. In Latin America, for example, as of January 2011, all States parties to the 1951 Convention (and/or the

<sup>26</sup> See, for example, article 2 (1) of the International Covenant on Civil and Political Rights; and article 2 of the African Charter on Human and Peoples' Rights.

<sup>27</sup> See United Nations, *Treaty Series*, vol. 999, No. 14668.

<sup>28</sup> *Ibid.*, vol. 993, No. 14531.

<sup>29</sup> *Ibid.*, vol. 1465, No. 24841.

<sup>30</sup> *Ibid.*, vol. 660, No. 9464.

<sup>31</sup> *Ibid.*, vol. 1577, No. 27531.

<sup>32</sup> See, for example, Office of the United Nations High Commissioner for Refugees (UNHCR) and the Inter-Parliamentary Union, *A Guide to International Refugee Protection and Building State Asylum Systems* (Handbook for Parliamentarians No. 27, 2017), p. 72.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, p. 95.

1967 Protocol thereto<sup>35</sup>) have enacted national refugee legislation, which incorporates and operationalizes the provisions of the Convention.<sup>36</sup> In addition, at least 14 countries in this region have incorporated into their national legislation the broader definition of the term refugee set out in the Cartagena Declaration.<sup>37</sup>

#### **Admission of refugees into a State as an act of international solidarity**

10. It is a well-known fact that many countries around the world, including some of the most impoverished, have taken in very large numbers of refugees, both in terms of absolute numbers and relative to the size of their available resources. For example, in 2017, developing countries, despite their limited resources, hosted 85 per cent of the world's refugee population (that is, those under the mandate of UNHCR).<sup>38</sup> Sub-Saharan African States hosted about 6.3 million refugees, or one third of the world's refugee population, in 2017.<sup>39</sup> By mid-2018, the number had increased to 6.4 million, with Kenya, Ethiopia, the Sudan, Uganda and the United Republic of Tanzania hosting the majority of them.<sup>40</sup> Asia and the Pacific region during this same period hosted 4.2 million refugees or about 21 per cent of the world refugee population.<sup>41</sup> The Middle East and North Africa hosted 2.7 million refugees or 14 per cent of the world refugee population.<sup>42</sup> The Americas hosted 664,200 refugees or 3 per cent of the refugee population under the UNHCR mandate. In Europe, Germany played host to over 900,000 refugees in 2017. Turkey remains the country that hosts the largest number of refugees in the world, with 3.5 million people.<sup>43</sup>

#### **Humanitarian exemptions to anti-human smuggling and trafficking legislation**

11. Although many States around the world criminalize those expressing solidarity to refugees by assisting their irregular entry or presence on their territories, and even though those States do so without significant regard to the humanitarian nature of the act,<sup>44</sup> a small number of States have now enacted clauses in their laws introducing humanitarian exemptions to these offences. This issue is discussed in detail in my report of April 2019 to the Human Rights Council.<sup>45</sup>

### **B. The laws and practices of cities**

12. Cities have tended to be the destination of choice for refugees, especially those fleeing from urban settings in their countries of origin.<sup>46</sup> Yet, for several decades, many national authorities and international organizations have, for various reasons, ignored the important role that cities play in refugee protection.<sup>47</sup> However, some of

<sup>35</sup> United Nations, *Treaty Series*, vol. 606, No. 8791.

<sup>36</sup> See, for example, UNHCR, "Recent developments on refugee protection: Meeting of the Regional Consultation on Migration, Tapachula, Mexico, 18–20 May 2010".

<sup>37</sup> For the text of the Declaration, see [www.oas.org/dil/refugees\\_pertinents\\_legal\\_instruments.htm](http://www.oas.org/dil/refugees_pertinents_legal_instruments.htm).

<sup>38</sup> See, for example, UNHCR, *Global Trends: Forced Displacement in 2017* (Geneva, 2018), p. 2.

<sup>39</sup> *Ibid.*, p. 13.

<sup>40</sup> See UNHCR, *Mid-Year Trends 2018*, p. 6.

<sup>41</sup> UNHCR, *Global Trends*, p. 14.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*, p. 3.

<sup>44</sup> See Mark Provera, *The Criminalisation of Irregular Migration in the European Union*, CEPS Paper in Liberty and Security in Europe, No. 80 (Brussels, Centre for European Policy Studies, February 2015), p. 17.

<sup>45</sup> [A/HRC/41/44](https://www.unhcr.org/refugees/41/44).

<sup>46</sup> See, for example, Robert Muggah, "Refugees from Venezuela are fleeing to Latin American cities, not refugee camps", *The Conversation*, 25 September 2018.

<sup>47</sup> See, for example, Robert Muggah and Adriana Erthal Abdenur, "Refugees and the city: the twenty-first-century front line", World Refugee Council Research Paper No. 2 (Waterloo, Canada, Centre for International Governance Innovation and World Refugee Council, July 2018).

these authorities and organizations are now gradually coming to terms with the reality of this city-driven human rights-based international solidarity with refugees.<sup>48</sup>

13. Cities around the world have developed a range of strategies for dealing with the direct consequences of anti-refugee/immigrant laws, policies and practices that their central governments have issued.<sup>49</sup> In some instances, cities have had “to navigate and/or counter government policies or measures”.<sup>50</sup> Thus, many cities in Europe, such as Barcelona, Frankfurt, Madrid and Utrecht, are leading the charge for more open and fair refugee and immigration laws, policies and practices, and they have done so through the adoption of tactics ranging from protest to outright defiance of national refugee/migration initiatives, to proactive legislation, policies and practices on the integration of refugees and migrants.<sup>51</sup>

14. Many cities have also become acutely aware of the consequences of failing to welcome and integrate refugees, and a significant number of cities around the world have made efforts to express human rights-based international solidarity with refugees, whatever their status. For instance, EUROCITIES, an umbrella organization for European cities, has identified two critical consequences when cities fail in this regard.<sup>52</sup> In the first place, this “impedes the respect of fundamental rights as well as the full realization of the benefits immigration can bring”.<sup>53</sup> Secondly, it inhibits refugees from contributing “to host societies and can prove costly in the long term for local as well as for national authorities”.<sup>54</sup> EUROCITIES has also engaged the European Union on the “sharing of responsibility and solidarity across Europe” for the protection of refugees.<sup>55</sup> In one North American State, more than 100 cities have declared themselves “sanctuary cities” that, as much as is possible, do not cooperate with the immigration authorities of their central government, who seek to deport and deny services to irregular refugees.<sup>56</sup> In Latin America, the cities of solidarity framework allows cities or municipalities to take the lead in identifying the needs of refugees and asylum seekers; evaluating the conditions of refugees living under their jurisdictions; and establishing plans to address the needs and improve the conditions of refugees.<sup>57</sup> In Africa, cities have tended to be more peripheral to the formal formulation and implementation of refugee policy. Even in countries with refugee-friendly legislation, the role of cities in refugee protection is not clearly stipulated.<sup>58</sup> This does not, however, mean that refugees are not in practice received and helped in many African cities.<sup>59</sup>

15. On the whole, many cities have in various ways expressed human rights-based international solidarity with (irregular) refugees, and have thus assisted States both

<sup>48</sup> Ibid.

<sup>49</sup> See Harald Bauder, “Sanctuary cities: policies and practices in international perspective”, *International Migration*, vol. 55, No. 2 (April 2017), p. 175.

<sup>50</sup> See Provera, *The Criminalisation of Irregular Migration in the European Union* (footnote 44 above), p. 31.

<sup>51</sup> See Jessica Bither and Paul Castello, “Cities across the Atlantic raise their voices for migrants and refugees”, 28 February 2017 (published online by the German Marshall Fund of the United States).

<sup>52</sup> EUROCITIES, “EUROCITIES statement on asylum in cities”, 12 May 2015.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid., p. 3.

<sup>56</sup> Muggah and Abdenur, “Refugees and the city” (see footnote 47 above), p. 9.

<sup>57</sup> Organization of American States, Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (16 November 2004). Available at [www.oas.org/dil/mexico\\_declaration\\_plan\\_of\\_action\\_16nov2004.pdf](http://www.oas.org/dil/mexico_declaration_plan_of_action_16nov2004.pdf).

<sup>58</sup> See, for example, Ingrid Palmay, “Refugees, safety and xenophobia in South African cities: the role of local government”, undated report for the Centre for the Study of Violence and Reconciliation.

<sup>59</sup> Ibid.

in meeting their international human rights obligations and in acting in the spirit and letter of the draft declaration on human rights and international solidarity.

### C. Civil society practices

16. Progressive civil society organizations in many countries around the world continue to express human rights-based international solidarity with refugees. While many civil society organizations in different countries undertake various activities of this kind, such as conducting search and rescue missions at sea to save refugees in distress; providing shelter, food, clothing, treatment, free legal services, legal reforms; and facilitating the integration of refugees into host communities through skills training for refugees, a couple of examples will suffice to illustrate this point here.

17. In one country, the Government issued a directive in 2016 to the effect that it had disbanded its refugee department and was working on mechanisms for the closure of the two refugee camps in the country within the shortest time possible.<sup>60</sup> This decision, were it to have been implemented, would have resulted in the forcible return of refugees from more than five countries to their countries of origin, where the conditions that forced them to flee and seek international protection were still prevalent. Some civil society organizations, in collaboration with that State's national human rights institution, filed a constitutional petition challenging the Government's decision to close the camps as breaches of several provisions of the country's Constitution and its international obligations under both the 1951 Convention, its related 1967 Protocol, and the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>61</sup> The court held, inter alia, that the Government's decision to close the refugee camps breached that country's domestic law as well as its international obligations under the 1951 Convention and the 1969 OAU Convention, and restrained the Government from implementing the decision at issue.<sup>62</sup>

18. Civil society organizations have also worked hard in many States to express solidarity with refugees through the provision of access to their socioeconomic rights. In one State, the activism of civil society organizations, including religious-based ones, has been critical to ensuring that refugees in one of the main cities in that State have continued to enjoy access to food, shelter and health services.<sup>63</sup> In one city, a leading religious civil society organization lobbied and negotiated with the city's main hospital management to restore the access of refugees to its health services, which had been cut off because of allegations that they abused it.<sup>64</sup> The agreement requires refugees to obtain a reference from that organization before the hospital in question will allow them to access its services.<sup>65</sup> Yet another civil society organization helps refugee children to access educational services, especially primary and

<sup>60</sup> See Kenya, National Commission on Human Rights and Legal Advice Centre Kituo Cha Sheria v. Attorney General and 3 Others, Constitutional Petition No. 226 of 2016, Judgement delivered 9 February 2017.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Steven Robins, "Humanitarian aid beyond 'bare survival': social movement responses to xenophobic violence in South Africa", *American Ethnologist*, vol. 36, No. 4 (November 2009), pp. 637–650.

<sup>64</sup> See Dieudonné Bikoko Mkombo, "The role of civil society in promoting greater social justice for forced migrants in the inner city of Johannesburg", thesis, Master of Science in Development Planning, Faculty of Engineering and Built Environment, University of Witwatersrand, Johannesburg, 2006).

<sup>65</sup> Ibid.

secondary education; it provides bursaries and seeks exemptions from payment of school fees.<sup>66</sup>

19. Pithily put, these kinds of civil society practices are positive expressions of human rights-based international solidarity in global refugee protection because refugees are as entitled to enjoy their internationally guaranteed human rights as any other human being. The fact that they are refugees does not detract in any way from their entitlement to almost all human rights. As such, it is – prima facie – a pro-human rights act, and therefore, a positive international solidarity practice, to facilitate the enjoyment of such rights by (irregular) refugees.

#### D. Regional laws and practices

20. Some regions have developed their own normative frameworks designed, at least in part, to ground and facilitate the protection of refugees, and thus to encourage to some degree the expression of human rights-based international solidarity to such persons. In Asia, a group of States have adopted a regional cooperation framework,<sup>67</sup> which incorporates refugee protection issues within the broader framework of the people-trafficking and smuggling-focused Bali Process.<sup>68</sup> Some of the key issues relating to refugee protection that the framework addresses include the provision of access to refugee status determination procedures to refugees, either “through a set of harmonized arrangements or through the possible establishment of regional assessment arrangements”.<sup>69</sup> The formally non-binding Bangkok Principles on Status and Treatment of Refugees of 1966 (as revised in 2001) adopted by the Asian-African Legal Consultative Organization remain the closest thing to a regional legal and normative framework for refugee protection in Asia.<sup>70</sup>

21. In Africa, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa provides a regional legal framework that enjoins member States to approach refugee protection on the continent in “the spirit of African solidarity and international cooperation”.<sup>71</sup> Inter alia, the Convention recognizes the need for responsibility-sharing among African Union member States and the importance of solidarity and cooperation in sharing the responsibility of hosting refugees; and exhorts those States to abstain from rejecting refugees at the frontiers of their territories, returning or expelling refugees to territories where there are threats to their lives, physical integrity or liberty.<sup>72</sup>

<sup>66</sup> Ibid.

<sup>67</sup> Surat Suwannikkha, “The regional cooperation framework and the Bali Process – an overview”, published online by UNHCR; Kate Jastram, “Regional refugee protection in comparative perspective: lessons learned from the Asia-Pacific, the Americas, Africa, and Europe” (Sydney, Australia, Andrew & Renata Kaldor Centre for International Refugee Law, University of New South Wales, Policy Brief No. 2, November 2015).

<sup>68</sup> Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime; see [www.baliprocess.net/](http://www.baliprocess.net/).

<sup>69</sup> Suwannikkha, “The regional cooperation framework and the Bali Process” (see footnote 67 above).

<sup>70</sup> For the final text of the Bangkok Principles on Status and Treatment of Refugees, as adopted on 24 June 2001 at the fortieth session of the Asian-African Legal Consultative Organization, New Delhi, see [www.aalco.int/final%20text%20of%20bangkok%20principles.pdf](http://www.aalco.int/final%20text%20of%20bangkok%20principles.pdf).

<sup>71</sup> See OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (footnote 20 above), art. 2, para. 4.

<sup>72</sup> Ibid., art. 2, paras. 3 and 4.

22. In Latin America,<sup>73</sup> several ideas and practices that enhance human rights-based international solidarity with refugees have been developed and implemented. Some are embodied in the Cartagena Declaration on Refugees of 1984.<sup>74</sup> This Declaration is non-binding and, among other things, contains some principles on assisting refugees. Another example is the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America.<sup>75</sup> The Mexico Declaration is unique among similar declarations because it explicitly provides for three innovative and solidarity-based programmes for sustainable solutions to the problems faced by refugees and their host communities. These include the solidarity cities programme, which aims “to provide effective protection” to refugees, through the facilitation of the “enjoyment of [their] social, economic and cultural rights”, and the resettlement programme, which emphasizes responsibility-sharing among States.<sup>76</sup>

23. The European Union has also adopted some legal and policy measures in support of refugees, and its member States have acted within its auspices to strive for solidarity with each other, and with refugees, in sharing the responsibility of hosting refugees who arrive in the European Union area.<sup>77</sup> One positive effort made by the European Union to strengthen international solidarity for refugees is its effort to strengthen the rights of unaccompanied minors who migrate to European Union member States. The European Union has enacted policies which will prevent minors from being transferred from one European Union State to another, and mandated that member States must give minors the chance to apply for protection once they enter the European Union.<sup>78</sup>

## E. Global laws and practices

24. Certain global-level laws and practices have the potential to enhance, or have had the effect of enhancing, human rights-based international solidarity in the global refugee protection context. The 1951 Convention and its Protocol of 1967 have established universal legal standards for the international protection of refugees. The regime established by the two treaties enhances human rights-based international solidarity in the area of refugee protection in part because it specifies the global legal obligations of States parties to accept and protect refugees. Three decades ago, the Executive Committee of the Programme of the United Nations High Commissioner for Refugees adopted a conclusion on international solidarity in global refugee protection and stressed the fundamental role that this principle plays in the effective provision of protection to refugees.<sup>79</sup>

<sup>73</sup> See, for example, the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (Mexico City, Mexico, 16 November 2004) (see footnote 57 above).

<sup>74</sup> For the text of the Cartagena Declaration, see [www.oas.org/dil/refugees\\_pertinents\\_legal\\_instruments.htm](http://www.oas.org/dil/refugees_pertinents_legal_instruments.htm).

<sup>75</sup> See footnote 73 above.

<sup>76</sup> See Mexico Declaration and Plan of Action (footnote 57 above), chap. three, “Durable solutions”.

<sup>77</sup> European Parliament, “Migration and asylum: a challenge for Europe”, fact sheet on the European Union, 18 June 2018, pp. 4 and 8.

<sup>78</sup> See “European Union: new rules on unaccompanied minors entering the EU illegally” (Washington, the Library of Congress, Global Legal Monitor, 9 July 2014).

<sup>79</sup> Executive Committee conclusion No. 52 (XXXIX), 1988, on international solidarity and refugee protection (see *Official Records of the General Assembly, Forty-third Session, Supplement No. 12A (A/43/12/Add.1)*).

25. Much more recently, the formally non-binding New York Declaration for Refugees and Migrants<sup>80</sup> upheld the principles of international refugee protection stipulated in the 1951 Convention. Crucially, the Declaration included a comprehensive refugee response framework to deal with situations of mass refugee movements, and set out steps towards the adoption of a global compact on refugees. In December 2018, the General Assembly affirmed the global compact on refugees.<sup>81</sup> Among other things, the global compact “represents the political will and ambition of the international community as a whole for strengthened cooperation and solidarity with refugees and affected host countries”.<sup>82</sup> The adoption of the global compact is thus further – if limited – evidence of the positive expression of human rights-based international solidarity in global refugee protection law and practice.

26. Certain international human rights instruments further reinforce the human rights-based international solidarity framework for refugee protection set out in the 1951 Convention. For example, article 22 of the Convention on the Rights of the Child<sup>83</sup> categorically enjoins States parties to put in place appropriate measures that guarantee that a child already recognized as a refugee, or a child still seeking refugee status, receives “appropriate protection and humanitarian assistance in the enjoyment of the applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties”.

27. The practice of the treaty bodies overseeing the implementation of international human rights instruments has helped to develop and even intensify, at least at the normative level, the principle of human rights-based international solidarity in global refugee protection. A notable example is general comment No. 23 of the Committee on Economic, Social and Cultural Rights, on the right to just and favourable conditions of work under article 7 of the International Covenant on Economic, Social and Cultural Rights.<sup>84</sup> This general comment establishes that the concept of work and workers under that provision includes refugee workers,<sup>85</sup> and that “the right to just and favourable conditions of work is a right of everyone” (refugees included).<sup>86</sup> Crucially, the Committee calls on States parties to “enact legislation enabling refugees to work and under conditions no less favourable than for nationals”.<sup>87</sup> Similarly, the Committee on the Rights of the Child adopted general comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin.<sup>88</sup> This general comment is a positive expression of human rights-based solidarity on the global level in the jurisprudence and workings of an important and relevant body.

#### **IV. Key human rights-based international solidarity gaps in global refugee protection**

28. There are extensive human rights-based international solidarity gaps in the responses of States and other stakeholders to global refugee flows. These gaps have all too often helped to produce negative consequences for the human rights of

<sup>80</sup> General Assembly resolution 71/1.

<sup>81</sup> See General Assembly resolution 73/151 and *Official Records of the General Assembly, Seventy-third Session, Supplement No. 12 (A/73/12 (Part II))*.

<sup>82</sup> *A/73/12 (Part II)*, para. 4.

<sup>83</sup> See United Nations, *Treaty Series*, vol. 1577, No. 27531.

<sup>84</sup> See *E/C.12/GC/23*.

<sup>85</sup> *Ibid.*, para. 4.

<sup>86</sup> *Ibid.*, para. 5.

<sup>87</sup> *Ibid.*, para. 47 (i).

<sup>88</sup> See *CRC/GC/2005/6*.

refugees. These gaps, highlighted in our time by the current iteration of “the problem of the universal boatperson”,<sup>89</sup> exist in several dimensions, contexts and issue areas.

## A. Intra-European Union and Council of Europe gaps

29. While, in theory, the legal framework of the European Union Common European Asylum System provides “common standards for the treatment of all asylum seekers and applications”, based on international refugee law, important gaps continue to exist in the way some European Union member States have in practice applied and implemented the obligations they owe to refugees under the 1951 Convention. While the European Union is an important regional actor experiencing significant global refugee flows from outside its external borders, the division of responsibility for the management and absorption of such flows has not been as fair as it could be, whether it is assessed on a per capita basis or in terms of the aggregate amount of resources available to the each of the States at issue. In practice, three or so States have, at least until recently, tended to assume the bulk of this responsibility.<sup>90</sup> The recent spat between two European Union States, over the refusal of one of them to let a ship that had rescued refugees and migrants in distress at sea disembark those persons at one of its sea ports, aptly illustrates that States increasingly fail to express human rights-based international solidarity to refugees.<sup>91</sup> It also exemplifies the inability of the Common European Asylum System to provide a clearer, more structured and more equitable, distribution of the refugee protection responsibility among European Union States, leading to certain of those States doing much less than others, and thus to gaps in the expression of human rights-based international solidarity to refugees.

30. In some European Union member States, there are numerous obstacles that bar potential refugees from accessing refugee status determination procedures.<sup>92</sup> In this context, refugees are exposed to the real risk of arbitrary refoulement in violation of article 33 of the 1951 Convention. For example, the European Court of Human Rights has held, in several cases, that the refugee status determination procedures in certain States members of the European Union and the Council of Europe were deficient, leading to the rejection of the refugee claims of all too many persons who ought to have been accepted as refugees in those countries.<sup>93</sup>

31. The adoption of measures that limit or deny access to the territories of European Union member States to potential refugees, including through pushbacks and collective expulsions, is another serious gap in human rights-based international solidarity in global refugee protection. Without access to these territories, potential refugees cannot access the refugee status determination procedures in the territories of member States to file an application for international protection. The European Asylum Support Office noted in its report of 2017 that contributing civil society

<sup>89</sup> See Mann, *Humanity at Sea* (footnote 4 above).

<sup>90</sup> See R. Cerrotti, “Sweden was among the best countries for immigrants: That's changing”, Public Radio International, Global Post, 11 September 2017; and Timothée de Rauglaudre, translated by Camille Raimondo, “Sweden: refugees should be able to start over”, *Le Journal International*, 30 January 2016.

<sup>91</sup> See Steve Scherer and Massimiliano Di Giorgio, “Italy and France try to patch up migrant row, draw papal rebuke”, Reuters, 14 June 2018.

<sup>92</sup> See, for example, Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford, Oxford University Press, 2009).

<sup>93</sup> See, for example, *M.S.S v. Belgium and Greece*, Application No. 30696/09, European Court of Human Rights, 21 January 2011; *I.M v. France*, Application No. 9152/09, European Court of Human Rights, 2 February 2012; *Abdolkhani and Karimnia v. Turkey*, Application No. 30471/08, European Court of Human Rights, 22 September 2009.

organizations expressed concerns about “limited access to the territory, including the occurrence of pushbacks in several Member States”.<sup>94</sup>

## B. North-South gaps

32. Serious gaps exist in the expression of human rights-based international solidarity in refugee protection between the States of the global North and those of the global South. As has been noted, States of the global North contribute immensely to the pool of financial resources available to fund the global refugee protection effort. Nevertheless, States in the global South tend to host nearly 90 per cent of the world’s refugees.<sup>95</sup> This is unfair whether it is viewed in terms of the number of refugees that a State accepts relative to its population or in terms of the number of refugees accepted relative to the financial resources available to a State. What is more, according to the UNHCR mid-year trends for June 2018, for example, “five of the top 10 refugee-hosting countries were least developed countries”,<sup>96</sup> and all of those States were in sub-Saharan Africa.<sup>97</sup> Hence, the poorest countries tend to bear a disproportionate share of the responsibility of protecting refugees.

33. Crucially, States in the global North have adopted more stringent measures to deny refugees from the global South entry to their territories. Some of the most commonly deployed measures include stricter visa controls, carrier sanctions, interdiction on the high seas, and cooperation with States in the global South, both with States of origin and with transit States.<sup>98</sup> States in the global North have also provided financial incentives, equipment, training, and seconded officials to States in the global South as incentives to control migration and the movement of refugees to the global North.<sup>99</sup> In 2017, for example, one State in the global North concluded a memorandum of understanding with a State in the global South in which the global North State committed to providing technical and financial assistance to all the institutions of the relevant global South State that are engaged in combating irregular migration from the global South to the global North.<sup>100</sup>

34. Some strong States have adopted a robust, military-led enforcement of refugee and immigration laws and policies that deny entry into their territories to refugees. In 2013, for example, one such State launched a military-led border security operation to, among other things, “protect its borders”.<sup>101</sup> It also warned people outside its territory that it has “reinforced its border protection capabilities” and that anyone who tries to travel by boat, in an irregular manner, to its territory will be “detected, intercepted, and turned back” and that “no-one who travels illegally” to its territory

<sup>94</sup> European Asylum Support Office, *Annual Report on the Situation of Asylum in the European Union 2017*, p. 114.

<sup>95</sup> See Ban Ki-Moon (footnote 2 above).

<sup>96</sup> UNHCR, *Mid-Year Trends 2018*, p. 11.

<sup>97</sup> *Ibid.*

<sup>98</sup> See, for example, Chimni, “The global refugee crisis: towards a just response” (footnote 3 above), pp. 7–8.

<sup>99</sup> *Ibid.*, p. 8.

<sup>100</sup> United Nations Support Mission in Libya and Office of the United Nations High Commissioner for Human Rights, “Desperate and dangerous: report on the human rights situation of migrants and refugees in Libya”, 20 December 2018, p. 14.

<sup>101</sup> Government of Australia, Department of Home Affairs, “Operation Sovereign Borders”. Available at <https://osb.homeaffairs.gov.au/>.

“will be allowed to remain”.<sup>102</sup> Since the launch of the operation in 2013, it has prevented more than 3,300 asylum seekers from entering that State.<sup>103</sup>

35. Another kind of gap in the expression of human rights-based international solidarity exists between States of the global North and those in the global South. Refugees who are granted refugee status in the global North have a significantly greater chance of accessing much-needed social protections and employment than refugees accepted by States of the global South. Although, in relative terms, most States in the global South have “open door” policies regarding the reception of refugees into their territories, those States also tend to place restrictions on refugees that limit their access to social protections.<sup>104</sup> For instance, the tendency in many global South States to encamp refugees limits their access to opportunities and makes them dependent on international aid for much longer than ought to be the case, if there are no foreseeable prospects for their voluntary return to their home States.<sup>105</sup> In one State in the global South, many refugees have been encamped for as long as 20 years.<sup>106</sup>

36. At the same time, funding gaps for refugee protection activities in many regions in the global South, and especially in Africa, are a constant issue of concern for host States and UNHCR, and reflect the gaps in the expression of human rights-based international solidarity in this context between most States of the global North and South. The General Assembly, at its seventy-first session, expressed concern that funding gaps, in responding to various refugee situations in Africa, are a major factor leading to deterioration in living conditions in many refugee camps in Africa.<sup>107</sup> Attempts to mobilize financial resources to support refugees in the global South have not always raised the amounts of funding required.<sup>108</sup> It is hoped that the stipulation in the new global compact on refugees that more financial support should be directed from the global North to the global South to aid their efforts to protect the vast majority of the world’s refugees, and the mandate conferred on UNHCR and States to organize “solidarity conferences” to facilitate this outcome, will stimulate greater international solidarity in this regard.<sup>109</sup>

37. That a handful of global South States host the vast majority of refugees may be seen by some as understandable since most of the refugees flee from neighbouring countries. But given that global South States tend to be far less resourced than their global North counterparts and are all too often beset by various internal challenges of their own, most commentators agree that the current division of responsibility for absorbing refugees is, on the whole, unfair. Therefore, a significant human rights-based international solidarity gap in terms of the South/North division of responsibilities exists in this context. Most countries of the global North need to turn

<sup>102</sup> Ibid.

<sup>103</sup> See, for example, Joe Kelly and Geoff Chambers, “Operation Sovereign Borders blocks 33 boats”, *The Australian*, 25 October 2018.

<sup>104</sup> See, for example, Zachary A. Lomo, “Refugees in East Africa: developing an integrated approach”, in Dorina A. Bekoe, ed., *East Africa and the Horn: Confronting Challenges to Good Governance* (Lynne Rienner Publishers, 2005), pp. 37–57.

<sup>105</sup> Ibid., p. 48; see also Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (Berghahn Books, 2005); Michel Agier, *Managing the Undesirables: Refugee Camps and Humanitarian Government*, trans. David Fernback (Cambridge, United Kingdom, Polity Press, 2011).

<sup>106</sup> See, for example, UN News, “UN-run camps for Somalia refugees in Kenya enter 20th year of existence”, 21 February 2012.

<sup>107</sup> See resolution 71/173, seventh preambular para.

<sup>108</sup> Aimée-Noël Mbiyozo, “The funding gap for refugees in Africa must be closed”, Institute for Security Studies, 28 March 2018.

<sup>109</sup> See A/73/12 (Part II), paras. 27 and 29.

much further away from their non-entrée policies and practices, and begin to do much more than they currently do to help to absorb global refugee flows.

### C. South-South gaps

38. Gaps also exist in the expression of human rights-based international solidarity in refugee protection along the global South-South axis. Some countries in the global South do significantly more than others in receiving and providing protection to refugees. This is due in part to the geographic proximity of most of these States to the sources of the major refugee flows. This factor may partially explain the positively disproportionate role of Uganda over the years in absorbing a massive number of refugees, mainly from other East African countries.<sup>110</sup> This explanation is, however, insufficient. Other factors, such as the robustness of a country's economy and how welcoming its refugee protection regime is, also play important roles in shaping the extent of a State's absorption of refugee flows. For example, South Africa's relatively robust economy is a factor in attracting the high number of refugees who now reside there.<sup>111</sup>

39. In the Latin American and Caribbean region, one important example will suffice to illustrate the point. The Mexico Plan of Action with its "solidarity cities" and "solidarity resettlement" and "solidarity borders" programmes, is often hailed as an exemplary model of innovative approaches to South-South cooperation in global refugee protection.<sup>112</sup> In practice, however, gaps exist between States in this region as to the extent to which solidarity-based commitments for sharing the responsibility for providing international protection to refugees are operationalized or implemented. For example, only 5 of the 18 States participating in the Plan of Action are currently implementing the solidarity resettlement programme.<sup>113</sup> Of the five, only four continue to accept refugees for resettlement in their respective countries,<sup>114</sup> and even these four States have had to suspend or delay their resettlement programmes, possibly for financial and other reasons.<sup>115</sup>

40. In Asia and the Pacific, discernible gaps in the expression of human rights-based international solidarity in refugee protection also exist among States in the region. First, as of September 2014, only 20 of the 45 States and territories in the region are signatories to the 1951 Convention and its 1967 Protocol.<sup>116</sup> This is despite the fact that this region is home to almost half of the world's refugee population, and that many States in the region in fact take in large numbers of refugees. This gap has fundamental implications for refugee protection in the region. One implication is that, in the majority of States in Asia and the Pacific region, the 1951 Convention is inapplicable. This means that many refugees in the region are not entitled as a matter of right to the universal protections that the 1951 Convention provides, at least not on the formal, justiciable level. Other implications are the resultant non-compliance of States, in all too many cases, with the international legal standards on refugee

<sup>110</sup> See, for example, Tessa Coggio, "Can Uganda's breakthrough refugee-hosting model be sustained?", Migration Policy Institute, 31 October 2018.

<sup>111</sup> Elizabeth Iams Wellman and Loren B. Landau, "South Africa's tough lessons on migrant policy", *Foreign Policy*, 13 October 2015.

<sup>112</sup> See, for example, Marcia Vera Espinoza, "The limits and opportunities of regional solidarity: exploring refugee resettlement in Brazil and Chile", *Global Policy*, vol. 9, No. 1 (February 2018), p. 89.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> Executive Committee, "Overview of UNHCR operations in Asia and the Pacific", document of the Executive Committee of the High Commissioner's Programme, 19 September 2017; UNHCR, Bureau for Asia and the Pacific Country Operations fact sheets, September 2014.

protection, and a marked lack of cooperation and coordination on refugee matters among States in the region, including inadequate collaboration with civil society organizations advocating for refugee rights in the region.<sup>117</sup>

41. Overall, while many States in the global South have adopted regional processes and plans of action that exemplify their readiness to develop and nurture South-South cooperation in addressing many refugee protection challenges, certain important gaps remain in their expression of human rights-based international solidarity with refugees.

#### **D. Civil society gaps**

42. As the Independent Expert elaborated in his last report to the General Assembly,<sup>118</sup> although civil society organizations around the world can, and often do, function as bulwarks for human rights, many of them also act in ways that undermine human rights, including the undercutting of the expression of human rights-based international solidarity in the global refugee protection context. As discussed in the same report, anti-refugee groups or mobs around the world, such as Defend Europe, have provided ample evidence of this tendency.<sup>119</sup> For example, Defend Europe and other groups have worked against humanitarian civil society organizations undertaking rescues at sea of refugees at risk of drowning while crossing the Mediterranean Sea.<sup>120</sup> Powerful extremist political parties, vigilante groups, and even paramilitary organizations have also taken action against “those who act in solidarity with refugees and migrants”.<sup>121</sup> Racist civil society groups such as the “alternative right”, or “alt-right”, continue to oppose any form of solidarity with refugees.<sup>122</sup> In certain countries, private individuals and groups patrol their country’s borders seeking to block or round up irregular refugees. All these are serious international solidarity gaps that have been produced by the actions of civil society organizations that profess and act in anti-human rights ways.

### **V. Abusive deployment of international solidarity in global refugee protection**

43. Global refugee protection is also troubled by the deployment in some cases of the principle of international solidarity in ways that allow certain States to – in effect – evade in whole or in part, or to seriously violate, their international legal obligations under the 1951 Convention and other regional refugee instruments, or under their other international human rights obligations. These policies, actions and arrangements are abuses of the international solidarity principle and, all too often, have highly negative impacts on the human rights of refugees.

#### **A. Domestic laws and practices**

44. The international solidarity principle can be, and has been, abused to violate, rather than protect, the rights of refugees in some States. There have, for example,

<sup>117</sup> See, for example, Brian Barbour, “Protection in practice: the situation of refugees in East Asia”, *Refugee Studies Journal (Nanmin Kenkyu Journal)*, vol. 2 (2012), p. 81.

<sup>118</sup> [A/73/206](#).

<sup>119</sup> *Ibid.*

<sup>120</sup> See Liz Fekete, Frances Webber and Anya Edmond-Pettitt, *Humanitarianism: The Unacceptable Face of Solidarity* (London, Institute of Race Relations, 2017), p. 31.

<sup>121</sup> *Ibid.*, p. 32.

<sup>122</sup> *Ibid.*, p. 31.

been cases where State authorities in a State of origin, with the tacit solidarity and complicity of the State of destination, aid and abet the kidnapping of refugees from their territories and their unlawful return to their countries of origin, where they face persecution and even death or life imprisonment. In a certain African State that is praised for its exemplary refugee legislation and policies, refugees who hail from a neighbouring State have been unlawfully returned, almost always with the cooperation of that State.<sup>123</sup> In 2013, a high-risk refugee was kidnapped from that same country and returned to his country of origin,<sup>124</sup> and in 2014 that refugee was convicted on trumped-up charges in the country of origin and sentenced to life imprisonment.<sup>125</sup>

## B. Regional laws and practices

45. The best illustrations of well-developed regional laws and practices that constitute abusive deployments of the international solidarity principle in global refugee protection tend to be found in Europe, though this is not exclusively the case. One example of this is the European Union deal with a State on its eastern external border to stem the flow of refugees and asylum seekers into the European Union area, namely, the Joint Action Plan of 2015.<sup>126</sup> This agreement is a product of the European Union's broad agenda to prevent refugees from Africa, the Middle East, and other areas from reaching its external borders. According to a United States Library of Congress study, under that agreement, signed on 29 November 2015, the European Union will give the aforementioned State €3 billion to manage the situation of refugees and asylum seekers in that country, aimed at preventing those persons from reaching European Union countries.<sup>127</sup> Under the Joint Action Plan, that State will be in charge of sea patrols and enforcing border restrictions to, among other related things, manage the flow of refugees and asylum seekers to Europe, return refugees and asylum seekers to their countries of origin if they do not meet refugee requirements, and thus form a "wall of defence" against what the European Union sees as a "flood" of refugees into its territory.<sup>128</sup> The clear intent of the European Union in signing this agreement can be seen in a report, published in 2016 by the European Commission, on that State's progress in implementing the Joint Action Plan.<sup>129</sup> Among the conclusions and recommendations contained in the report are that the State in question needs to, inter alia, "make significant progress in preventing irregular departures of migrants and refugees from its territory"; take urgent action to align its visa policy with that of the European Union, "prioritizing those countries that are a source of irregular [refugee flows and] migration" to the European Union; step up bilateral cooperation with a specific European State in border surveillance, anti-migrant-smuggling efforts, and implementation of bilateral readmission obligations; and strengthen actions against human smuggling in coastal areas.<sup>130</sup>

46. While the European Union and the State in question are of course entitled to cooperate and act in solidarity with each other in the refugee protection context, and European Union States enjoy certain sovereign – though not absolute – rights to limit

<sup>123</sup> See, for example, Verdirame and Harrell-Bond, *Rights in Exile* (footnote 105 above).

<sup>124</sup> See, for example, UNHCR, "UNHCR deeply concerned about hand-over of Rwandan refugee by Ugandan authorities", press release, 5 November 2013.

<sup>125</sup> See, for example, International Refugee Rights Initiative, "Abuses against Rwandan refugees in Uganda: has time come for accountability?", 27 August 2018.

<sup>126</sup> See European Union/Turkey Joint Action Plan of 29 November 2015.

<sup>127</sup> See Library of Congress, "Refugee law and policy: Turkey", 21 June 2016.

<sup>128</sup> See European Union/Turkey joint action plan of 29 November 2015.

<sup>129</sup> See the implementation report on the European Union/Turkey Joint Action Plan (European Commission document COM (2016) 85 final, annex 1, 10 February 2016).

<sup>130</sup> *Ibid.*

entry into their territories, the intention of the Joint Action Plan to limit refugees, asylum seekers and migrants from entering the European Union is troubling from the perspective of the protection of the human rights of refugees and asylum seekers. Since the alternative pathways to enter Europe are already few and far between, shutting the door to refugees in this way, at a time when they are in desperate situations, does not advance the protection of their human rights, and tends to endanger those rights in serious ways. Furthermore, although the relevant non-European Union State is to be commended for hosting one of the world's largest refugee populations, the human rights conditions in that country have not been outstanding since the time the agreement was entered into. Instructively, in February 2018, the European Economic and Social Committee issued a statement calling on that State to protect the rights of refugees and migrants.<sup>131</sup> Thus, this agreement can be faulted as an instance of the deployment of international solidarity in the global refugee protection context that seriously detracts, or at least could seriously detract, from the protection of the human rights of refugees and asylum seekers.

47. The effort that has been made by the European Union and individual European countries to act in international solidarity with at least one fragile North African State in an attempt to stem the flow of refugees into the European Union is another good example of the deployment of international solidarity in the global migration context that has seriously harmed, or at least could seriously harm, the human rights of refugees. For example, in return for financial aid, the "authorities" in that State have signed and implemented a number of such agreements with European Union countries.<sup>132</sup> These agreements do not tend to emphasize, or even mention, in a substantive way, the protection of the human rights of refugees.<sup>133</sup> For its own part, the European Union has adopted at least seven different programmes under the rubric of its Emergency Trust Fund for Africa, all directed at this same North African country.<sup>134</sup> The European Union argues that the programmes are part of its international cooperation efforts and its expressions of international solidarity with refugees to prevent humanitarian emergencies at sea, stop human trafficking/smuggling, and build the capacity of the relevant North African country's authorities.<sup>135</sup> It is of course a worthy venture to end drowning deaths at sea and stop human trafficking. Yet these European Union programmes tend to feed into that organization's control-centric focus on its cooperation with the State at issue, in the global refugee protection area. And the well-known fact that the human rights of refugees are liable to be seriously abused in that same North African State makes the studied focus of those agreements on preventing refugees and migrants from departing that State and entering Europe very troubling from a human rights perspective.<sup>136</sup> International solidarity has, in this case, been rather conducive to the serious violation of the human rights of refugees.

48. A non-European Union example of a situation in which the international solidarity principle has been instrumentalized in ways that lead to the denial of access to international protection to refugees and serious violations or potential violations of

<sup>131</sup> European Economic and Social Committee, "Turkey's role in the refugee crisis is crucial but there is room for improvement", press release, 15 February 2018.

<sup>132</sup> See, for example, the Italy-Libya Memorandum of Understanding of 2 February 2017. See also Anja Palm, "The Italy-Libya Memorandum of Understanding: the baseline of a policy approach aimed at closing all doors to Europe?", Istituto Affari Internazionali, 2 October 2017.

<sup>133</sup> Ibid.

<sup>134</sup> European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa. See European Commission, "EU Emergency Trust Fund for Africa: support Libya", fact sheet, 18 April 2018.

<sup>135</sup> Ibid.

<sup>136</sup> See Amnesty International, "Libya's dark web of collusion: abuse against Europe-bound refugees and migrants" (London, Amnesty International, 2017).

human rights can be found in North America. In this instance, involving two States of asymmetrical size and influence, the more powerful State has piled pressure on its less powerful neighbour to limit the transit of Central American refugees through the latter's territory towards the former. Under sustained pressure from successive Administrations of the more powerful State, including the current one, the other State has devised and implemented a plan to shut its borders to Central Americans fleeing gang violence and serious economic deprivations in their own countries, and prevent them from reaching the more powerful North American State, where almost all of them would like to end up.<sup>137</sup> In effect, the former State now serves – or at least seeks to function – as a first line of defence for its more powerful neighbour against the attempts of the affected potential refugees and migrants to enter the territory of the latter. This plan has not, however, deterred the flow of refugees into the two States in question, but has instead made their journeys through the less powerful State and onward to the more powerful one significantly more treacherous, thereby imperilling all too frequently their rights to life, dignity, liberty and so on.<sup>138</sup>

49. While every country is entitled to manage its borders as it sees fit, such sovereignty is clearly not absolute. The management and control of borders cannot be done in a way that imperils certain of the most basic human rights of refugees and other persons – such as their rights to life and dignity as human beings. While refugees do assume some risk in deciding to embark on such journeys in the first place, the aggravation of that risk by the laws, policies and practices of home, transit or destination States to the extent of imperilling such basic rights violates international human rights law. Thus the deployment of international solidarity by the two North American States in this case detracts, or at least could detract, from the protection of the human rights of the targeted Central American refugees, especially their rights to life, dignity and liberty.<sup>139</sup> Hence, it constitutes an abusive deployment in the refugee protection context of the principle of international solidarity.

## VI. Conclusions and recommendations

50. **The present report has considered many of the issues that affect human rights-based international solidarity in global refugee protection. Given the importance of both human rights-based international solidarity and global refugee protection in our time, and especially with regard to the imperative need to protect refugees around the world from serious and rampant violations of their human rights, States, civil society and all other stakeholders must vastly intensify their efforts to address the concerns raised in this report. The General Assembly has previously played and should continue to play a key role in ensuring that this preferred course of action is adopted. The Independent Expert hopes that this august assembly will rise to this challenge, including through ensuring the adoption and robust implementation, and if necessary, the revision of the global compact on refugees.**

51. **In the light of the foregoing discussion, the Independent Expert makes several key recommendations to States and other stakeholders, as follows:**

(a) ***A mindset reset.* A change in the prevalent social and legal mindset about global refugee protection is urgently needed in almost every country. As one global leader has noted, rather than viewing global refugees as “threats to our comfort”, all stakeholders must work even more closely to ensure respect for**

<sup>137</sup> See Azam Ahmed, “Step by step on a desperate trek by migrants through Mexico”, *New York Times*, 8 February 2016.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

the dignity and human rights of all refugees and asylum seekers, and to create a sociolegal environment that values them as “persons whose life experience and values can contribute greatly to the enrichment of our society”.<sup>140</sup>

(b) *The reinforcement, expansion and celebration of pro-refugee solidarity.* The positive expressions of human rights-based international solidarity towards refugees by elements within civil society, cities and other local governments, countries, regional organizations, and at the global level, should be reinforced, expanded, supported by others, and celebrated more widely as imperative pro-human rights and pro-humanitarian acts that save the lives of thousands of human beings; ensure that they are treated with the dignity to which that they are entitled; and advance global integration, development and social justice.

(c) *The expansion of existing avenues for the sociolegal protection of refugees.* States that have already created avenues for the sociolegal protection of refugees are strongly encouraged to enact laws and take other measures to ensure a significant expansion of the numbers of refugees accommodated through such avenues.

(d) *A more effective European Union internal solidarity mechanism.* More effort needs to be made by European Union States to implement in effective and just ways the Union’s internal solidarity mechanisms for sharing and managing the refugees – and migrants – that seek to enter the European Union area. The Independent Expert welcomes the increased efforts that have been made in this regard, including the Brussels Agreement of 28 June 2018.

(e) *Delegitimize extremism and populist antagonism against refugees.* Consistent with their obligations under articles 4 and 7 of the Convention on the Elimination of All Forms of Racial Discrimination, States should make greater effort, within the limits of the rights of everyone to freedom of expression and association, to discourage and delegitimize extremism and populist antagonism against refugees – and migrants. These ills strongly impair the human rights of these persons, negate the values of human rights-based international solidarity, and run contrary to the draft declaration on the right to international solidarity.

(f) *End or modify efforts to externalize continental borders.* Efforts to externalize the borders of continental or regional arrangements to other continents and regions, through the adoption of international agreements of the sort that tend to undermine rather than bolster the human rights and dignity of refugees, should be strongly discouraged. Such agreements tend to lead to significant human rights violations, offend the spirit of human rights-based international solidarity, and run contrary to the letter and spirit of the draft declaration on the right to international solidarity.

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<sup>140</sup> See Scherer and Di Giorgio, “Italy and France try to patch up migrant row, draw papal rebuke” (footnote 91 above).