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Displaced: A Proposal for an International Agreement to Protect Refugees, Migrants, and States

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ABSTRACT

This article proposes and sketches a new international agreement to address the crucial human rights and international security issues posed by mass migration. Currently, the human rights of people fleeing violence are largely unprotected by international law. The 1951 Refugee Convention protects only refugees: those fleeing across borders due to a well-founded fear of persecution on the basis of race, religion, nationality, political opinion, or membership in a particular social group. The world's other 46.3 million people displaced by violence have few international legal protections. I argue that an international agreement that creates an additional category of people who receive international protections, whom I call "Displaced Persons," is necessary to foster human rights, further state interests, and improve international security. A new Displaced Persons Convention would provide the strongest legal protections for individuals fleeing violence and states alike. If this proves impossible, second best would be a non-binding or partially binding international agreement, which could also shape state practices and international norms. An agreement to protect Displaced Persons would supplement, not supplant the 1951 Refugee Convention, which provides critical protections for minorities and political dissidents that must not be diluted. Policymakers should consider the provisions discussed in this article as they prepare the UN Global Compact on Migration and similar agreements.

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INTRODUCTION

Every day, desperate people risk their lives to flee horrific circumstances. As of this writing, an estimated 5 million people have fled the Syrian civil war,[1] which was only one of forty active armed conflicts as of 2014.[2] Many of those who flee believe that they will receive refugee status and resettlement elsewhere, if only they can reach their destination of choice.[3] Instead, many face maltreatment and the threat of being returned to war zones.

Meanwhile, states are straining under the sheer numbers of migrants seeking assistance. A record 1.3 million migrants applied for asylum in Europe in 2015.[4] States' resulting squabbles threatened to tear the Union apart, as exemplified in the success of the 2016 British referendum to leave the EU. In 2014, tens of thousands of unaccompanied minors fled violent conditions in Central America to seek asylum in the United States.[5] Upon their arrival, the Department of Homeland Security struggled to find enough lawyers and aid workers to meet their needs, amidst highly politicized debate over whether they should be granted legal status as "refugees" or deported as illegal "migrants."[6] Many migrants seek to obtain international refugee status or protection under domestic asylum regimes, overwhelming even the most developed legal systems.

Why these human rights and security catastrophes? Part of the problem is a mismatch between law and reality. International law provides few protections for most displaced people. Among people fleeing from violence across international borders, international law protects only refugees: those who have fled persecution on the basis of race, religion, national origin, political opinion or membership in a particular social group.[7] The term "migrant," by contrast, is

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1. *Syria*, INT'L ORG. FOR MIGRATION https://www.iom.int/countries/syria (last visited Feb. 28, 2017).

2. THERÉSE PETTERSSON, ET. AL., ARMED CONFLICTS, 1946–2014 1 (2015), http://www.pcr.uu.se/digitalAssets/61/c_61533-l_1-k_journal-of-peace-research-2015-pettersson-536-50.pdf.

3. *See, e.g.,* Luke Mogelson, *The Impossible Refugee Boat Lift to Christmas Island*, N.Y. TIMES, Nov. 15, 2013, http://www.nytimes.com/2013/11/17/magazine/the-impossible-refugee-boat-lift-to-christmas-island.html?pagewanted=all (discussing migrants who erroneously believe they will be resettled in Australia and so pay smugglers to bring them to Christmas Island).

4. Phillip Connor, *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, PEW RESEARCH CENTER (Aug. 2016), http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/.

5. Marc R. Rosenblum, et. al., *Trends in Unaccompanied Child and Family Migration from Central America*, MIGRATION POL'Y INST. (Jan. 2016), http://www.migrationpolicy.org/research/trends-unaccompanied-child-and-family-migration-central-america.

6. *See, e.g.,* Frances Robles, *Fleeting Gangs, Children Head to U.S. Border*, N.Y. TIMES, July 9, 2014, http://www.nytimes.com/2014/07/10/world/americas/fleeing-gangs-children-head-to-us-border.html.

7. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention]; Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606

undefined in international law.[8] In common parlance, "migrant" is used to refer to anyone leaving his or her home to seek work, refuge, escape from war, or otherwise. Yet of these migrants, only people who can prove that they meet the criteria for "refugee" status are protected by international refugee law—which is mirrored in the asylum laws of most developed states.[9] All other migrants may be legally sent back into the horrors from which they came.

States, scholars, and policymakers agree that the status quo needs to change. Lack of relevant binding international law—or any international legal agreement—to protect people fleeing violence[10] has tremendous consequences for states and human rights. The need for the international community to develop a new international agreement to manage migration has been recognized by the United Nations. In September 2016, the UN General Assembly held a special high-level plenary meeting to address the refugee and migration crisis.[11] At this UN Summit on Refugees and Migrants, the General Assembly affirmed the New York Declaration for Refugees and Migrants.[12] The Declaration itself is not binding and largely reaffirmed existing international human rights law. However, it also began a process by UN member-states to create a Global Compact for Migration by 2018. This agreement, which will fall short of a binding treaty, aims to create an international framework for safe, orderly, and regular migration.

This article sketches such a framework for a new international agreement to address the human rights and security problems posed by large movements of refugees and migrants. I argue that the agreement ought to reflect a conceptual shift about which individuals should be offered protection by the international

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U.N.T.S. 267 [hereinafter 1967 Protocol]. The Refugee Convention defines a refugee as one who, ". . . owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside his country of former habitual residence as a result of such events, is unable to, or owing to such fear, is unwilling to return to it." (Article 1(2)).

8. "Migrant workers" who have jobs abroad, however, are defined and protected by The International Convention on the Protection of the Rights of All Migrant Workers and Their Families, U.N.G.A. 45/158 (1990). On the relationship between provision of transnational social protections and labor markets, see Ruxandra Paul, *Welfare Without Borders: Unpacking the Bases of Transnational Social Protection for International Migrants*, 45 OXFORD DEVELOPMENT STUD. 33 (2017).

9. In the U.S., the Immigration and Nationality Act was revised to mirror the language of the 1951 Refugee Convention and its 1967 Protocol. *See* 8 U.S.C. Chapter 12. In monist systems elsewhere in the world, the 1951 Refugee Convention became incorporated into domestic law upon ratification.

10. This article uses the term "violence" as shorthand for "violent conflict," which may include war, armed conflict, civil war, or generalized violence that may fall short of any legal definition of war. A discussion of the relationship between other forms of violence, such as domestic violence, and protections for refugees or displaced people lies beyond the scope of this article.

11. *See Addressing Large Movements of Refugees and Migrants*, U.N. (2017) http://refugeesmigrants.un.org/.

12. New York Declaration for Refugees and Migrants, U.N.G.A., Sept. 19, 2016, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1.

community. To be sure, the 1951 Refugee Convention, and the legal category of refugee that it defines, must be preserved because of the critical protections it provides for the rights of minorities and political dissidents.[13] I argue that a new, additional international agreement is also necessary to supplement existing international refugee law and protect people fleeing violent conflict. A treaty, such as the Displaced Persons Convention I propose, would provide the strongest, most enforceable protections for displaced people and for international security. Short of a treaty, however, any international agreement designed to change state behavior should reflect a shift in protection standards that reflects the realities of modern population displacement.

The proposed 2018 UN Global Compact on migration provides one such opportunity to shape state behavior. The Global Compact aims to shape state behavior, which may later evolve into state practices and norms that may eventually become international law. Thus, it is crucial for those making the Global Compact to consider the legal import of their work, and for the Global Compact to shape state behavior in a way that augments—and does not undermine—existing human rights law and the 1951 Refugee Convention. Recognizing that the Global Compact process is now underway, and likely to materialize faster than any treaty, the article aims to establish a relevant framework for negotiation of either a non-binding agreement or international law to protect the human rights of displaced persons and improve international security.

The reforms proposed here would better serve all of those fleeing violence and persecution, as well as states, by clarifying which migrants are eligible for international legal protection. They would also buttress other major goals of international human rights law, such as religious freedom, freedom of expression, and protection against torture and racial discrimination.[14] They would promote safe, orderly, and regular migration, which would align with states' goals of protecting their borders, upholding their human rights commitments, and streamlining large movements of refugees and migrants, which would improve international security.

I.
WHY REFUGEE LAW FAILS TO PROTECT DISPLACED PERSONS

The failings of International Refugee Law to protect people displaced by violence are easily highlighted by the stories of Iraqis I interviewed in Jordan in 2009. I soon discovered that many United Nations-registered refugees were not legally refugees at all. One former Iraqi army general, whom I will call Hamdan, fled to Jordan in 2005 after his sons' lives were threatened because of their

13. *See supra* note 7.

14. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S., 211; International Covenant on Civil and Political Rights, art. 18, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

Sabean religion.[15] Sabeans are an ancient religious sect whose presence in Iraq is now almost non-existent, due to rampant persecution and flight after the United States invasion and the ensuing civil war.[16] Hamdan spent years waiting to register with the Office of the United Nations High Commissioner for Refugees (UNHCR), which did not have a program dedicated to assisting or resettling Iraqis in 2005.[17] After registering, Hamdan spent more years waiting for UNHCR to process his resettlement claim until Australia finally agreed to resettle him. While his final approval was pending, his savings ran out, and he relied on charities for his daily bread. Hamdan could not venture out at night for fear of violent harassment. Although his was a clear-cut case for receiving refugee status under the 1951 Refugee Convention, and despite his vulnerable status in Jordan, he was stuck in a backlog in an overwhelmed resettlement system clogged with submissions of Iraqis who did not meet the Convention definition.

Another Iraqi school administrator, whom I will call Mohammed, fled for his life after militias accused him of helping American forces simply for trying to reopen schools in Baghdad.[18] He registered with UNHCR in 2007 and applied for resettlement. After years of waiting, he learned that no country would resettle him because he did not meet the international legal criteria for refugee status—even though UNHCR had registered him as a "refugee." He was a Sunni Muslim, and he could not prove the identity of the militias that threatened him, nor could he prove that they did so on the basis of his religion. His situation was not considered particularly vulnerable by UNHCR, since he was living in the Sunni-majority country of Jordan. He, too, lived in poverty, with no future in sight, and feared every day that the Jordanian security forces would send him back to Iraq.

The stories of these Iraqis illustrate how international refugee law has failed, and why new international law is needed to protect people fleeing violent conflict. Victims of religious persecution, like Hamdan, can claim refugee status under international law. However, they are denied the full protection to which they are legally entitled and wait years for resettlement, caught in a backlog caused by UNHCR's efforts to process all those fleeing conflict. Meanwhile, all those who have fled war, like Mohammed, are called "refugees" by UNHCR. Nevertheless, Mohammed—and most others who have fled war zones like Iraq, Syria, and Afghanistan—stand no chance of being able to prove that they meet the strict criteria for "refugee" status mandated by the 1951 Refugee Convention. Most states with developed asylum systems have asylum laws that

15. Interview with Anonymous Iraqi Registered with UNHCR (Aug. 2009) (names and identifying details have been modified to protect the interviewees).

16. Zaid Sabah, *Sabian Sect Keeps the Faith*, USA TODAY (Sep. 2007), http://usatoday30.usatoday.com/news/world/iraq/2007-09-27-iraqweek_N.htm.

17. *See generally* Jill I. Goldenziel, *Regulating Human Rights: International Organizations, Flexible Standards, and International Refugee Law*, 14 CHI. J. INT'L. L. 453–702 (2014).

18. Interview with Anonymous Iraqi 2 Registered with UNHCR, (Aug. 2009) (names and identifying details have been modified to protect the interviewees).

mirror the 1951 Refugee Convention; therefore, those who do not meet the Convention's criteria are unlikely to receive asylum abroad. Those who do not meet the criteria—or who are unable to prove that they meet the criteria—often live in constant fear of sudden expulsion. And their fear is justified: mass deportations to war-torn Syria or Afghanistan might be inhumane, but could be perfectly legal.[19]

Like Mohammed, most people fleeing war and conflict do not legally qualify as refugees. People who are fleeing generalized violence may be in similar circumstances to those persecuted based on race, religion, nationality, political opinion, or membership in a particular social group, but they are not refugees under international law, and are not eligible for asylum in most states. Of the 60 million people of concern to the U.N. Refugee Agency (another name for the Office of the U.N. High Commissioner for Refugees, or UNHCR), the agency classified only 13.7 million as refugees in 2015. Most of the other 46.3 million people fleeing war and violent conflict—a number larger than the population of 85% of the countries in the world—have little to no protection under international law.

A. Law Designed for a Different World

International refugee law was simply not designed to deal with the endless civil war and state failures at the root of today's global displacement. It was made to protect discrete flows of persecuted minorities and dissidents who could be quickly absorbed by states. In modern times, states codified age-old commitments to protecting minority rights in the 1951 Refugee Convention. (I have detailed the history of the Convention, and the historical concept of refugee protection in international law more generally, in a companion article).[20]

In brief, the 1951 Refugee Convention was created in the wake of World War II, when millions were displaced throughout Europe, a humanitarian disaster that threatened to cause further strife. The nascent U.N. needed solutions to protect, resettle, and guarantee the rights of displaced people who could not return to their countries of origin. The U.N. was simultaneously involved in a broader project of creating international human rights law as a way to entrench the world's collective cry of "never again" after the atrocities of the Holocaust.

The Convention that emerged was eventually signed by 143 of the U.N.'s 191 members. The Convention's core provision, that a refugee cannot be returned to a place where her life will be endangered (known as "non-refoulement"), is considered binding on every state, not just Convention

19. The Convention Against Torture, Article 3, would still prohibit deportation of anyone "where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 UNTS 85 [hereinafter Convention Against Torture].

20. *See generally* Jill I. Goldenziel, *The Curse of the Nation-State: Refugees, Migration, and Security in International Law* 48 ARIZ. ST. L.J. 579 (2016).

signatories. The Convention also obligates states to provide an array of rights to refugees, including the right to work, to housing, and access to courts.[21]

B. Refugee Flows Are Not What They Used to Be

The end of the Cold War led to a rise in civil conflict that was unforeseen by the drafters of the 1951 Refugee Convention. Today's refugees are not primarily European, scattered throughout their own continent. They are not awaiting orderly processing in European camps, relatively peacefully, as they were after World War II. Nor are they trickling slowly across borders, as they have throughout much of history. Instead, it is now commonplace for thousands of people fleeing both war and persecution to spill over borders within hours or days. Refugees may flee not just to nearby countries, but find smugglers to carry them halfway around the world.[22]

Changes in the nature of refugee flows became especially pronounced in the 1990s. In April 1991, fearing reprisals from Saddam Hussein's regime after a U.S.-encouraged Kurdish uprising after the First Gulf War, 1.3 million people fled Northern Iraq for Iran over a three-week period.[23] Simultaneously, 400,000 mostly Kurdish Iraqis fled Northern Iraq for Turkey, which promptly closed its borders.[24] 1 million Rwandans fled into Zaire in July 1994 alone.[25] On April 1, 1999, after Serbia rejected Kosovo's autonomy, 25,000 Kosovar Albanians took six trains to Macedonia.[26] In all of these places, economic migrants, finding their business prospects destroyed by war or seeking to flee poverty, could easily join the throngs.

The 1951 Refugee Convention is unequipped for such a massive change in forced migration. The Convention has no provisions for dealing with massive, mixed flows of refugees and migrants, and no provisions for states to share in the burden of assisting them. Under the Convention, a refugee has the right to seek asylum, but no state has the legal obligation to grant it. When mixed flows occur, states are required not to refoul anyone who is seeking international protection while his claim is being processed. A host state thus has a legal obligation to protect members of a mass influx from refoulement, at least temporarily, while the international community has no obligation to share the burden.

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21. *See* 1951 Convention, *supra* note 7.

22. Felicity Attard, *Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas*?, 47 J. MAR. L. & COM. 219 (2016).

23. *See* KATY LONG, NO ENTRY! A REVIEW OF UNHCR'S RESPONSE TO BORDER CLOSURES IN SITUATIONS OF MASS REFUGEE INFLUX 72 (2010), http://www.unhcr.org/en-us/research/evalreports/4c207bd59/entry-review-unhcrs-response-border-closures-situations-mass-refugee-influx.html?query=mass%20influx.

24. *See Morbidity and Mortality Surveillance in Rwandan Refugees—Burundi and Zaire*, CDC (Sept. 19, 1998), http://www.cdc.gov/mmwr/preview/mmwrhtml/00040202.htm.

25. Long, *supra* note 23, at 25.

26. *Id*. at 33.

Moreover, most people who have fled violence and persecution are hosted by some of the world's poorest states.[27] Most reside in the Middle East and Africa, where many states have not signed the 1951 Refugee Convention, where asylum systems may not exist, and where the rule of law is often weak.[28] For these and other reasons, most experts agree that the 1951 Refugee Convention has become irrelevant for the protection of most people fleeing persecution and violence today.[29]

C. The Politicization of Refugee Assistance

Since the 1951 Refugee Convention has become less useful, refugee protections have been increasingly less legalized over time. UNHCR has largely become a humanitarian aid organization, far from its original function of administering international refugee law and providing legal protections to refugees.[30] Since the end of the Cold War, the agency has focused more of its budget and organizational priorities on operations and away from legal protection.[31] The agency now strives to serve people displaced by war and conflict as well as 1951 Convention refugees, which has been quite controversial. One senior protection officer distilled the problem for me: "refugee protection means something specific" under international law, and that it is eroded each time UNHCR waters it down to aid new categories of people.[32] However, others within the organization believe the shift in focus from legal protections of refugees to humanitarian aid enables them to assist more people. As a Senior Adviser to the High Commissioner explained to me in 2010, while international law underpins the agency's work, it is often better to get things done rather than "banging the bible."[33]

The agency has extended its operations far beyond those specified in its Statute or the Convention. As need has arisen, the U.N. Secretary General, General Assembly, or Security Council has designated additional people to fall

27. *See UNHCR Global Trends Report 2015*, UNHCR (June 20, 2016), http://www.unhcr.org/uk/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html.

28. *Id*.

29. *See, e.g.*, Deborah Anker, et. al., *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 297 (1998); James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997); T. ALEXANDER ALEINIKOFF, THE ARC OF PROTECTION (forthcoming book manuscript). On the need for a new approach to international migration law, see also Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. (forthcoming 2017).

30. *See* GIL LOESCHER, UNHCR AND WORLD POLITICS: A PERILOUS PATH 80 (2001).

31. *Id*.

32. Interview with Petros Mastakis, Protection Officer, UNHCR-Syria, in Damascus, Syria, (Jan. 6, 2010).

33. Interview with Jose Riera, Senior Policy Adviser to the High Commissioner, UNHCR, in Geneva, Switz. (June 18, 2010).

within UNHCR's "persons of concern," including select groups of internally displaced people and victims of natural disasters.[34]

Without relevant law to guide it, UNHCR's work has become increasingly politicized. After a number of budgetary crises, UNHCR has survived by making itself an agent of the world's major powers.[35] The agency's mandate must be regularly renewed by the U.N. Because the agency receives 98% of its budget from donors, with 86% from individual states and the EU, it is largely dependent on individual donor countries for its survival. The 2% of its budget that comes directly from the U.N. mostly pays for overhead.[36] To continue its existence, UNHCR must appear responsive and accountable to the whims of its donors.

UNHCR is especially dependent on the United States for funding. The United States has consistently been the UNHCR's single largest donor, typically funding about 30% of UNHCR's budget, and currently funding 39%.[37] The European Commission, its member states, and Japan typically account for most of the remainder of the budget. The United States and EC exclusively earmark their contributions to UNHCR to ensure that the agency serves their foreign policy goals. As of December 2016, only 14% of the agency's total contributions for the year were un-earmarked.[38] The agency's operations, then, are a function of the political interests of the major powers that fund it.

De-legalization of the refugee regime has meant increasing politicization of refugee assistance. UNHCR has increasingly acted at the behest of the wealthy states that provide its funding.[39] To give but a few examples: the agency expanded its mission for the first time to include internally displaced people in the early 1990s to assist nearly all of those displaced due to the disintegration of the former Yugoslavia.[40] This radical expansion of the agency's mission was done at the behest of European powers that wished to keep Muslim immigrants

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34. *See, e.g.*, S.C. Res. 1781, U.N. Doc. S/RES/1781 (Oct. 15, 2007) (calling on parties to conflict in Abkhazia, Georgia, to work with UNHCR to assist Internally Displaced People in returning home). For a general discussion of UNHCR's role assisting stateless people and IDPs, and additional examples of its authorization to do so, see *UNHCR's Mandate for Refugees, Stateless Persons, and IDP's*, UNHCR, https://emergency.unhcr.org/entry/55601/unhcrs-mandate-for-refugees-stateless-persons-and-idps (last visited Feb. 28, 2017).

35. On agency in international organizations, *see generally* DARREN G. HAWKINS ET AL., DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (2006).

36. *Figures at a Glance*, UNHCR, http://www.unhcr.org/en-us/figures-at-a-glance.html (last visited Feb 28, 2017).

37. *Id.*

38. *Financials*, UNHCR, http://reporting.unhcr.org/financial#tabs-financial-contributions (last visited Feb. 28, 2017).

39. On how the agency has expanded and contracted the definition of refugee to serve the interests of its donor states, particularly the U.S., see Jill Goldenziel, *supra* note 17 (documenting expansion of the term refugee to encompass most Iraqis fleeing after the U.S. invasion of 2003); JILL GOLDENZIEL, DISPLACED: REFUGEES, INTERNATIONAL LAW, AND U.S. FOREIGN POLICY (forthcoming).

40. *Information Note: UNHCR's Role with Internally Displaced Persons*, UNHCR (Nov., 20 1998), http://www.refworld.org/docid/3ae6b31b87.html.

from entering into Europe.[41] After the United States invasion of Iraq in 2003, a "prima facie" refugee regime was adopted to term nearly all Iraqis who had fled to neighboring countries as "refugees."[42] This allowed them to receive legal and humanitarian assistance from UNHCR and its partners, regardless of whether they met the 1951 Convention definition of refugee. Backed by United States and EC funding, UNHCR then provided all displaced Iraqis with more assistance, in terms of dollars per refugee, than any of its other refugees throughout the globe.[43]

D. The World Closes Its Gates

Meanwhile, increasingly restrictive domestic asylum regimes, particularly in the West, have narrowed the reach of the 1951 Refugee Convention. States have defined persecution narrowly, requiring refugees to prove a specific fear of persecution, or to return to dangerous conditions in their countries of origin to provide identity documents in order to be resettled. Elsewhere, states have refused to winnow refugees from "mixed flows" containing refugees and migrants, instead sending all would-be asylum-seekers back home.[44] In the 2000s, the European Union revamped its asylum regime with a series of laws designed to discourage migration by sending asylum-seekers back to their original country of entry within Europe, and building massive detention centers in Italy and Greece, the most frequent points of entry, to house them while they ostensibly awaited processing.[45] In 2004, the European Union also created a new and extensive border patrol agency called Frontex to patrol Europe's borders.[46] Frontex's interdiction of migrants at sea to send them back to their home countries has caused NGOs to accuse them of refoulement.[47] Increasingly, Western states have employed restrictive visa requirements, carrier sanctions, "safe third country" designations, "readmission agreements," and internal "safe zones" inside conflict areas to prevent migrants and refugees from crossing

41. *See* LOESCHER, *supra* note 30.

42. *See generally* Jill I. Goldenziel, *supra* note 17, at 702 (explaining the "prima facie" refugee regime for Iraqis).

43. *Id*.

44. *See generally* UNHCR, Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/25/CRP (Feb. 7, 2014), http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/CommissionInquiryonHRinDPRK.aspx (discussing China's policy of summarily repatriating escapees from North Korea).

45. *See* 2013 O.J. (L 604/2013), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/index_en.htm (EU Dublin Agreement).

46. Frontex was authorized by (EC) 2007/2004. Frontex became operational on October 3, 2005.

47. *See, e.g.*, "NGO Statement on International Protection: The High Comm'r's Dialogue on Protection Challenges," UNHCR ExCom Standing Committee, Rep. on its 41st Meeting, Mar. 4-6, 2008. On interdiction at sea and refoulement, see Jill Goldenziel, *When Law Migrates: Refugees in Comparative International Law*, in COMPARATIVE INTERNATIONAL LAW (forthcoming, Oxford University Press, 2017).

borders.[48] While UNHCR has protested many of these measures, they can do little to stop them.

Due to increased restrictions on migration, controversies involving the rights of refugees and migrants have reached the highest courts of several countries throughout the world, including the U.S. Supreme Court, the High Court of Australia, and the European Court of Human Rights (ECtHR).[49] These three courts have interpreted international refugee law differently in their jurisprudence, thus creating discrepancies in the interpretation and application of the principle of non-refoulement. The U.S. and Australian courts have determined that state practices of interdicting mixed groups of migrants and refugees at sea do not violate non-refoulement.[50] In 2011, the ECtHR determined that Italy's practices of interdiction at sea constituted non-refoulement, causing Italy and the EU to change their policies.[51] Because these courts' decisions shape the refugee and asylum law of states who are major migrant-receiving countries, these courts' interpretations of international refugee law will play a major role in creating international norms of treatment of refugee and migrants with even wider effects.[52] As courts develop disparate interpretations of international refugee law relating to mixed migration, desperate individuals and sovereign states alike need the clarity that a Displaced Persons Convention can provide.

Despite the intentions of the drafters to create a refugee convention with universal application,[53] international refugee law is hardly applied universally. While human rights were a paramount concern when the treaty was negotiated, power politics have intervened throughout the application and development of international refugee law.[54] Today, most of UNHCR's funding comes from wealthy states that earmark it so they can direct the agency to protect their own interests.[55] Meanwhile, many of these same wealthy states have increasingly restricted the entry of refugees through tactics that may violate the Convention.[56] New international law is thus needed to provide refugees with the

48. Deborah Anker, Joan Fitzpatrick & Andrew Shacknove, *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 297 (1998).

49. *See, e.g.,* Sale v. Haitian Centers Council, 509 U.S. 155 (1993); Ruddock v. Vadarlis (2001) FCA 1329 (Federal Court) (Austl.)**;** Hirsi Jamaa and Others v. Italy, 2012 Eur. Ct. H.R.; M.S.S. v. Belgium and Greece, 2011 Eur. Ct. H.R. For discussion of these cases, *see* Goldenziel, *When Law Migrates*, *supra* note 47.

50. *See* Sale v. Haitian Centers Council, *id*.; Ruddock v. Vadarlis, *id*.

51. *See* Hirsi Jamaa, 2012 Eur. Ct. H.R., *supra* note 49.

52. For discussion of this point, *see generally* Goldenziel, *When Law Migrates*, *supra* note 47.

53. *See generally* Goldenziel, *supra* note 20 (discussing the intentions of the drafters if the 1951 Refugee Convention).

54. *Id*.

55. UNHCR, *supra* note 36.

56. *See* Deborah Anker, Joan Fitzpatrick & Andrew Shacknove, *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 297 (1998) (citing use of restrictive visa requirements, carrier sanctions, safe third country designations, readmission agreements, safe zones inside conflict areas, and interdiction at sea by Western states to curtail migration).

human rights protections that the Convention's drafters intended, to protect the human rights of migrants who are not refugees, and to protect the rights of sovereign states.

II.
REFUGEES, MIGRANTS, DISPLACEMENT AND LAW: A THEORETICAL FRAMEWORK

As James Hathaway has noted, refugee status has always taken on "different meanings as required by the nature and scope of the dilemma prompting involuntary migration."[57] But even as the scope of involuntary migration has radically changed over the past sixty years, the legal status of refugees under international law has remained stagnant. As noted above, scholars and policymakers have repeatedly argued that international refugee law is irrelevant to the world we now face.

Debate has raged over exactly how to reform international law protecting those fleeing violence and persecution. Roughly speaking, proposals to reform international refugee law have been either moral or economic in nature. Michael Walzer and Niraj Nathwani, for example, have argued that assistance to refugees should be based on need.[58] The moral obligation to assist people based on need rather than on persecution on the basis of particular categories, they argue, is equivalent, and therefore the category of "refugee" should expand beyond the narrow Convention definition to all people forced to migrate and in humanitarian need.

Other scholars have called for a broadening of the definition of the term refugee in a way that would entirely scrap existing international refugee law. Joseph Carens argues that, from a moral perspective, the Convention definition should be revised so that "the seriousness of the danger and the extent of the risk, not the source of the threat or the motivation behind it," matters most.[59] Selya Benhabib argues that Kant's "universal right to hospitality" imposes upon states a moral duty to assist anyone "whose life, limb, and well-being" are endangered, implying the need for a broader definition of the term "refugee."[60]

Most broadly, liberal and utilitarian theorists argue that states are not only required not to refoul those who would have their lives endangered, but that they are obligated to accept larger numbers of refugees and immigrants. These theorists often conflate these categories, since they usually do not use the term refugee in the legal sense. Joseph Carens and Anne Dummet, for example, argue

57. James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920–1950*, 33 INT'L COMP. L. Q. 348, 380 (1984).

58. NIRAJ NATHWANI, RETHINKING REFUGEE LAW 7 (Anne F. Bayefsky ed. 2003); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

59. Joseph Carens, *Migration and Morality: A Liberal Egalitarian Perspective*, in FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND MONEY 25 (Brian Barry and Robert Goodin, eds., 1992).

60. SELYA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS 37 (2004).

that liberalism requires that states recognize a right to freedom of movement that would require them to accept all those who wish to live there.[61] Peter and Renata Singer argue that liberal democracies are obligated to accept refugees up until the point that tolerance in the society would break down, endangering peace and security.[62]

Economic proposals to reform refugee protection focus on the burden shifting necessary to align state interests with greater international protection. While the details of these proposals vary significantly, most scholars agree that reforms must focus on burden sharing and outcome-based solutions that focus on refugee assistance as it exists, not on the Convention definition of refugee.[63] Two of the most prominent proposals, developed in the late 1990s by James Hathaway and Alexander Neve, and by Peter Schuck, argued for insurance-like schemes to incentivize Northern states to reduce the costs of processing migrants by shifting funds and transferring refugees to Southern states that would serve as host countries.[64]

As Hathaway later acknowledged, these proposals attracted little attention from policymakers and were roundly criticized by scholars.[65] Among other flaws, scholars charged that the proposals accepted the current policies of Northern states to dodge the obligation of non-refoulement.[66] The proposals suggested that refugees primarily be hosted in the global South, with Northern states providing funding to assist them there. Without a binding commitment by Northern states, critics argued that Northern states would relinquish their promised assistance fail absent a pressing refugee emergency affecting their own interests.[67] Scholars also charged that the proposals failed to solve many flaws inherent to the current refugee regime, and that they promoted group-based rather than individualized processing for refugees, which would raise human rights concerns.[68] Scholars also expressed concern that an insurance scheme risked commodification of refugees.[69]

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61. Carens, *supra* note 59; Anne Dummett, *The Transnational Migration of People Seen from within a Natural Law Tradition*, in FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND MONEY 169 (Brian Barry and Robert Goodin, eds.1992).

62. *See* Peter Singer & Renata Singer, *The Ethics of Refugee Policy*, in OPEN BORDERS? CLOSED SOCIETIES?: THE ETHICAL AND POLITICAL ISSUES 111 (Mark Gibney, ed., 1988).

63. *See* HATHAWAY, RECONCEIVING INTERNATIONAL REFUGEE LAW (1997).

64. *See, e.g.,* James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997); Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243 (1997).

65. James C. Hathaway, *Book Review: Rethinking Refugee Law, by Niraj Nathwani*, 98 AM. J. INT'L L. 616, 616 (2004).

66. For the most prominent and thorough critique, see Anker, et al., *supra* note 29.

67. *Id.*

68. *Id.*

69. *Id.*

Regional organizations have also taken steps to address the problem of population displacement that lies beyond the scope of the 1951 Refugee Convention. However, these efforts have been incomplete at best, and have faced significant problems in implementation, monitoring, and enforcement. The 1969 OAU Refugee Convention and 1984 Cartagena Declaration for Refugees in Latin America expand the definition of refugee to include people who have fled violent conditions or disturbances in public order.[70] However, the OAU Refugee Convention remains unenforced due to weak enforcement mechanisms, and the Cartagena Declaration is non-binding. Moreover, states have been slow to incorporate them into their domestic law, and they include no burden-sharing mechanisms. EU Directives related to asylum and migration, such as the 2011 Directive on Standards for the Qualification of Third-Country Nationals, and several directives in 2013, are largely focused on curbing migration, although they do allow for "subsidiary protection" for people fleeing generalized conditions of violence who do not qualify for refugee status.[71] Even before the EU's common asylum regime broke down, many states were not following the directives. The UK, Ireland, and Denmark opted out of the 2011 EU Directive from the outset.[72] In 2015 and 2016, the European Commission brought at least 49 infringement proceedings against member-states for not following the 2011 and 2013 migration and asylum directives and/or failing to transpose them into domestic law.[73] Temporary Protection (TP) regimes have been adopted by some states in response to humanitarian emergencies.[74] However, TP regimes are applied haphazardly, sow confusion by differing from state to state, and arguably have been used by countries to avoid their obligations under the 1951 Refugee Convention.[75]

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70. *See, e.g.*, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984; Organization for African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45.

71. *See, e.g.,* Council Directive 95, 2011 O.J. 377 (EU); 2013/32/EU (revised asylum procedures), 2013/33/EU (Reception Conditions Directive).

72. *See* EUROPEAN COUNCIL ON REFUGEES AND EXILES, ECRE INFORMATION NOTE ON THE DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 13 DECEMBER 2011 (2011),

http://www.ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Qualification-Directive-recast_October-2013.pdf.

73. *See* Press Release, European Commission, More Responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work (Sept. 23, 2015),

http://europa.eu/rapid/press-release_IP-15-5699_en.htm; *see also* Press Release, European Commission, Implementing the Common European Asylum System: Commission acts on 9 infringement proceedings (Feb. 10, 2016) http://europa.eu/rapid/press-release_IP-16-270_en.htm (bringing additional and new proceedings against states for noncompliance).

74. In the EU, regimes granting forms of temporary protection are called "subsidiary protection" or "humanitarian protection." *See id*.

75. *See, e.g.*, Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AM. J. INT'L L., 279, at 297-98 (2000); *see alsoPosition of the European Council on*

None of these documents address the root causes of modern population displacement that has threatened international peace and security. The agreements are undermined because refugee emergencies often arise from conflicts between neighbors, complicating regional solutions.[76] Moreover, the protections associated with all of these documents are ambiguous because key terms are left undefined. Also, states often lack the will, capacity, or funding to implement the agreements. Last, such non-binding regional agreements may clash with the universal aims of the 1951 Refugee Convention, sowing still more confusion as to who is protected and how.

A. Why International Law?

What is the role of international refugee law in a modern migration environment at all? When proposing reforms for international law regarding people fleeing persecution and violence, this foundational question is necessary to consider. After all, the costs of compliance with treaty regimes or even non-binding international norms can be high, and not evenly distributed. As explained previously, most people flee persecution and violence into developing countries, where adherence to international law, and international human rights law in particular, may be weak.[77] Richer states generally find it cheaper and easier to make, ratify, and comply with international human rights law than poorer ones. Moreover, in some circumstances, refugees and displaced people have been treated comparatively well by host countries that are not 1951 Refugee Convention signatories. Senior officials in UNHCR, including the High Commissioner, have found that politically palatable solutions to displacement crises are often policy-based and not legal.[78] In states averse to international law, UNHCR often finds that pushing states to comply with international legal obligations does not work, and it needs to find other ways to assist refugees. As senior UNHCR officials explained to me, solutions are most easily found through bilateral negotiations for aid between donor and recipient states, or by emphasizing the humanitarian nature of a situation instead of legal commitments.[79]

However, international law to protect refugees and people fleeing violent conflict is still ideal. International law solves collective action problems that are important for the protection of both human rights and state security. Binding,

Refugees and Exiles on Temporary Protection in the context of the Need for a Supplementary Refugee Definition, EUROPEAN COUNCIL REFUGEES & EXILES (Dec. 2002), http://www.ecre.org/wp-content/uploads/2016/07/ECRE-Position-on-the-Integration-of-Refugees-in-Europe_December-2002.pdf.

76. For discussion of the complex dynamics of refugee flows in the Great Lakes Region of Africa in the 1990s, see SARAH KENYON LISCHER, DANGEROUS SANCTUARIES (2006).

77. *See supra* note 27.

78. Interview with Antonio Gutierres, High Comm'r, UNHCR, in Geneva, Switz. (July 30, 2010).

79. *Id*.; Interview with Jose Riera, *supra* note 33; Interview with Dag Sigurdson, Deputy Head, Donor Relations & Resource Mobilization Unit, UNHCR, in Geneva, Switz. (Jul. 21, 2010).

enforceable international law is a highly effective means to keep states from adopting policies that collectively harm those displaced by persecution and violence, and from shirking their obligations to protect human rights and assist other states. While compliance with international law is obviously imperfect, issues involving treatment of refugees and migrants are increasingly coming before international courts for enforcement.[80] International refugee law provides a floor, de facto or de jure, for state migration policies. Eric Posner and Adam Cox have recognized, in their discussion on an optimal migration contract, that refugee rights require international cooperation to avoid a "race to the bottom," in which states adopt increasingly restrictive refugee policies to deflect refugees to other states.[81] Only international law can ensure that these refugees have somewhere to turn.

At the same time, it is important to preserve, not dilute, existing legal protection in the form of the 1951 Refugee Convention. For all of its limitations, the Convention has crucial value as binding law. It provides legal protection to many people in need. The Convention serves as the basis for asylum law in many states—an important step toward harmonizing global refugee protections.[82] Many of these states grant refugees most of the protections delineated in the Convention. In states that have signed the Convention but have weaker legal systems or fewer resources, UNHCR uses the Convention as a basis for its operations, and as a starting point for negotiations on what it can do to protect people displaced by persecution and violence. As then-Deputy Representative in Egypt, Katharina Lumpp, explained to me, the Convention serves as a basis for negotiation on the treatment of refugees in state signatories.[83] In state parties to the treaty, international refugee law provides a floor for refugee protection, and a baseline for negotiation to improve it.

Non-binding international legal instruments also have value. International human rights law, including international refugee law, has always served an important aspirational purpose. Although most of the world's states are signatories to either the International Covenant on Civil and Political Rights and/or the International Covenant on Economic and Social Rights—which are known, along with the Universal Declaration of Human Rights, as the International Bill of Rights—no signatory truly lives up to all of the commitments it has made in either document.[84] The rights that these documents

80. *See generally* Goldenziel, *When Law Migrates*, *supra* note 47; Goldenziel, *International Decisions: International Decision: Plaintiff M68/2015 v. Minister for Immigration and Border Protection*, [2016] HCA 1 (Austl)(discussing recent case involving Australia's third-country resettlement program). (2016) (discussing recent court cases involving refugees and migrants).

81. Adam Cox & Eric Posner, *The Rights of Migrants: An Optimal Contract*, 84 N.Y.U. L. REV. 1403, 1462; *see also* Ryan Bubb, Michael Kremer & David I. Levine, *The Economics of International Refugee Law*, 40 J. LEG. STUD. 367-404 (2011) (describing a race to the bottom).

82. *See supra* note 9.

83. Interview with Katharina Lumpp, Deputy Rep., UNHCR-Cairo, in Cairo, Egypt (Dec. 10, 2009).

84. *See generally* ERIC POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW (2014)(discussing

seek to entrench are so broad and vague that no signatory can possibly live up to the ideals they contain, and full realization of these rights would also be impossible due to inevitable clashes between the ideals they embody. Yet, these documents provide important aspirational norms for states, which commit to each other in an international forum that they will keep trying to live up to these utopian standards. Indeed, these documents contain clauses that commit developing states to continued improvement toward these ideals, even if they cannot currently comply with them. So long as states continue to aspire to these international norms, they will continue to seek justice and human rights for their citizens. Much like constitutional law at the domestic level, international human rights law serves to entrench certain pre-commitments that cannot be violated, regardless of majority will.[85] As states increasingly adopt international human rights law as a basis for their own constitutional instruments, enabling litigation and interpretation of these norms in domestic courts, their importance as foundations of law continue to increase.[86]

International refugee law reinforces other normative goals of the international human rights system. The Genocide Convention, Convention on the Elimination of Racial Discrimination (CERD), and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), all proscribe categories of behavior related to those in the 1951 Refugee Convention. For example, the Genocide Convention prohibited systematic state actions "committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group."[87] The Genocide Convention was developed by many of the same drafters of the Refugee Convention and ratified in nearly the same historical moment.[88] It is no coincidence that the Genocide Convention and the Refugee Convention proscribes destruction of and persecution of nearly the same categories of people.[89] The Convention Against Torture prohibits refoulement or extradition of anyone to any other state if "there are substantial grounds for believing" that he could be tortured there.[90] The International Bill of Rights also contains provisions entrenching an international human right to freedom of expression, which includes the right to express political opinions without persecution.[91] The existence of refugees is often a sign that serious

the impossibilities of complying with human rights law in its entirety).

85. On parallels between international and constitutional law, see Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

86. *See generally* Goldenziel, *International Decisions*, *supra* note 80.

87. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

88. For discussion of the drafting of both Conventions and the relationship between them, see Goldenziel, Curse of the Nation-State, supra note 20.

89. *Id*.

90. Convention Against Torture, *supra* note 19, at art. 3 ("No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.").

91. ICCPR, *supra* note 14, at art. 19.

human rights abuses are occurring within a state, such as genocide or ethnic cleansing. Multiple international human rights treaty commitments to non-refoulement and persecution of minority groups and political dissidents, like those specified above, support claims that these international commitments are *jus cogens* norms and therefore hold even higher legal authority than the treaty commitments themselves.[92] These human rights treaties are mutually reinforcing and help ensure that states will be continually vigilant against human rights abuses.

B. Why the 1951 Convention Definition of "Refugee" Must be Preserved

The 1951 Refugee Convention, and the definition of "refugee" it contains, should not be modified. As an instrument of international human rights law, the core commitments entrenched in international refugee law remain as relevant and important as ever.[93] The historical record shows that members of racial, religious and ethnic minority groups have always been subject to persecution on the basis of these characteristics.[94] We need only look at the news to see that such persecution is still rampant. Protection of people on the basis of these categories is worth preserving, as states have repeatedly been incapable of providing protections for individual members of these groups. Persecution of minorities is often systematic and not easily solved. International refugee law provides that these people must be given basic human rights, especially when their countries of origin cannot provide them; and that a certain minimum level of human rights normatively exists outside the construct of states. International refugee law is truly international: law that extends beyond the traditional zone of state sovereignty. The 1951 Refugee Convention obligates states to provide legal protections for non-citizens who are de facto without the protections of their countries of origin, presenting a stark exception to a state's sovereign right to control who enters and leaves its territory.

For anyone concerned with international human rights, international refugee law thus provides critical legal and moral functions for protecting the rights of those whom the international community has deemed the most vulnerable: members of religious, racial, and ethnic minorities, as well as members of particular social groups, such as homosexuals. Even as categories of those persecuted on the basis of political opinion have changed over time, the international community has, on a normative level, always been concerned with the protection of minority rights. As the protection of minority rights is

92. On non-refoulement see, for example, 1951 Convention, *supra* note 7; Convention Against Torture, supra note 19; European Convention on Human Rights, Sept. 3, 1953, ETS 5; 213 UNTS 221.

93. *See generally* Goldenziel, *supra* note 20 (discussing the relationship between international refugee law and international human rights law).

94. For discussion of the development of international refugee law in response to persecution of minorities and political dissidents, particularly religious minorities, see *id*.

fundamental to democratic systems, any international legal system seriously concerned with democratic values must protect them as well.

To understand why refugees are distinct from other groups of migrants and therefore merit different legal protections, we must consider how human rights operate under a general theory of state sovereignty. Any discussion of international legal theory based on sovereignty is, of course, neither perfect nor fully descriptive of the reality of international politics. My analysis will proceed given these caveats, while acknowledging that sovereignty remains the basis of most theories of international law and international relations, and the starting point for most doctrinal scholarship on international human rights law.

1. Refugees Have Unique Legal Claims for Protection

Refugees are distinct from most other migrants because they are unable to avail themselves of the protection of their states due to their fear of persecution. Assuming a system of sovereign states, pursuant to international human rights law, states have the legal and moral responsibility to protect the rights of their citizens. States and individuals can then rely on this social contract. States sever this contract with refugees when they are unable to protect their citizens from persecution or a well-founded fear of it.[95]

Unlike refugees, other migrants do not have their ties to their states severed. Other migrants, such as those leaving their countries due to economic woes, generalized violence, or climate change, may have a government that is very much interested in providing them with legal protections.[96] Moreover, whether displaced inside or outside their country, migrants who are not refugees enjoy benefits of citizenship that refugees cannot. Migrants have freedom to travel and freedom of movement, which bona fide refugees do not have. Internally Displaced Persons (IDPs) may be able to migrate to other sections of their country, where they can enjoy these protections, without moving abroad.[97] Refugees are unlike other migrants precisely because of their inability to enjoy the benefits of citizenship due to their fear of persecution, and their individualized, specific needs demand a specific solution.

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95. Refugees may also be stateless, citizens of no state. Statelessness gives rise to another host of international legal problems outside the scope of this article. Statelessness is addressed by another international instrument, the 1961 Convention on the Reduction of Statelessness.

96. On assisting climate change migrants, see Katrina Miriam Wyman, *Responses to Climate Migration*, 37 HARV. ENVTL. L. REV. 167 (2013) (discussing three recent proposals for international legal and non-legal responses to climate change migration); *see also* Agnes Hurwitz, *Climate-Related Displacement: The Perilous Path Towards Normative Development*, in STILL WAITING FOR TOMORROW: THE LAW AND POLITICS OF UNRESOLVED REFUGEE CRISES 193 (Susan M. Akram & Tom Syring, eds., 1st ed. 2014).

97. The "Deng Principles" on internal displacement have been developed to provide an international framework for protecting IDPs. However, these principles are not binding and are left to individual states to adopt in their own policies and caselaw, and do not address the root causes of displacement that may cause both internal and external displacement. *See Guiding Principles on Internal Displacement,* U.N. OFF. FOR COORDINATION HUMANITARIAN AFF. (2004), https://docs.unocha.org/sites/dms/Documents/GuidingPrinciplesDispl.pdf.

http://scholarship.law.berkeley.edu/bjil/vol35/iss1/2
DOI: https://dx.doi.org/10.15779/Z38901ZF5Z

Refugees require legal complementarity: legal protections ordinarily provided by states because states are unavailable to provide these basic needs. Historically, a major function of international refugee law was to provide refugees with passports, travel documents, and certifications of personal status that their states were unable to provide. Although UNHCR today is more an international humanitarian agency than a legal one, these basic legal protections remain among its most critical functions. Refugees also need the rights to work and access justice required by international refugee law, because their states are unavailable to provide them with these basic needs. As mentioned above, other types of migrants can, at least theoretically, still avail themselves of the protections of their states.

Unlike most people fleeing war, poverty, or natural disasters, a refugee's status may never end.[98] For economic migrants, people fleeing violence and crises caused by climate change, resolution of conflict within the state, improved economic development, or recovery from a natural disaster may end their displacement. They will be able to repatriate if the circumstances causing their reasons for flight subside. For Convention refugees, by contrast, this may never happen. According to the Convention definition, the nature of the persecution that caused the flight depends on both the ability of the state to protect its citizens from persecution and the characteristics of the individuals involved. Resolution of conflict or disaster within the state will not be enough to ensure that these individuals will be protected from persecution on the basis of their characteristics as minorities or dissidents.

Reality, of course, is more complicated than this stylized example. Refugees and migrants may often have multiple, overlapping reasons for flight. Some Convention refugees may choose—and have chosen—to voluntarily repatriate. Individual asylum claims are difficult to adjudicate for precisely these reasons. However, the point remains that many migrants can repatriate to their home countries more easily than refugees, and that refugees may never be able to do so. To give but one example, it would have been ludicrous to expect all Jews to return to Germany after the end of World War II. Similarly, it would be abhorrent to expect all refugees who have fled persecution to return to their countries of origin.

2. Refugees Have Unique Moral Claims for Protection

Beyond the gruesome history and persistence of persecution in international law, because of their political and legal vulnerability, refugees have the strong moral claims for international assistance that other groups of migrants

98. Of course, a climate change migrant's plight may never be fully solved if her land disappears. However, as discussed herein, climate change migrants are likely to receive assistance and protection from their own governments, while refugees will not. In a sense, climate change migrants can receive restitution for the loss of their land from their states or the international community. Refugees can never receive compensation for their status that will similarly make them whole.

do not. Unlike refugees, economic migrants are likely to be protected by their states. Most states ideally wish to prevent economic migration. Assuming states are rational economic actors, even those who benefit from remittances fear brain drain and would prefer to create economic opportunities at home rather than having citizens live and work abroad. Moreover, economic migration is largely voluntary. For these reasons, economic migrants have less of a moral claim for international protections than other groups of migrants.

Migrants fleeing violent conflict or climate change have a stronger moral claim to international protection than economic migrants. However, their situation is still distinct from that of refugees. These groups of migrants have governments that can seek domestic solutions or request international aid to assist them. South Sudan, for example, is a fragile state from which many have fled, but its government has sought international assistance for its people.[99] The governments of climate change migrants, in particular, may be actively working toward a solution to protect their citizens. For example, The Marshall Islands is currently seeking financial assistance to help its many citizens who are affected by climate change.[100] While the plight of such people is morally wrenching, their situations do not demand the same type of protection that refugees require. For these types of migrants, international aid may be available and appropriate for migrants as groups, based on the circumstances that collectively affect them. While all migrants should be treated in a manner that respects their human rights, their situations may not demand the individualized processing and treatment that international refugee law demands as part of the international human rights regime.

Refugees present the most morally serious case of need because they face the world's most vulnerable legal and political circumstances. Persecution on the grounds enumerated in the 1951 Refugee Convention is among the most egregious of human rights abuses. Even if other groups of migrants have equivalent or greater material need to that of refugees, their situation could theoretically be solved by humanitarian aid alone. Morality does not require that law prioritize the needs of the most materially destitute migrants over the needs of refugees. Refugees require legal protections to meet their unique needs.

Changes in humanitarian needs over time also should not change the core definition of what constitutes a human right. The right of freedom from persecution on the basis of one's religious, racial, ethnic, or national status, or political opinion, is one that has been entrenched in international law before the advent of modern law itself.[101] Expanding the category of "refugee" to include other groups of migrants would undermine the protections that states long ago determined to be in their moral and political interests, along with well-

99. *See Fragile States Index*, FUND FOR PEACE (2015), http://fsi.fundforpeace.org/rankings-2015 (ranking South Sudan the highest among the world's most fragile states).

100. *See* Coral Davenport, *The Marshall Islands Are Disappearing*, N.Y. TIMES, Dec. 2, 2015.

101. *See* Goldenziel, *supra* note 20.

established law that has given legal protections to generations of people without anywhere else to turn.[102]

While sovereign states legitimately have the right to restrict their borders, this does not mean that states have no moral obligation to admit as many or as few applicants who would like to live there. States need morally grounded legal principles for whom to prioritize for entry. International refugee law provides states with a universal rubric for whom to give precedence. People who are persecuted on the basis of religion, race, nationality, or membership in a particular social group should be prioritized in the international system, legally and morally, because of their unique needs as well as the international community's moral obligation to protect those fleeing persecution.

3. The Expressive Importance of Preserving the Refugee Definition

International refugee law, as it currently exists, provides a powerful expressive function. By categorizing victims of persecution on the basis of race, religion, nationality, political opinion, or membership in a particular social group as needing international protection, the international community has effectively proscribed certain behaviors as beyond the pale of what it can accept. The term "refugee" holds tremendous rhetorical power. The term "migrant," standing alone, has no meaning in international law.[103] It connotes mere movement of a person from one place to another due to any number of circumstances. "Refugee," by contrast, is a term that defines a specific set of commitments that the international community has historically owed to a specific type of international migrant. "Refugee" also connotes humanitarian need worthy of international assistance. The strategic use of these terms by actors in the international community can support or detract from their own political aims. A country cannot produce large numbers of "refugees" unless conditions inside it are unstable; therefore, an official statement that a country is producing "refugees" can be tantamount to saying that a country is suffering from instability or is unable to protect its citizens. Countries may also suffer reputation losses from expelling "refugees," or by failing to admit those who claim to be "refugees." Conversely, asylum countries are likely to gain reputational benefits from hosting "refugees." In 2015, for example, Germany was widely praised by the media and human rights groups for accepting large numbers of refugees and migrants, while Hungary has been condemned for closing its borders and detaining migrants.[104] Defining a group of migrants as

102. Joseph H. Carens, *Refugees and the Limits of Obligation*, PUBLIC AFF. Q. 31 (1992).

103. "Migrant workers" who have jobs abroad, however, are defined and protected by The International Convention on the Protection of the Rights of All Migrant Workers and Their Families, U.N.G.A. 45/158 (1990).

104. On Germany, see, for example, Martin Varsavsky, *Germany's attitude toward refugees is a refreshing change from that of America and the rest of Europe*, BUS. INSIDER, Aug. 31, 2015, http://www.businessinsider.com/why-germany-is-generous-to-refugees-2015-8.. On Hungary, see for example, *https://www.hrw.org/news/2015/12/01/hungary-locked-seeking-asylum* (last visited Mar. 11, 2017).

"refugees" also affects how other political actors will treat population movement. As discussed above, states are bound by international law not to send refugees back to circumstances where they are likely to face persecution. Migrants can legally be sent home.

The existence of the refugee status, as it currently stands, plays another important expressive role by implicitly condemning certain state behaviors. Refugee status connotes the failure of states to protect their own citizens, or more particularly, the failure of governments to do so. Indeed, refugee status implies a human element that other types of forced migration do not. Refugees flee when states are involved in persecution or are unable or unwilling to protect individuals from persecution occurring within their borders. Other categories of migrants may be fleeing the vicissitudes of fortune, perhaps wrought by Mother Nature, but not necessarily due to state action. The existence of refugee law casts aspersion upon the behavior of states that fail to protect their own citizens, and more so in the case of states that are unwilling to do so. Such a basic failure of an integral government function calls the legitimacy of that state or government into question.

This expressive function is increasingly important in the context of recent international debates, regarding when protecting human rights makes it acceptable to violate sovereignty. Prominent examples include controversies over the Responsibility to Protect and appropriate uses of the International Criminal Court.[105] The Security Council has linked the prevention of refugee flows and population displacement, considered a threat to international security, as justification for recent international interventions in Haiti, Iraq, Kosovo, Liberia, Rwanda, and Somalia.[106] In the context of increased willingness by the international community to violate sovereignty to protect human rights, it is especially important not to back away from international refugee law, which has long guaranteed rights that individuals have independent of states. Having such a category in international law sends a message to states that the international community will not tolerate their persecution of religious and ethnic minorities and dissidents.

C. The Need for a New International Agreement to Protect Displaced Persons

Accepting that refugees deserve legal protection, should states also protect people fleeing violence? The answer is yes, for both moral and practical reasons.

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105. *See, e.g.*, U.N. Secretary-General, *Implementing the Responsibility to Protect: Report of the Secretary-General*, U.N. Doc. A/63/677 (Jan. 12, 2009); Alan Dowty & Gil Loescher, *Refugee Flows as Grounds for International Action*, 21 INT. SECUR. 43–71 (1996), 43.

106. *See* Guy Goodwin-Gill, *Editorial: Refugees and Security*, 11 INT'L J. REFUGEE L. 1,3 (1999); Burden-sharing has been a frequent theme of the High Commissioner's annual dialogues. For recent discussions, see U.N. High Comm'r for Refugees, *International Cooperation to Share Burden and Responsibilities*, REFWORLD (June 2011), http://www.refworld.org/docid/4e533bc02.html.

The special obligation to protect refugees does not absolve states of a moral responsibility to legally protect or materially aid other people. On moral grounds, the philosophical principle of mutual aid requires that if a person is in dire need and a state is able to assist that person with little cost, a state has a moral duty to help them.[107] Moral concerns are heightened when neighboring states bear some responsibility for the circumstances of displacement. For example, many states are involved in proxy wars in so-called civil conflicts that cause population displacement. Saudi and Iranian involvement in the current so-called "civil war" in Yemen is but one example.

Even states that reject morality principles on sovereignty grounds may have a strong practical interest in mandated international assistance for people who fall outside of the 1951 Refugee Convention's definition of refugee. States benefit from stability and predictability in the international system and suffer from having their borders flooded by those seeking to leave desperate circumstances elsewhere. States also suffer when vulnerable people compete over scarce resources, often causing conflict that can spill over state borders. In our globalized world, violent conflict has ramifications for population displacement throughout the globe. As of this writing, civil war has displaced at least 4.8 million Syrians in neighboring countries. Hundreds of thousands of other migrants have fled as far as to Europe, Australia, and the U.S.[108] Refugees and migrants have overwhelmed these legal systems and caused political controversies. EU ministers have met repeatedly to address the crisis and failed to reach solutions.[109] Australia has devised a highly controversial third-country processing system on Nauru.[110] Global forced displacement has reached an all-time high.[111] Practicality demands international action to address the growing political and legal problems caused by migration, even when moral arguments to address humanitarian needs fail.

A new international agreement is needed to protect both the interests of states and people who have fled internationally from violent domestic conflict.

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107. Walzer, *supra* note 58, at 49-50.

108. For regularly updated statistics on displacement in neighboring countries, see *Syrian Regional Refugee Response*, UNHCR, http://data.unhcr.org/syrianrefugees/regional.php (last visited Feb. 28, 2017). For statistics on European asylum claims, see *Eurostat*, EUROPEAN COMM., http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database?p_p_id=NavTreeportletprod_WAR_NavTreeportletprod_INSTANCE_sFp6GUtIbBHg&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=1; for statistics on migration from Syria, see https://www.iom.int/countries/syria (last visited Feb. 28, 2017).

109. On the EU's failure to reach agreement on migration policy, see, for example, *Migrant crisis: EU meeting seeks to heal growing rifts*, BBC, Feb. 25, 2016, http://www.bbc.com/news/world-europe-35657054.

110. For discussion of legal and political issues involving the Australian processing system, see Goldenziel, *International Decisions*, *supra* note 80; see also Goldenziel, *When Law Migrates*, *supra* note 47. For discussion of the Central American migration crisis, see Kirk Semple, Fleeing Gangs, Central American Families Surge Toward U.S., N.Y. TIMES, Nov. 12, 2016, https://www.nytimes.com/2016/11/13/world/americas/fleeing-gangs-central-american-families-surge-toward-us.html.

111. *See generally supra* note 35.

Binding international law would provide the strongest protections for these displaced people. International law also provides important guidance to the international community, even to non-signatory states, on how to manage population displacement. Currently, even in states that have not signed the 1951 Refugee Convention, UNHCR uses the Convention and state practice, along with states' other commitments to international human rights law, as leverage to pressure states to protect people fleeing violence and persecution.[112]

International law on how to categorize and protect people displaced by violence would make states less able to ignore these populations or to selectively aid them for political reasons. Enforcement in domestic and international courts would provide a check on politicization of assistance to Displaced Persons. The manner in which states should and do provide rights to displaced people is a subject of political disagreement in many states. In both EU states and in the U.S., for example, political parties have repeatedly threatened to roll back protections for refugees and migrants, making the rights of vulnerable people dependent on political pressures and electoral cycles.[113] Law would clarify the rights of Displaced Persons and would be more likely to be followed and enforced than a non-binding agreement.

As a fallback, a non-binding agreement containing many of the same principles outlined in this article could still help improve state behavior and international security. Of course, it would lack the teeth and enforceability that law would have in domestic and international courts. Without binding law, states will be more likely to shirk their duties when international politics dictate that they do so, due to domestic political constraints or failure of their immigration systems. A non-binding agreement would also not have the same authority to shape state practice that law can provide.

It is important to acknowledge the skepticism that any international agreement, binding or otherwise, can solve a problem that so acutely implicates state sovereignty. Yet recent events involving climate change offer an instructive counterargument. Just twenty-five years ago, when the world was beginning to recognize signs of global warming, the idea of international cooperation to fix this global problem was nearly unthinkable. Nonetheless, with the 2015 Paris Agreement, delegates from the world's nations unanimously agreed to a framework to combat climate change. The Paris Agreement is considered a treaty, although it includes both binding and non-binding

112. *See* interview with Katherina Lumpp, *supra* note 83 (explaining that UNHCR is able to refer to Egypt's Refugee Convention commitments when seeking access to refugee prisoners, among other Convention obligations).

113. In the U.S., see, for example, Michelle Innis, *As Trump Nears Office, Australian Deal to Move Refugees to U.S. Is in Doubt*, N.Y. TIMES, Nov. 17, 2016, http://www.nytimes.com/2016/11/18/world/australia/australia-us-refugee-deal.html. On Germany and the EU, see, for example, Alison Smale, *Angela Merkel's Problems in Germany Could Challenge Europe, Too*, N.Y. TIMES, Sept. 11, 2016, http://www.nytimes.com/2016/09/12/world/europe/angela-merkel-germany-european-union-migrants.html.

provisions. For example the specific commitments to reduce greenhouse gas emissions are not legally binding, but parties are legally obligated to report on their progress in implementing the agreement, and these reports will be monitored and evaluated in turn.[114] Many provisions were not made binding at the request of the U.S., since the Obama administration wanted to avoid the need to have the treaty ratified by Congress.[115] However, the U.S. was willing to sign on to a partially binding agreement, and the Obama Administration subsequently attempted to implement even its non-binding commitments.[116] The international community's willingness to negotiate an agreement on climate change suggests enthusiasm for international law, or at least an international agreement, to solve a common problem—even when it implicates their sovereignty.[117]

Like climate change, population displacement, is a problem of global scope and ramifications that demands an international solution. Persistent security and human rights concerns caused by population displacement may bring the world to commit to an international agreement, or even international law, to help displaced people. Urgency has already caused countries such as the E.U., Australia, and countries neighboring Syria, to seek atomized solutions that can be globalized, harmonized, and improved.[118] Recent UN efforts on refugees and migrants suggest a wider desire to create an international agreement—whether binding, non-binding, or partially binding.

1. Recent UN Efforts to Address Refugees and Migration

The U.N. itself has recognized that new international solutions to the refugee and migration crisis are necessary. In September 2016, the UN General Assembly held a special Summit on Refugees and Migrants.[119] At the Summit, member-states affirmed a Political Declaration supporting human rights

114. *United States Joins Consensus on Paris Climate Agreement*, 110 AM. J. INT'L L. 374, 374 (2016).

115. *See generally id*. (explaining reasoning behind non-binding provisions in Paris Agreement).

116. *See generally id*. (explaining Obama administration's implementation of Paris Agreement).

117. The Paris Agreement on climate change is considered to be international law and is often called a treaty. However, the fact that it is only partially binding makes its legal status weaker than other treaties that are binding as a whole. For a more complete discussion of the status of the Paris Agreement in international law, see Daniel Bodansky, *Legally Binding versus Non-Legally Binding International Instruments*, *in* TOWARDS A WORKABLE AND EFFECTIVE CLIMATE REGIME (Scott Barrett Carlo Carraro and Jaime de Melo, eds., 2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2649630.

118. On European and Australian solutions, see Goldenziel, *When Law Migrates*, *supra* note 47. Jordan and Lebanon are not signatories to the 1951 Refugee Convention. Turkey is a signatory but has kept the geographic restriction that limits its commitments only to European refugees. Responses to refugee crises in the region have been made on an ad hoc basis and vary widely from country to country. *See generally* http://data.unhcr.org/syrianrefugees/regional.phpUNHCR, *supra* note 108 (providing data on individual country responses to Syrian displacement).

119. *Summit for Refugees and Migrants*, UN, http://refugeesmigrants.un.org/summit (last visited Feb. 28, 2017)

commitments for refugees and migrants, known as the New York Declaration.[120] This declaration is not binding, and critics have noted that it falls far short of what is needed to address the scope of the crisis.[121] Moreover, it largely affirms commitments already made by member-states in previous human rights treaties. A Leader's Summit on Refugees hosted by President Obama the following day brought awareness to the plight of refugees and produced more concrete funding commitments to assist them, but excluded migrants from its purview and did not result in legal commitments by states to assist either refugees or migrants.[122]

Building on the Summit, the U.N. is now beginning the process to hold a second international conference and a "Global Compact on Safe, Orderly, and Regular Migration" in 2018.[123] The stated goal of this Global Compact is to be a "framework" and present "guidelines" for migration. This Compact will, therefore, not produce binding, international legal commitments. The Compact will certainly serve an important awareness-raising function. Since it will not bind states with the force of law, it is less likely to make the same difference in the lives of refugees and migrants or improve state security as a binding agreement would.[124] But it is a valuable start toward shaping state behavior in a positive direction.

The New York Declaration recognizes that refugees already have specific and important rights under the 1951 Refugee Convention, and that any Global Compact is meant to supplement this, not to undermine it. Indeed, civil society groups repeatedly emphasized this point in hearings leading up to the adoption of the New York Declaration.[125] The General Assembly has thus reaffirmed the distinct legal categories of refugees and other groups of migrants. In doing so, the UN implicitly has recognized that the concept of "refugee" in the Refugee Convention should not be diluted, but that new international agreements are needed to protect more displaced people.

The Global Compact process is already underway, and is far more likely to materialize than a treaty by its scheduled completion date of 2018. However, the Summit on Refugees and Migration and the Global Compact process have made

120. New York Declaration, G.A. Res. A/RES/71/1, U.N. GAOR, 71st Sess., U.N. Doc. A/71/L.1 (Sept. 13, 2016), http://refugeesmigrants.un.org/declaration. The author consulted on the draft declaration as part of the civil society consultations held before the meeting.

121. *World leaders at UN approve plan for refugee crisis,* CHI. TRIB., Sept. 19, 2016, http://www.chicagotribune.com/news/nationworld/ct-refugee-crisis-united-nations-20160919-story.html.

122. Joint Statement on Leaders' Summit on Refugees, United States Missions to the United Nations (Sep. 2016),https://2009-2017-usun.state.gov/remarks/7507

123. Faye Leone, *UN Prepares for Migration, Refugee Negotiations*, IISD: SDG KNOWLEDGE Hub (Nov. 2016), http://sdg.iisd.org/news/un-prepares-for-migration-refugee-negotiations/. The author spoke at an initial Modalities meeting on civil society participation in the Global Compact process.

124. For a differing view, see U.N. News Centre, *INTERVIEW: New global compact 'should make a difference' in lives of refugees and migrants – outgoing UN Special Adviser*, U.N. NEWS SERV. (Oct. 28, 2016), http://www.un.org/apps/news/story.asp?NewsID=55419.

125. The author attended such a hearing on July 18, 2016.

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the need for a Displaced Persons Convention to supplement the 1951 Refugee Convention even more clear. The international community has reaffirmed the unique rights of refugees under international law, but is still floundering when it comes to determining what protections to provide to other groups of migrants. A Displaced Persons Convention would provide protections to those displaced by violence that go far beyond the non-binding commitments currently being proposed by the UN. However, it would also protect the sovereign right of states to exclude economic migrants from their borders. International security would be improved by the development of a clear legal framework to determine how to prioritize the claims of refugees arriving en masse on state borders. The Global Compact may be more achievable than a treaty in the short term. However, as discussed below, the framers of the Global Compact should view the document as a step on the way to creating binding international law.

III.
WHAT AN INTERNATIONAL AGREEMENT TO PROTECT DISPLACED PERSONS WOULD LOOK LIKE

This section proposes suggestions for what an international agreement to protect Displaced Persons might look like. This section will not present a draft of a new treaty or international agreement. Ultimately, all international agreements must be negotiated and bargained-for by states and stakeholders so that they may succeed. This article's goal is, rather, to sketch some considerations for states as they negotiate new protections for people fleeing violent conflict, while preserving their own sovereign aims and protecting their borders.

As discussed above, international law is the best way to provide human rights protections to refugees and migrants while protecting international security. However, treaty-making is an arduous and lengthy process, and states are far more likely to come up with more informal agreement such as the Global Compact in the near term. If realized, this Global Compact or a similar agreement will shape state behavior, and therefore may create state practices and norms that may eventually become law. Thus, any international agreement on migration management must be drafted with the idea that its provisions may eventually become legally entrenched.

For this reason, a Displaced Persons Convention or a non-binding international agreement would contain similar provisions. This section will reference both a Displaced Persons Convention and a non-binding international agreement, making clear when suggested provisions would apply to only a binding agreement. The Paris Agreement on climate change, discussed above, presents a new paradigm of a "partially-binding" agreement with both binding and non-binding provisions. A partially binding agreement on Displaced Persons might also be possible. One could imagine the U.S., for example, accepting a definition of "Displaced Persons" as law without committing to specific financial burden-sharing mechanisms that would require Congressional

approval. For simplicity's sake, however, I will refer to "binding" and "non-binding" agreements in the discussion below. A full discussion of the full panoply of partially binding agreements lies beyond the scope of this article.[126] Instead, I aim to present reasonably realistic proposals and acknowledge their political limitations.

Also for the purposes of this section, I will refer to those people fleeing violence to whom the international community should expand protections as "Displaced Persons." Policymakers may choose another term or to define the category more broadly or narrowly than I propose. My point is that any new international agreement must reflect a conceptual shift as to which displaced people the international community will protect, under what circumstances, and how—and define a new category to enable their protection.

Any international agreement to protect Displaced Persons must involve provisions for defining the category of individuals who will be protected, how these protections would be triggered and monitored, what rights these individuals would receive, and state obligations. This article will discuss each of these in turn.

A. Defining Displaced Persons

Clearly delineating who qualifies as a "Displaced Person" will be critical to the success of a DPC or international agreement to protect Displaced Persons. States must know to whom they are bound to provide protections. Most critically, states must know which people they can legally send back home, and which people they must protect. While actual cases of individual people may not fall along such clear lines, questionable cases can and should continue to be adjudicated.

To that end, any agreement should distinguish three primary categories of people that are now commonly referred to as "migrants": refugees, economic migrants, and those fleeing violent conflict.[127] Refugees should continue to receive unique protections under international law. Those seeking economic opportunity alone should be directed to a state's regular immigration system. "Displaced Persons" would be the third category: those fleeing violence but not persecution. Climate change migrants present a fourth category, which, as discussed above, is already being addressed by other draft conventions and international commitments.[128]

The definition of "Displaced Person" must be carefully circumscribed to avoid encompassing endless flows of people. I propose that the international community should protect only those Displaced Persons whose flight threatens

126. For more on binding versus non-binding international agreements, see Bodansky, *supra* note 117.

127. Most human rights treaties include clauses that explain that a new treaty is not meant to undermine commitments in previous treaties.

128. *See supra* note 56.

international peace and security, in accordance with the language of Article I of the U.N. Charter. States will be interested in providing protection if international stability is threatened. While this standard is less stringent than the "well-founded fear" criterion in the 1951 Refugee Convention, it also ensures that every individual cannot have a claim to be a Displaced Person.[129]

Drafters might draw lessons from the definitions used by the Organization for African Unity and the European Commission in their attempts to provide protection to people who do not meet the 1951 Refugee Convention's definition of refugee. The OAU Refugee Convention defines a "refugee" as:

> every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[130]

The 2004 European Council (EC) directive and 2011 European Union (EU) Directive provide "subsidiary protection" to those who can show:

substantial grounds . . . for believing that," if returned to his country of origin or former habitual residence, he "would face a real risk of suffering serious harm . . . [and] is unable, or owing to such risk, unwilling to avail himself or herself of the protection of that country.[131]

The Directive defines "serious harm" as:

"(a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."[132]

This language resembles the 1951 Convention definition of "refugee," but is less stringent. To receive "subsidiary protection," which usually provides lesser protections than asylum, one must show a belief in a substantial risk of "serious harm" rather than a "well founded fear" of persecution on the basis of specific categories.

Both definitions expand the category of persons who should receive international assistance in a way that would not create endless obligations for states. The OAU definition focuses on the causes of displacement, while the EC's definition centers on the risk of harm that an individual will face if refouled. The OAU's mention of "external" or "foreign" pressures implies that international involvement in a displacement logically is required for an international response to occur. The events must be "seriously disturbing public

129. *See* 1951 Refugee Convention, *supra* note 7.

130. Organization for African Unity, *supra* note 70.

131. European Council Directive 2004/83, On Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugee or as Persons who Otherwise need International Protection and the Content of the Protection Granted, 2004 O.J. (L304) 12 (EC), art. 2(e).

132. *Id*. at art. 15(a)-(c), 19.

order," which is close to the level of threatening international peace and security. Moreover, Displaced Persons must be "compelled" to leave their place of habitual residence in order to seek refuge outside of theirs country. This standard, while less stringent than the specific fear of persecution required by the 1951 Refugee Convention,[133] still demands that people are forced to migrate for reasons other than personal convenience, and would exclude economic migrants. The OAU Convention's use of "compelled" implies that protected people must find it necessary to flee their homes because their states cannot provide adequate protection in a particular instance. Combining this definition with the EU's requirement of a specific, individualized risk of harm restricts the definition further. Including the EU's criteria ensures that the focus of protection will be on individual Displaced Persons, rather than groups of displaced people, in accordance with the norms and goals of protecting individual human rights in international law.

The OAU and EU definitions, while imperfect, provide important guidance for protecting both individuals and states. No doubt, they will not satisfy those who seek to expand the category of refugee more broadly, as discussed above. However, combined, the OAU Convention and the EU Directive sketch out a definition of "Displaced Person" likely to be accepted by states. States are most likely to sign an agreement that would reduce threats to international peace and security. States will also be likely to sign an agreement that reflects a moral responsibility of states that participate in violent conflict to help Displaced Persons. At the core of both the OAU and EU definitions is the norm of non-refoulement, the idea that a person must not be sent back to a place where her life would be endangered. Together, both documents protect individuals fleeing for reasons beyond the stringent standards of the 1951 Refugee Convention while ensuring that the definition of Displaced Person will not become so broad as to be infeasible, by requiring international protection for anyone in need of humanitarian assistance. State practice, or at least the intent of states in Africa and Europe, lies behind these definitions as well. A broader commitment to a similar definition by states would not therefore result in a problematic rollback of international aid and legal protections from many people who currently receive them. Given quickly changing migration flows, any definition of Displaced Persons should be revisited by state parties every few years, which would allow states to respond to new migration challenges they face.

An international agreement to protect Displaced Persons must also make clear whom it would not protect. It must state that Displaced Persons are not refugees, and that the agreement will not conflict with the 1951 Refugee Convention. Economic migrants, climate change migrants, and IDPs should be excluded for reasons discussed above. "Exclusion clauses," similar to the ones in the 1951 Refugee Convention, are necessary to ensure that states are not required to protect individuals who pose security threats.[134] The agreement must

133. *See* 1951 Refugee Convention, *supra* note 7, at art. 1.

134. 1951 Refugee Convention, *supra* note 7, at art. 1F.

also clarify that individuals will have the burden to prove that they meet the criteria set forth in the definition of "Displaced Person," and lay out individual status determination procedures for this to occur.

To deter illegal entries, the agreement might also not protect those who enter a country illegally. Forbidding Displaced Person status to anyone who enters illegally could deter illegal migration, which would improve state security, thereby making the agreement more appealing to states. However, the 1951 Refugee Convention explicitly forbids denial of refugee status to people who meet the relevant criteria who enter a country illegally, because of human rights issues with doing so.[135] Exceptions in the agreement should be crafted to alleviate human rights concerns.

B. Triggering Convention Protections

A DPC or international agreement must specify how its protections would be triggered, and when these protections would end. Only members of the international community can decide when an international agreement will be triggered. Negotiating states may wish to consider one or several options, operating in tandem or individually. States must also decide whether the DPC may be triggered retroactively, with respect to populations who are already displaced, or if it will only apply going forward. When choosing a trigger mechanism, states should consider how quickly protections could be triggered, since large displacement flows may require a rapid response.

Agreement protections might be triggered when states are unable or unwilling to protect their own citizens. Such a requirement would bring an international agreement to protect refugees in line with the principle of complementarity that allies other instruments of international human rights law and international criminal law.[136] A declaration of state incapacity might come from a state itself in a formal plea for international assistance, or through designation by individuals, states, or a UN body. For example, a citizen of the state might petition the UN or a body monitoring the agreement to ask that his state be declared incapacitated due to large-scale displacement. Alternatively, the General Assembly, UNHCR, or another body might declare or resolve that a state itself is incapable of providing for its citizens in a particular instance. The reputational costs of such a declaration of state incapacity would deter states from requesting international assistance unless it is necessary, and would incentivize them to act to avoid displacement in the first place.

States might vote to determine whether a particular group of people meets the definition of Displaced Persons. A vote by signatories, the Security Council, or the General Assembly might trigger agreement protections. Votes by a UN

135. 1951 Refugee Convention, *supra* note 7, at art. 31.

136. Complementarity is a foundational concept in International Criminal Law; considering it when creating an international legal agreement involving human rights helps to harmonize the international legal regime.

body, however, should not be the sole trigger for agreement protections. Doing so would carry a high risk that the process will become politicized.

Sheer numbers of people displaced by violent events, such as a mass influx of 1,000 per day over a short time, might also play a role in determining whether protections should be triggered.[137] However, setting an objective threshold should be done with caution to avoid the risk of creating perverse push and pull factors. For example, a situation where an evil dictator purposely forces out 1,000 people per day to trigger international protections, or where a group of 1,000 people coordinates their flight from a country to improve their chances of receiving benefits, would not be desirable.

The actions and voices of Displaced Persons themselves, as well as NGOs and other stakeholders, should also be considered when deciding whether Convention protections will be triggered. Displaced individuals might petition an international body to trigger agreement protections. Protections for Displaced Persons might also be triggered by numbers of people from a given country who have registered for services from UNHCR or reputable international NGOs, such as those with UN observer status or which are registered with the UN Economic and Social Council (EcoSoc). UNHCR must be required to publicize numbers of people registering for its services at various field offices so that the international community can become easily aware of flows of Displaced Persons and act on them.

States must also negotiate a procedure for determining when the status of any group of Displaced Persons might end. When doing so, states should allow for flexibility for these decisions to be made on a case-by-case basis. They should also include provisions for the voices of Displaced Persons to be heard when making this decision. And finally, they should take extra precautions to ensure that these decisions—which could be a matter of life and death for vulnerable individuals—are not subject to politicization.

C. Supervision

States must decide who will supervise implementation of international protections once they have been triggered. A new agency, monitoring body, or ad hoc organization might supervise the agreement. UNHCR, however, is probably best positioned to supervise an international agreement to protect Displaced Persons. The agency has, de facto, been providing for the needs of much of this population for years, so it has the expertise and the capacity to expand its operations to provide aid and administer a new international agreement.[138] For example, in 2006-2007, during the Iraqi civil war, UNHCR

137. The term "mass influx" has never been legally defined or defined by UNHCR. *See* U.N. High Comm'r for Refugees, Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations, U.N. Doc. A/AC.96/1003 (Oct. 8, 2004).

138. UNHCR provides services to many "persons of concern" beyond Convention refugees. *See, e.g.*, 2015 UNHCR Global Report, http://www.unhcr.org/gr15/index.xml

treated all Iraqis in neighboring countries as prima facie "refugees," regardless of whether they met Convention refugee criteria.[139]

UNHCR is far from perfect, as discussed above. However, careful design of a DPC or international agreement to protect Displaced Persons could mitigate problems that have plagued the agency in the past. Providing UNHCR with core funding for humanitarian use, such as using a fund discussed below, would insulate the agency's activities from some of the politicization inherent in past humanitarian actions to assist refugees.[140] With funding at the ready, the mandate to administer a new international agreement, and a reaffirmation of its protection functions, UNHCR could more expeditiously assist both refugees and Displaced Persons. It would no longer have to wait to act until it received U.N. authorization or funding from a politically interested donor state.

D. Rights of Displaced Persons

Because DPs are morally and politically distinct from refugees, the international community has a different set of obligations to them. According to UNHCR, refugee status terminates via one of three durable solutions: local integration, resettlement, or repatriation. Article 34 of the 1951 Refugee Convention encourages states to "facilitate the assimilation and naturalization of refugees," although it stops short of requiring this.[141] By contrast, protections for Displaced Persons under any international agreement should be geared toward eventual repatriation. As discussed above, Displaced Persons are distinct from refugees because their ties to their countries of origin are not severed by the circumstances of their displacement. As a practical matter, states are likely to be unwilling to commit to providing more than temporary protections to Displaced Persons, especially those states who are already involuntarily hosting large numbers of refugees and migrants.

Accordingly, Displaced Persons should only be granted temporary protection until sufficient arrangements can be made for them to return to their homes or to a safe zone within their country of origin. Displaced Persons should know that temporary protection could be revoked at any time, with reasonable notice. Unlike refugees, Displaced Persons should not have access to third-country resettlement, since their protection is designed to be temporary. Displaced Persons should be integrated locally only to the extent that they can easily be repatriated when the situation in their origin country stabilizes. Temporary work permits, for example, might be an appropriate mechanism to ensure that Displaced Persons do not remain in a host country indefinitely.

A Displaced Persons Convention or related international agreement must avoid the pitfalls of other human rights treaties. Many failures of international

139. *See* Goldenziel, *supra* note 18, at 477.

140. For a discussion of the politicization of the Iraqi refugee crisis after the 2003 U.S. invasion of Iraq, *see generally* Goldenziel, *supra* note 18.

141. 1951 Refugee Convention, *supra* note 7, at art. 34.

human rights law are due to poor enforcement mechanisms and long, unrealistic laundry lists of rights "commitments" that few, if any, states have the means to fulfill.[142] For the sake of practicality, any international agreement to protect Displaced Persons should not include long lists of rights commitments that no state has yet matched. For an international agreement to protect Displaced Persons to work, it must include fewer commitments that are more concrete, while stressing in its text that nothing in it will undermine previous human rights commitments. Ideally, states would ensure that all Displaced Persons enjoy all of the inalienable human rights delineated in the body of international human rights law, and a DPC would become an instrument of international human rights law on par with the core human rights treaties. For now, this is politically unrealistic.

Instead, states must negotiate what they, as an international community, can realistically provide to Displaced Persons. Basic shelter, sustenance, security, access to healthcare and the legal system, and *jus cogens* human rights protections provide a floor for treatment of Displaced Persons. Beyond that, any agreement must recognize that no one-size-fits-all solution exists for all states, nor for all Displaced Persons. For example, requiring that all Displaced Persons be granted work permits may be infeasible in countries with nearly 25% unemployment, such as Greece.[143] For similar reasons, an international agreement to protect Displaced Persons might not include the "right to work" language listed in the 1951 Refugee Convention and other human rights instruments.[144] Instead, the agreement could require that signatory states convene to promote and fund creative solutions for Displaced Persons to have livelihoods when the agreement's protections are triggered.

E. Enforcement

An international agreement to protect Displaced Persons should also have enforcement mechanisms. A DPC or similar treaty would have stronger enforcement provisions than a non-binding agreement. International law would be enforceable in international and many domestic courts. Countries also might agree to economic sanctions against those who violate a legal agreement, although in reality, economic sanctions for violations of a Displaced Persons Convention would be politically unlikely.

Non-binding agreements can also have enforcement mechanisms. While these likely will not be as strong as judicial enforcement or sanctions, they may still be powerful. Censure or punishment within the context of the agreement may be possible, such as withholding of development aid for violating the terms of the agreement. Censure within the UN might also be possible. Monitoring,

142. *See generally* POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW, *supra* note 84 (discussing how most states do not fulfill their human rights commitments under international law)..

143. *Greek Unemployment*, WORLD BANK, http://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?locations=GR (last visited Feb. 28, 2017).

144. *See, e.g.*, 1951 Refugee Convention, supra note 7, at Chapter III.

reporting, and evaluation mechanisms will also be key. The international agreement should specify who would conduct the monitoring. This might me a new body such as the Committee for Displaced Persons, analogous to the Committee on the Rights of the Child that monitors the Convention on the Rights of the Child. Alternatively, UNHCR or an existing international entity might modify the agreement. Mechanisms for reliable and transparent reporting must also be established, such as censure for late or inaccurate reports, and external as well as self-reporting.

UNHCR, NGOs, and other civil society groups should also be involved in monitoring, reporting, and evaluation processes as stakeholders and watchdogs. With an on-the-ground presence, these non-governmental actors can provide a more accurate picture of human rights conditions and fairness of Displaced Persons determination processes than self-reporting or international monitoring alone. They can also provide an important monitoring and "naming and shaming" function by calling out those states that do not live up to their commitments under the agreement or DPC.

F. State Obligations

To treat Displaced Persons humanely, any international agreement must make clear what commitments states have to Displaced Persons, and must contain commitments that are realistic enough for states to meet. This would allow people to make informed choices about the rights and opportunities they will have if they flee their countries.

The success of an international agreement to protect Displaced Persons will hinge on provisions for burden sharing among states. As the term is used in humanitarian circles, burden sharing primarily refers to the financial and infrastructural burden of hosting Displaced Persons and paying for their humanitarian needs. In addition to the burdens of hosting and providing aid to Displaced Persons, states will have to pay for other obligations specified in any international agreement to protect Displaced Persons. Agreement signatories must also specify how states will share the costs of preventative mechanisms for the root causes of displacement. States must also determine who will ensure, and pay to ensure, the physical safety and human rights of Displaced Persons if and while repatriation occurs.

1. Burden Sharing

Burden sharing should be the goal of any international agreement, as most scholars and practitioners agree. However, the international community must decide how burden sharing of hosting and financial responsibilities should occur.

Hosting

One option might be to commit signatories to host proportionate numbers of Displaced Persons. Such an arrangement may not be desirable, however. Historically, most Displaced Persons have been displaced within the developing world, and transferring them may be costly. Providing temporary protection to Displaced Persons within their region of displacement will often be the most practical option. Supporting them within the developing world may be less expensive than transferring them elsewhere. Furthermore, linguistic and cultural similarities may help Displaced Persons integrate in their host communities, and regional economic cooperation may allow those displaced to engage in productive economic activities. Geographic proximity can also facilitate ties between Displaced Persons and their countries of origin, which will facilitate eventual repatriation.

It should be noted that Displaced Persons might not always fare best in their regions of origin. The experience of Palestinian refugees is instructive in this regard. Palestinians who fled the creation of Israel in 1948, for example, were not initially granted human rights or legal protections in most of the Arab world. To this day, of countries neighboring Israel, only Jordan has granted full citizenship and legal rights to Palestinians, although it has denied it to Gazans.[145] Any international agreement must be flexible enough to account for individual circumstances of displacement.

Negotiating states may arrange to distribute Displaced Persons elsewhere, regardless of where they initially flee. Wealthy states, like Germany in 2015, may be interested in taking large numbers of Displaced Persons in order to bolster their workforce. Poorer states may be willing to accept large numbers of Displaced Persons in return for development aid or other financial assistance. Some wealthier states may be happy to pay poorer states to host Displaced Persons. In the mid-2000s, for example, the U.S. gave Jordan development aid for hosting large numbers of displaced Iraqis.[146] States may also wish to transfer Displaced Persons to third countries for processing or eventual hosting, as has been considered by the EU in 2014 and 2015 in response to large migration flows.[147] Under existing international law, if Displaced Persons are transferred to third countries for processing or hosting, the transferring country will need to ensure that they will not be subject to torture or maltreatment there.[148] This standard should be reflected in any international agreement on Displaced Persons. If these and other basic human rights are guaranteed, both transfers of

145. *See generally* Sawsan Ramahi, *Palestinians and Jordanian Citizenship*, MIDDLE EAST MONITOR, Dec. 2015 (explaining the legal status of Gazans in Jordan).

146. *See* Goldenziel, *supra* note 18.

147. Australia, too, has a third country processing program, but it has come under fire for human rights abuses. *See* Goldenziel, *International Decisions*, *supra* note 80; Goldenziel, *When Law Migrates*, *supra* note 47.

148. Convention Against Torture, *supra* note 19.

refugees and financial transfers to pay for their hosting may be desirable outcomes.

2. Funding and Related Incentives

Any well-crafted international agreement must provide assurances to wealthier and poorer states that they will benefit from signing. A DPC that is legally enforceable would provide a more credible commitment than an international agreement in this regard. However, any agreement that makes flows of Displaced People safer and more orderly will benefit states. All states benefit from predictability and stability in the international system. States also have the natural incentive to coordinate to avoid the instability and potential for conflict spillover that accompanies massive flows of people fleeing violence.

Assurances of financial assistance will incentivize wealthier and poorer states alike to participate in a DPC. Minimum human rights standards require that host states ensure non-refoulement and provide Displaced Persons with basic needs, security, sustenance, and access to justice while they are present. Ensuring these human rights will be expensive and burden state infrastructure. Developing nations usually cannot bear these costs alone, and even wealthy European states have been saddled by the costs of hosting sheer numbers of Displaced Persons, as in the mid-2010s. An international agreement should therefore ensure that states hosting Displaced Persons can rely on financial and technical assistance from fellow signatories in a time of need. Financial assistance from wealthier states to poorer states likely will also be necessary to give teeth to the legal rights of Displaced Persons in the developing world. Poorer states would certainly benefit from the assurance that they will receive financial assistance to host large numbers of Displaced Persons, especially when they do so involuntarily.

States would also benefit from guarantees that co-signatories will assist them in times of acute need. All states could use assurance that increasing numbers of Displaced Persons will receive temporary protection elsewhere, if state infrastructure should become overwhelmed, or if repatriation remains impossible after a protracted period. States may also want to ensure that co-signatories will help them transfer Displaced Persons if a mass influx would exacerbate ethnic tensions or otherwise threaten domestic security, particularly in countries where ethnic tensions have led to past conflict. Both wealthier and poorer states would benefit from such burden-sharing provisions.

For some states, the costs of participating in a new international agreement may also be less than their current costs of managing migration. Mass migration flows are currently straining states' asylum programs, security, and welfare systems states. An agreement that may reduce those costs will be attractive. A new agreement may also be more sustainable than existing migration deterrence mechanisms by wealthier states, which are increasingly costly and not working

well.[149] Economic analysis is needed to determine whether such incentives exist, as well as what would constitute situation-specific, adequate financial compensation for countries hosting refugees.

As another major stakeholder in Displaced Persons crises, UNHCR would welcome any international agreement with funding provisions attached. If such an agreement is successful in deterring migration, it would also relieve the problematic backlog in UNHCR's resettlement programs, discussed in the case of Hamdan above. An agreement would also provide UNHCR grounds to negotiate with governments for greater international protections for Displaced Persons. International law would give them greater authority to pressure governments, and would also save the Agency from the need to undergo complicated legal and administrative contortions to protect large "mixed flows" containing people fleeing both violence and persecution. A non-binding international agreement would also provide them with leverage, although less.

3. Common Fund

Another cost-sharing mechanism might be a common pool of humanitarian aid money might be created and reserved for deployment in emergency situations. States could commit to contribute to an international fund for Displaced Persons, similar to the fund underlying the Global Counterterrorism Forum or funds for many international environmental protection initiatives.[150] Countries would be required to commit regularly, not just in times of emergencies, based on their funding commitments to the U.N., or other agreed-upon criteria. UNHCR, or another supervisory body could administer the fund, to provide protection and assistance for Displaced Persons. This commitment would help rectify the funding gap that has been identified as a weakness in other proposals to assist people displaced by violence.[151]

A DPC or other international agreement would not prevent states from pursuing their own foreign policy objectives, such as providing additional development aid to their allies. However, a common fund would provide baseline financial assistance, and a minimum commitment to burden sharing.

A more complete discussion of burden-sharing mechanisms lies beyond the scope of this paper. In short, states must negotiate how costs should be allocated, weighing tradeoffs between hosting and financial commitments. Enforcement of burden-sharing mechanisms will be critical to the success or failure of any DPC, as discussed below.

149. *See* Goldenziel, *When Law Migrates*, *supra* note 47.

150. *See generally*, GLOBAL COUNTERTERRORISM FORUM, https://www.thegctf.org/ (last visited Feb. 28, 2017)(explaining the workings of the Global Counterterrorism Forum).

151. *See* Hathaway and Anker et al., *supra* note 29.

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4. Preventative Measures

Population displacement will not end until its root causes are addressed. An international agreement to protect Displaced Persons, therefore, should require states to implement preventative measures, in order to receive a guarantee of future international assistance. States cannot predict that their countries will erupt in civil conflict. However, they can tell if they are situated in a bad neighborhood, where surrounding states are prone to instability and strife. Political science research consistently seeks to determine predictors of future conflict.[152] While conclusions have varied as research has progressed, for the purposes of protecting Displaced Persons and refugees, an international monitoring body might continually review states to determine whether risk factors are present. States in the global North can often predict whether, and how such issues will affect their borders, on the basis of how past episodes of international violence have impacted their immigration and border controls.

An international agreement could pre-commit states to responding to these future needs. It could also commit states to allow the international community to establish safe zones for those who wish to flee, within their borders, in the event of civil conflict. Safe zones accessible for provision of legal and humanitarian assistance could help stem the flow of Displaced Persons elsewhere. An international agreement could also ensure that peace treaties, to which states are parties or help negotiate, will include provisions for the safe return of refugees and Displaced Persons. The agreement should also stipulate reporting mechanisms, to allow the international community to plan for displacement before it occurs.

To discourage displacement, the Convention should also commit states to allow an international body to implement an information campaign. This campaign would be designed to dispel misconceptions about who qualifies as a Displaced Person, and the assistance and protection that Displaced Persons will receive. In the late 1980s, as part of the Comprehensive Plan of Action to end the Indochinese boat people crisis, the UNHCR set up a televised information campaign in Vietnam for a similar purpose.[153] The advertisements showed scenes of adequate, but not deluxe, refugee camps in Hong Kong and elsewhere. It featured interviews with UNHCR personnel discussing the refugee status determination process, and explaining how those who did not qualify would be sent back to Vietnam. The advertisements were designed to present Vietnamese people with neutral facts that would enable them to make an informed decision about whether to leave their country. The ads are credited with widely reducing

152. *See, e.g.*, PAUL COLLIER & ANKE HOEFFLER, GREED AND GRIEVANCE IN CIVIL WAR (2001); JAMES FEARON & DAVID LAITIN, ETHNICITY, INSURGENCY, AND CIVIL WAR (2003); *Atrocities Worldwide*, POL. INSTABILITY TASK FORCE, http://eventdata.parusanalytics.com/data.dir/atrocities.html (last updated Feb. 8, 2017).

153. ALEXANDER CASELLA, BREAKING THE RULES (2011); LUISE DRUKE, INNOVATIONS IN REFUGEE PROTECTION (1ST ED. 2014).

flows of "boat people" from both North and South Vietnam.[154] Similar information campaigns might be useful today in reducing flows of migrants to Europe and elsewhere. Migrants would be able to make more informed decisions about whether to flee. With better information, economic migrants and others who have little chance of qualifying as Displaced Persons or refugees would be less likely to flee their homes based on the misconception that they would be allowed to remain abroad. People would also know that Displaced Persons status would not entitle them to remain in a country permanently, and that failure to qualify for either refugee or DP status would mean that they would likely be sent home.

5. Supplementing Refugee Protections

All signatories to an international agreement to protect Displaced Persons should be encouraged to ratify the 1951 Refugee Convention and its basic norm of non-refoulement. This would bolster protection for refugees by nations in the world who have an interest in receiving hosting assistance, but who have previously been reluctant to sign the 1951 Refugee Convention. It would help ensure that an international agreement to protect Displaced Persons and the 1951 Refugee Convention are viewed as complementary, that the two separate and distinct categories are understood, and that countries do not lump Displaced Persons and refugees together into one larger category that would undermine the protections for both. Ideally, signing the 1951 Refugee Convention would be required for a state to receive the benefits of the international agreement to protect Displaced Persons. In reality, a requirement to sign the Refugee Convention might be an obstacle to achieving any international agreement for Displaced Persons.

CONCLUSION

If adopted, the reforms proposed here would improve protections for refugees, Displaced Persons, and states alike. A new international agreement clarifying the status of Displaced Persons would provide guidance to shape the behavior of states, individuals, U.N. Agencies, and NGOs within the international system. It would make clear that persecution on the basis of religion, race, nationality, or membership in a particular social group is still among the most heinous of international crimes. New international law would provide even stronger protections for refugees and Displaced Persons, while also providing much-needed support to the international legal framework for humanitarian aid.

Clarification that Convention refugees will receive priority in the international system for resettlement and assistance would reduce the administrative burden on states and on UNHCR by discouraging people who do

154. *See* Cassella, *supra* note 153.

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not fit into these categories from applying. Those who still find it necessary to flee, but who do not meet 1951 Refugee Convention grounds, can be assured that they will receive temporary protection, and not summarily refouled to dire circumstances. States can be assured that they will have some control over who will reach their borders, and to whom they will have to provide humanitarian aid. A commitment to participate in an international agreement will also enable states to plan to mitigate future displacement issues.

No international agreement—legal or otherwise—can solve all of the problems faced by refugees, Displaced Persons, and the states to and from which they flee. Desperate people will always flee desperate circumstances. Hard and heart-wrenching cases will abound. Some politicization is inevitable; states providing oversight to a displacement regime may still decide to provide assistance to some people and not to others on political grounds. The analysis above is necessarily state-centric, and does not capture the complex role that non-state actors and stakeholders—violent humanitarian, and otherwise—play in creating and managing population displacement. The international community must carefully design an international agreement to protect Displaced Persons—or any international agreement to manage migration—to reduce push and pull factors and avoid creating an undue burden upon states. However, clarity will help circumscribe the burdens on states and also clarify which migrants will receive international assistance, and which might be better off seeking alternatives to flight abroad.

Many of the legal and policy solutions discussed here could help improve international protections for refugees as well as Displaced Persons. However, the two categories of people must not be lumped together for purposes of protection and assistance. The international community cannot roll back or water down existing legal protections for refugees by expanding the definition of "refugee," because the core values that the refugee regime protects are too important and foundational to our very conception of what international human rights are. If every person fleeing violence were a refugee, as other commentators would have it, then protection of bona fide refugees, and minority protections that are fundamental to our human rights regime, would be lost. Put simply, if everyone is a refugee, then no one is.

Yet no longer can international law turn a blind eye to the plight of those displaced by war and other violent conflict. Both human rights and international security face dire harm from states' erratic and inconsistent responses to population displacement. The international community, through the UN, is now embarking on a process to resolve the growing crisis. An agreement to protect a defined category of Displaced Persons would be one modest step toward a solution. A Displaced Persons Convention, which would bind states through enforcement in international and domestic courts, would be a better one.