Introduction

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On July 5-7, 2016, the Center for Migration Studies (CMS) — with support from the John D. and Catherine T. MacArthur Foundation and the Foundation to Promote Open Society — convened a symposium devoted to strengthening the global refugee protection system. The event included representatives from states, the United Nations (UN) system, supranational entities, academia, and leading nongovernmental organizations. It occurred in anticipation of the September 19, 2016 UN Summit to Address Large Movements of Refugees and Migrants, which led to the unanimous adoption of the New York Declaration for Refugees and Migrants. Annex I of that document sets forth a Comprehensive Refugee Response Framework and calls upon the UN High Commissioner for Refugees to develop a Global Compact on Refugees in 2018, which is currently in process.

In conjunction with the symposium, CMS commissioned a series of papers by leading scholars and policy experts. These papers — released on a rolling basis between late 2016 and early 2018 — seek to inform the development and implementation of the Global Compact on Refugees and subsequent dialogues, processes and commitments in this area. They form the basis of this special edition of CMS’s Journal on Migration and Human Security.

The papers analyze state policies in light of international law, examine refugee-producing conditions, interrogate barriers to access to protection, assess traditional durable solutions, highlight promising new initiatives, explore the system’s assumptions and ethical underpinning, identify non-refugee populations in need of protection, review public opinion on the global crisis in refugee protection, and create a strong analytical and evidence base for reform. The collection includes the following articles:

- “New Models of International Agreement for Refugee Protection” by Susan Martin
- “Borders and Duties to the Displaced: Ethical Perspectives on the Global Refugee Protection System” by David Hollenbach, SJ
- “Rethinking the Assumptions of Refugee Policy: Beyond Individualism to the Challenge of Inclusive Communities” by George Rupp
- “Responding to a Refugee Influx: Lessons from Lebanon” by Ninette Kelley
- “Prospects for Responsibility Sharing in the Refugee Context” by Volker Turk
- “Matching Systems for Refugees” by Will Jones and Alex Teytelboym
- “You are Not Welcome Here Anymore: Restoring Support for Refugee Resettlement in the Age of Trump” by Todd Scribner

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• “Safe and Voluntary Refugee Repatriation: From Principle to Practice” by Jeff Crisp and Katy Long
• “The ‘Right to Remain Here’ as an Evolving Component of Global Refugee Protection: Current Initiatives and Critical Questions” by Daniel Kanstroom
• “The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants” by Bill Frelick, Ian Kysel, and Jennifer Podkul
• “Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research” by Gabriella Sanchez
• “Kidnapped, Trafficked, Detained? The Implications of Non-state Actor Involvement in Immigration Detention” by Michael Flynn
• “‘They Need to Give Us a Voice’: Lessons from Listening to Unaccompanied Central American and Mexican Children on Helping Children Like Themselves” by Susan Schmidt
• “Seeking a Rational Approach to a Regional Refugee Crisis: Lessons from the Summer 2014 ‘Surge’ of Central American Women and Children at the US-Mexico Border” by Karen Musalo and Eunice Lee
• “Refugee, Asylum, and Related Legislation in the US Congress 2013-2016” by Tara Magner
• “How Robust Refugee Protection Policies Can Strengthen Human and National Security” by Donald Kerwin
• “Another Story: What Public Opinion Data Tell Us about Refugee and Humanitarian Policy” by Brad K. Blitz
• “Thrive or Survive? Explaining Variation in Economic Outcomes for Refugees” by Alexander Betts, Naohiko Omata, and Louise Bloom
• “Refugees, Development, Debt, Austerity: A Selected History” by Leah Zamore
• “Strengthening the Global Refugee Protection System: Recommendations for the Global Compact on Refugees” by J. Kevin Appleby

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• T. Alexander Aleinikoff, University Professor and Director of the Zolberg Institute on Migration and Mobility at The New School;
Introduction to the Special Edition

• Alexander Betts, Leopold Muller Professor of Forced Migration and International Affairs and Director of the Humanitarian Innovation Project at the University of Oxford;

• Jacqueline Bhabha, XB Director of Research, Professor of the Practice of Health and Human Rights at the Harvard School of Public Health, the Jeremiah Smith Jr. Lecturer in Law at Harvard Law School, and an Adjunct Lecturer in Public Policy at the Harvard Kennedy School;

• Susan Martin, Donald G. Herzberg Professor Emerita of International Migration at Georgetown University;

• Kathleen Newland, Senior Fellow and Co-Founder of the Migration Policy Institute;

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Finally, CMS thanks the refugees and asylees who participated in the symposium and in CMS’s many other events during this period, offering their ideas, experiences, and inspiration for this special collection.
New Models of International Agreement for Refugee Protection

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Executive Summary

In June 2016, the United Nations High Commissioner for Refugees (UNHCR) announced that more than 65 million persons have fled conflict and persecution. While certainly large in its own right, the number actually underestimates displacement in today’s world. Many millions more are displaced each year and cumulatively from a much broader range of life-threatening humanitarian crises than are captured by UNHCR’s figures. An average of 26.4 million were displaced annually by acute natural hazards since 2008 and an unknown but sizable number displaced by gang and cartel violence, electoral and communal violence, nuclear and industrial accidents, and a range of other human-made disasters. This article argues for new frameworks to more effectively address the situation of the totality of displaced persons, citing two recent efforts — the Nansen Initiative and Migrants in Countries in Crisis Initiative — as examples of practical ways to move forward in this regard.

I. Introduction

Displacement from humanitarian crises is complex and diverse. For the purposes of this article, humanitarian crises are any situations in which there is a widespread threat to life, physical safety, health, or basic subsistence that is beyond the coping capacity of individuals and the communities in which they reside (Martin et al. 2014). Humanitarian crises may be triggered by acute events or slow-onset processes, and can unfold naturally, in combination with anthropogenic factors and/or through human accident or ill will. Hurricanes, cyclones, tsunamis, earthquakes, epidemics and pandemics, nuclear and industrial accidents, acts of terrorism, armed conflict, environmental degradation, drought, famine, climate change, situations of generalized violence and political instability, and serious and pervasive human rights violations, including persecution and torture, are all potential triggers. In most cases, underlying structural factors exacerbate the situation. Poor governance at the national and local levels, high levels of poverty and inequality, and insufficient access to basic services undermine coping capacities and make a crisis out of what might otherwise be a manageable event.

1 The author thanks the John D. and Catherine T. MacArthur Foundation for their support of her work on “crisis migration.”
New Models of International Agreement

The 65 million refugees and displaced persons reported by UNHCR in June 2016 represent only one group of those affected by humanitarian crises — those fleeing persecution and conflict (UNHCR 2016). Many persons are displaced by other crises that, in some cases, present equally life-threatening situations. According to the Internal Displacement Monitoring Center (IDMC), more than 19 million people were newly displaced by disasters brought on by natural hazards in 2015 (IDMC 2016). The 2015 levels were lower than average; annual displacement from these hazards since 2008 averaged more than 21.5 million per year (ibid.). The majority of new displacements from natural hazards are in Asia, primarily from weather events but also from earthquakes, volcanoes, and other geophysical disruptions. India, China, and Nepal registered the highest numbers of newly displaced in 2015, with 3.7 million, 3.6 million and 2.6 million, respectively (ibid.). As a proportion of population, new displacements most heavily affected small island states; for example, a storm surge in Tuvalu uprooted 55 percent of its population of around 10,000 (ibid.). While the majority are displaced globally for a short period and then return home, an increasing number of those fleeing natural hazards are in protracted situations (IDMC 2015a), unable to return or to find permanent solutions in other locations.

The only statistics available on movements in the context of acute natural hazards pertain to internally displaced persons (IDPs); there are no global and few national statistics on cross-border movements. Although not citing specific numbers, the Nansen Initiative identified “50 countries that in recent decades have received or refrained from returning people in the aftermath of disasters, in particular those caused by tropical storms, flooding, drought, tsunamis, and earthquakes” (Nansen Initiative 2015). The largest numbers appear to have been displaced cross-border from Somalia to Kenya and Ethiopia during a drought in 2011 and from Haiti to the Dominican Republic after an earthquake in 2010.

Human-made events also cause large-scale displacement both internally and across borders. Hundreds of thousands have been displaced by gang and cartel violence (e.g., the estimated 566,700 IDPs in El Salvador, Guatemala, and Honduras [IDMC 2015b]). Similarly, election and communal violence that does not rise to the level of armed conflict causes displacement (e.g., the more than 600,000 estimated to have been displaced after the 2007 Kenyan elections [Adeagbo and Iyi 2011]). Although triggered by natural events (earthquake and tsunami), the 2011 Fukushima-Daiichi nuclear accident in Japan displaced more than 150,000 people, many of whom remain displaced (IOM 2015). The earlier nuclear accident in Chernobyl also displaced thousands of people (Meybatyan 2014). At the time, the displacement was internal to the Soviet Union; had it occurred after the dissolution of the Soviet Union, it would have involved considerable cross-border movements from Chernobyl, which was close to the borders between Ukraine, Russia, and Belarus.

At the nexus of natural and human-made causes are the slow-onset environmental disruptions related to climate change. According to the Fifth Assessment report of the Intergovernmental Panel on Climate Change, “[c]limate change over the 21st century is projected to increase displacement of people” (IPCC 2014, 20). The detailed review of the evidence indicated that “[e]xtreme weather events provide the most direct pathway from climate change to migration” (Adger et al. 2014, 767), but also noted that in the longer-term “sea level rise, coastal erosion, and loss of agricultural productivity … will have a significant impact on migration flows” (Adger et al. 2014, 768-69). While some
of these movements precipitated by worsening environmental conditions are likely to be 
voluntarily planned by individuals and households, others will be clearly involuntary, 
including relocations planned by governments. Perhaps most at risk will be those who are 
unable to move on their own because of age, infirmity, or lack of financial, social or human 
resources, and who become trapped in increasingly more dangerous situations.

II. Challenges

In general, the legal, policy, and institutional frameworks for protecting those who are 
displaced by humanitarian crises are woefully inadequate. Remedy the inadequacies 
of these frameworks presents great challenges to the international community. Protections 
afforded to those who are displaced by humanitarian crises should include physical and 
legal safeguards as well as access to humanitarian assistance and durable solutions. 
Generally, however, the extent to which those who move in the context of humanitarian 
crises have access to protection under existing frameworks is affected and often limited by 
the specific causal factors that precipitate movement and whether affected populations cross 
international borders or remain within their own countries. Not surprisingly, in light of the 
Holocaust and emerging Cold War, in creating the office of the UNHCR and promulgating 
the 1951 Convention Relating to the Status of Refugees (hereinafter referred to as the “1951 
Convention”), the international community gave special consideration to those fleeing 
persecution (Martin 2014). Soon thereafter, however, UNHCR was repeatedly asked to 
use its “good offices” to provide protection to those fleeing armed conflict. While the 1951 
Convention remained focused on persecution, in 1969, recognizing the inadequacy of the 
1951 Convention in addressing displacement in Africa, the Organization of African Unity 
(now the African Union) adopted a regional convention that defined refugees to include 
persons compelled to leave because of external aggression, occupation, foreign domination, 
or events seriously disturbing public order. In 1984, the Latin American countries adopted 
a similar definition in the Cartagena Declaration. Victims of other types of humanitarian 
crises, however, still fall outside these commendable regional expansions of the refugee 
definition.

Geopolitical developments affect and have affected responses as well. Throughout the Cold 
War, the principal focus of the international community was the protection of those who 
were displaced across international borders. Many of those who were treated as refugees had 
fled Communist countries or were displaced by superpower proxy conflicts. The end of the 
Cold War and subsequent interventions increased the visibility of persons forcibly uprooted 
within country borders because of armed conflict, internal strife, and systematic violations 
of human rights. In 1998, Guiding Principles on Internal Displacement were promulgated by 
the special representative of the secretary-general. Although not binding international law, 
the World Summit in New York in September 2005 recognized the Guiding Principles as 
“an important international framework for the protection of internally displaced persons.”

Unlike the 1951 Refugee Convention, the Guiding Principles apply to persons displaced 
by a wide range of events, including “armed conflict, situations of generalized violence, 
violations of human rights or natural or human-made disasters” (OCHA 2004, 192) In

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2005, UNHCR agreed to lead the UN cluster responsible for protection of IDPs in conflict situations; no single UN agency has responsibility for protection in other crises.

This patchwork of conventions and institutional mandates has proven to be highly ineffective in providing protection to those displaced by today’s humanitarian crises. Even the long-standing refugee regime is facing major challenges in light of the multiple crises in the Middle East, Africa, and mostly recently Europe that have led to the highest levels of displacement recorded by UNHCR. A linchpin of the refugee system — burden sharing — appears to be withering just when most needed. Some members of the European Union refused to accept asylum seekers; financial support for refugees had reached dangerously low levels in the Middle East, necessitating large cuts in food rations for Syrian refugees in fall 2015 (before the EU stepped up its funding in the hopes of curtailing outmigration); and few countries pledged significant levels of refugee resettlement — even traditional resettlement countries like the United States, in which resettlement became a heated political issue.

A further challenge to today’s handling of displacement relates to the length of average crises and the displacement they produce. Much of the existing system for protecting and assisting refugees and displaced persons was designed to meet short-term emergency needs, not long-term ones. Yet, crises that produce refugees and displaced persons generally persist for years, often decades (Ferris 2011; Loescher and Milner 2004). Increasingly, even natural hazards are creating conditions that make it difficult if not impossible for people to return home quickly or ever. This trend is likely to accelerate as climate change renders larger areas uninhabitable or undermines traditional livelihoods. As these situations become more and more protracted, new sets of challenges emerge — not least, finding durable solutions to avoid the type of intergenerational displacement that has become too familiar in too many locations. Treating 30 year “crises” as ongoing emergencies renders the refugees and displaced persons dependent on continuing humanitarian aid and deprives them of the opportunity to establish new livelihoods and resume normal lives.

The multiplicity of legal statuses of those affected by humanitarian crises presents challenges as well. Globally, the majority of the affected populations are citizens of the countries in which the crisis occurs. If they are displaced within their own borders, they are internally displaced, but if they cross international borders, they may be granted refugee status, temporary protected status, or be treated as irregular migrants. Within the countries in crisis, there also may be non-nationals and stateless persons who are endangered. The non-nationals also include persons with multiple statuses — tourists, business travelers, foreign students, temporary workers, irregular migrants, permanent residents, asylum seekers and refugees, to name a few. Depending on the status of the affected persons, they may be eligible for a range of different services and benefit from different levels of protection during the crisis.

**III. The Way Forward**

It is time for a fundamental rethinking of the ways in which countries respond to large-scale displacement from all life-threatening events, regardless of location. The World Humanitarian Summit (WHS), which took place in Istanbul in May 2016, provided an
opportunity to reconsider the entire international response to these situations of mass displacement. An initiative of UN Secretary-General Ban Ki-moon, the summit brought together governments, humanitarian organizations, people affected by humanitarian crises, and the private sector “to propose solutions to our most pressing challenges and set an agenda to keep humanitarian action fit for the future” (OCHA 2016). The summit had four principal themes: humanitarian effectiveness, reducing vulnerability and managing risk, transformation through innovation, and serving the needs of people in conflict. All four apply to refugees and displaced persons, although the fourth is most pertinent as conflict is the backdrop for most displacement. The chair’s report summarized the conclusions of the conference pertaining to displacement:

Participants resolved to pursue a new approach to address the needs of internally displaced persons and refugees that would meet immediate humanitarian needs and longer-term development outcomes to enhance the self-reliance of refugees, Internally Displaced Persons (IDPs) and host communities... Displacement in the context of disasters and climate change was also recognized as a growing threat. A number of participants called for the development of an international mechanism and legal framework for the protection of people displaced by the adverse impacts of climate change. A Platform on Disaster Displacement [successor to the Nansen Initiative] was also launched.

(emphasis in original; UN Secretary-General 2016c, 5)

The secretary-general’s report to the WHS offered concrete objectives regarding displacement, including “a shift from delivering increasing annual amounts of short-term assistance to displaced people towards an approach that seeks to reduce displacement and strengthen the self-reliance of internally displaced persons over three to five years through returns, integrations or resettlement” (UN Secretary-General 2016b). The High-Level Panel on Humanitarian Financing recommended that the WHS “establish an international solidarity levy mechanism to support the health welfare of displaced people” (High-Level Panel 2015).

Less than one month from now, on September 19, 2016, another UN high-level meeting will focus more specifically on large movements of migrants and refugees, spurred largely by the multiple crises that have led to mass movements throughout the world. It appears that this meeting will not address the situation of internally displaced persons in any detail, aiming instead to bring attention to cross border movements. The secretary-general’s report describes the challenge:

Large movements of people will continue or possibly increase as a result of violent conflict, poverty, inequality, climate change, disasters, and environmental degradation. Despite valiant efforts, our responses have too often been inadequate. We have provided life-saving assistance, but have been unable to plan for the eventuality of longer-term displacement or to sufficiently support host communities.

(UN Secretary-General 2016a, 2)
The report went on to discuss four principal goals of the meeting:

We must find ways to govern our national borders effectively, while protecting the human rights of all refugees and migrants. We need to address the causes of displacement and irregular migration. We must develop mechanisms to respond to future large movements of people more effectively and predictably. We must acknowledge and strengthen the contributions that refugees and migrants make to host communities.

(ibid., 3)

Among the problems to be addressed, the report raised the gaps in protection referenced herein:

Despite the gradual expansion of refugee protection there are many people who are compelled to leave their homes for reasons that do not fall within the Convention’s refugee definition, including disasters or the erosion of livelihoods due to adverse impacts of climate change and food insecurity. Many use migration channels to seek safety and many countries allow people who have left their countries for these and other reasons to remain under temporary measures.

(ibid., 6)

The secretary-general recommended adoption at the upcoming summit of two measures to foster greater solidarity: a Global Compact on Responsibility-Sharing for Refugees and a Global Compact for Safe, Regular, and Orderly Migration. The draft outcome document released in August 2016 defers the adoption of these compacts until 2018. In the meantime, the referenced gaps in current protection would be addressed through other mechanisms, largely state-led, ad hoc, informal initiatives aimed at addressing the situation of specific populations at risk: the Nansen Initiative, the Migrants in Countries in Crisis (MICIC) initiative — each of which is discussed at length in Section IV — and a yet-to-be-established initiative to improve protection and assistance for migrants in vulnerable situations.

IV. State-Owned Processes to Improve Protection

Bottom-up, state-led consultative processes with multi-stakeholder involvement — such as the Nansen Initiative and MICIC — have become the norm in addressing protection gaps in displacement. Substantively, these state-led efforts resemble the soft-law approach of the Guiding Principles on Internal Displacement, as they seek to incorporate well-ratified international norms into a set of non-binding but persuasive guidance. Procedurally, however, they differ from the Guiding Principles on Internal Displacement, which were launched by the special representative of the secretary-general and presented to the UN Commission on Human Rights. Whereas the Guiding Principles were later endorsed by governments (at the 2005 World Summit), states often pointed out that they had not been engaged in their formulation. The concept for the Nansen Initiative and MICIC is modeled, in part, on the success of the Global Forum on Migration and Development (GFMD), which emerged from the 2006 High-Level Dialogue on Migration and Development in the UN General Assembly. The GFMD is a state-led consultative process that has annual meetings as well as workshops and roundtables throughout the year on the themes set by
the chair. Although not a decision-making body, the GFMD has proven to be a useful way for governments, in collaboration with civil society and the private sector, to explore new issues and approaches to common problems.

### A. The Nansen Initiative

The Nansen Initiative was launched in 2011 at a Ministerial Conference commemorating the 60th anniversary of UNHCR’s founding and adoption of the 1951 Refugee Convention. The aim was to develop an agenda for improving protection of people displaced across borders by natural disasters and the slow onset effects of climate change. The impact of climate change on displacement had long been a concern to Antonio Guterres, then the high commissioner. As early as 2007, he gave voice to his concerns:

> When we consider the different models for the impact of climate change, the picture is very worrying. The need for people to move will keep on growing. One need only look at East Africa and the Sahel region. All predictions are that desertification will expand steadily. For the population, this means decreasing livelihood prospects and increased migration. All of this is happening in the absence of international capacity and political will to respond.

(Guterres 2007)

The following year, Assistant High Commissioner for Protection Erika Feller summarized the dilemma before the UNHCR Executive Committee: “New terminology is entering the displacement lexicon with some speed. The talk is now of ‘ecological refugees,’ ‘climate change refugees,’ the ‘natural disaster displaced.’ This is all a serious context for UNHCR’s efforts to fulfill its mandate for its core beneficiaries … The mix of global challenges is explosive, and one with which we and our partners, government and non-government, must together strike the right balance” (Feller 2008). In an address before the UN Security Council in November 2011 — with famine and displacement in Somalia heavily on his mind — High Commissioner Guterres returned to the theme: “we should be addressing the more complex issue of the way in which global warming, rising sea levels, changing weather patterns and other manifestations of climate change are interacting with and reinforcing other global imbalances, so as to produce some very powerful drivers of instability, conflict and displacement” (Guterres 2011, 3).

In the lead-up to the Ministerial Conference, the organization commissioned new research on climate change and displacement. Preparatory meetings were held in Bellagio (UNHCR 2011) and Oslo (Nansen Conference 2011) to discuss gaps in the international response to the evolving phenomena. The June 2011 Oslo conference resulted in the Nansen Principles, which outlined core approaches for addressing both internal and international displacement. Recognizing that the Guiding Principles on Internal Displacement already covered those displaced by natural disasters and other environmental disruptions, the Nansen Principles urged action on cross-border movements: “A more coherent and consistent approach at the international level is needed to meet the protection needs of people displaced externally owing to sudden-onset disasters. States, working in conjunction with UNHCR and other relevant stakeholders, could develop a guiding framework or instrument in this regard” (Nansen Conference 2011, 5).
The initial hope was that governments would back reforms in the institutional arrangements, particularly for responding to natural disasters, in the Ministerial Conference. This would have helped clarify under which situations UNHCR should take leadership in assisting and protecting victims. There was no inclination, however, on the part of the governments for UNHCR to become more systematically involved with migrants who cross borders because of natural disasters or climate change. The Ministerial Conference instead gave very indirect acknowledgement of the problem:

We note that today’s challenges in providing protection and achieving solutions continue to be serious, interconnected and complex… We will reinforce cooperation with each other and work with UNHCR and other relevant stakeholders, as appropriate, to deepen our understanding of evolving patterns of displacement and to agree upon ways to respond to the challenges we face in a changing global context.

(UNHCR 2011)

The Swiss and Norwegian governments did take up the call in the Nansen Principles for more attention to protection needs, pledging to fund an intergovernmental process that would examine the issue and make recommendations for enhancing protection in both acute emergencies and slow onset processes.

Switzerland and Norway asked Walter Kalin, formerly the special representative of the secretary-general and one of the principal architects of the Guiding Principles on Internal Displacement, to take on the leadership of the initiative, serving as the chair’s envoy. The Nansen Initiative was clear in stating, however, that it “does not seek to develop new legal standards, but rather to build consensus among states on the elements of a protection agenda, which may include standards of treatment” (Nansen Initiative, “About Us”). There was no expectation that the process would lead to a set of guiding principles on cross-border displacement that would be equivalent to the ones developed for internally displaced persons.

The initiative was governed by a Steering Committee, chaired by Switzerland and Norway, and including Australia, Bangladesh, Costa Rica, Germany, Kenya, Mexico, and the Philippines. A Consultative Committee3 was formed to bring the expertise of representatives from international organizations dealing with displacement and migration issues, climate change and development, researchers, think tanks, and non-governmental organizations to bear. A “Friends of the Initiative” allowed other governments to provide advice and remain informed of the deliberations. Finally, a secretariat supported the work of the initiative. The main fact-finding activities were a series of regional consultations to pull together evidence about the impacts of natural disasters and climate change on displacement and to solicit the views of governments and civil society. The secretariat also distilled the lessons of research for the initiative’s consideration and commissioned background papers on a number of topics.

The end product was the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Nansen Initiative 2015). It recommends action in three principal areas. The first is to improve the collection of data and to

3 The author was a member of the Consultative Committee.
enhance knowledge on cross-border disaster-displacement. More specifically, the agenda recommends improvements in the collection, consolidation, and analysis of “gender- and age-disaggregated data regarding the overall number of people displaced in disaster contexts, both internally and across international borders, based on clear criteria and effective methods” (Nansen Initiative 2015, 45). It also calls for new “methodologies to identify those at risk of being displaced in disaster contexts, including across international borders” and new research to “determine to what extent men and women already rely on migration as a strategy to cope with the effects of natural hazards and the effects of climate change, and what lessons can be learned for improving the benefits of migration and addressing related protection risks” (Nansen Initiative 2015, 45). Finally, the agenda in the first area of action emphasizes the need for additional data and analysis of planned relocation processes in the context of disasters and effects of climate change.

The second area of the agenda focuses on “humanitarian protection measures for cross-border, disaster-displaced persons, including mechanisms for lasting solutions” (Nansen Initiative 2015, 44). These measures include ones related to the admission of disaster displaced persons from abroad as well as those preventing the return of displaced persons to countries experiencing natural disasters and the effects of climate change. The agenda points to the need for new legal instruments and policies that would, for example, grant “temporary entry and stay for cross-border disaster-displaced persons, such as through the issuance of humanitarian visas or other exceptional migration measures” (Nansen Initiative 2015, 26). It also emphasizes that governments could use existing legal frameworks, such as existing temporary labor migration programs, more creatively to permit admission and stay of those needing protection.

The third set of recommendations is aimed at strengthening the management of disaster displacement risk in the country of origin so that those affected by natural disasters and the effects of climate change would not need to cross international borders. These include “[i]ntegrating human mobility within disaster risk reduction and climate change adaptation strategies, and other relevant development processes; … [i]mproving the use of planned relocation as preventative or responsive measure to disaster risk and displacement; [and] … [e]nsuring that the needs of IDPs displaced in disaster situations are specifically addressed by relevant laws and policies on disaster risk management or internal displacement” (Nansen Initiative 2015, 19, 53). Finally, the agenda notes that legal migration can prevent displacement since they allow people to move in a safe and orderly manner.

The agenda was endorsed by 109 governmental delegations during a global multi-sectoral consultation in October 2015. More than 360 participants from governments, international organizations, academic institutions, and civil society attended. That so large a number of governments endorsed the agenda was impressive. Those that spoke at the consultation noted the utility of the agenda and the flexibility of governments to adopt its recommendations in accord with national law.

**B. Migrants in Countries in Crisis Initiative (MICIC)**

The origins of the MICIC initiative are similar to Nansen, whose success influenced its development. Sir Peter Sutherland, the special representative of the secretary-general,
played the role that High Commissioner Guterres did in urging governments to fill the protection gap for non-nationals caught in acute emergencies resulting from conflict and natural disaster. The mass displacement of migrant workers in Libya during the 2011 conflict, followed by similar crises in Cote d’Ivoire, Syria, Thailand, and the United States that affected millions of non-nationals, generated substantial interest among governments, civil society, and the private sector. In support of Sir Peter and with funding from the MacArthur Foundation, Georgetown University’s Institute for the Study of International Migration (ISIM) commissioned a paper outlining the protection gaps (Koser 2014) and produced desk studies of the major crises involving displacement of non-nationals.

The call for action was met with a positive response by the United States and the Philippines. In her plenary statement at the 2013 High-Level Dialogue on Migration and Development, Assistant Secretary Anne Richard, thanking Sir Peter and noting the seriousness of the problem, pledged on behalf of the United States to chair what became the MICIC initiative. She used language similar to Nansen’s in describing the initiative: “I envision a State-led process aimed at examining the responsibilities of different actors in these crisis situations” (Richard 2013). A working group was subsequently named; in addition to the United States and the Philippines, Australia, Bangladesh, Costa Rica, Ethiopia, and the European Commission also served on it, as did the International Organization for Migration (IOM), UNHCR, the International Centre for Migration Policy Development (ICMPD), and ISIM.

MICIC also worked in similar ways to Nansen. A grant from the United States established a secretariat based in IOM; the European Commission funded regional consultations; and the United States and Australia supported consultations with civil society and the private sector, as well as with members and friends of the Intergovernmental Consultation on Migration, Refugees, and Asylum Seekers. The European Commission also supported a research program that examined the longer-term impacts of the crises on migrants and the United States supported capacity building for countries experiencing the impacts of these crises.

The results of the consultations and research contributed to a set of principles, guidelines, and effective practices that were presented on June 15, 2016 at the United Nations. The principles focused on core rights and responsibilities. The duty to save lives in conflict and disasters is the first responsibility; as such, the humanitarian principles of neutrality, impartiality, and independence should govern responses to migrants in these crisis situations. To ensure effective protection, the principle of non-discrimination, particularly by immigration status, when lives are at risk permeates the recommendations. The principles and resulting guidelines emphasize that states have primary responsibility but that other stakeholders, including nonnationals themselves, play an important role in ensuring protection. In that respect, Principle 6 states clearly that “Migrants are rights holders and capable actors, resilient and creative in the face of adversities, not merely victims or passive recipients of assistance” (MICIC 2016, 16).

The guidelines are described as “targeted suggestions, organized by theme, that identify in broad terms the actions needed to better protect migrants in countries experiencing

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4 For more information on the displacement of migrants during these crises, see Weerasinghe and Taylor (2015).
crises. States, private sector actors, international organizations, and civil society can use the guidelines to inform and shape crisis preparedness, emergency response, and post-crisis action” (MICIC 2016, 19). They are organized around the phases of crises: pre-, during- and post-crisis. Each is elaborated with concrete practices that would aid their implementation. The most detail is provided on pre-crisis emergency preparedness since this is the phase in which much can be done to lay the groundwork for effective action during crises. The guidelines recognize, however, that crises often take on lives of their own and needs and contexts depart from even the best laid plans. As such, they recommend continual assessment of the situation and flexibility to adapt and innovate as needed during the emergency response period. They also take into account that the post-crisis stage requires special attention to the long-term needs of migrants displaced by conflict and disasters as well as to the needs of communities to which they may need to relocate.

V. Conclusion

The Nansen and MICIC initiatives represent new ways in which governments and other stakeholders are attempting to address persistent protection gaps for those displaced by crises. Unlike earlier efforts that focused primarily on adoption of binding international conventions, these initiatives are less formal, more ad hoc, and less binding. The reluctance of many states to ratify the UN Convention on the Rights of all Migrant Workers and Members of their Families or to open up the 1951 Convention Relating to the Status of Refugees to renegotiation has heralded the need for such initiatives. In the first case, the reluctance appears to be concerns about over-reach, particularly with regard to migrants in irregular status. In the second case, amid backlashes against refugees and asylum seekers, the concern is about losing the protections currently available to those populations.

In the face of such impasses, informal, non-binding, state-led processes for reform are seen as a more pragmatic approach. There are a number of reasons to be optimistic about this trend. First, promulgation of the Guiding Principles on Internal Displacement has proven to be a highly effective way to gain visibility and improved protection for a population that had not previously received sufficient attention. They have been recognized widely as applicable to a broad range of persons forced to leave their homes because of events beyond their own control. The Guiding Principles have broad support, as witnessed by the 2005 World Summit’s entreaty to states and international organizations to implement them. Many individual countries have incorporated them into national law and the African Union has promulgated a binding convention based on them.

A second reason to recommend this approach is that, because states are leading these efforts, there is a built-in constituency for ensuring their implementation. The Nansen Initiative has been succeeded by the Platform on Disaster Displacement, which was announced at the World Humanitarian Summit in May 2016. The platform will follow up on Nansen and implement the recommendations of the Agenda for Protection by building “partnerships between policymakers, practitioners and researchers and constitute a multi-stakeholder forum for dialogue, information sharing as well as policy and normative development” (Platform on Disaster Displacement, “About Us”). The chairs of the MICIC initiative have pledged a similar follow-up process, with continuation of the secretariat’s capacity-building and other activities.
Third, these processes have been highly inclusive in terms of regional scope and participation. Members of the steering/working groups have come from all regions. Regional variations have been solicited in consultations that brought together governments, civil society, the private sector, international organizations, and the research community. The resulting recommendations have been vetted with multiple stakeholders, although responsibility for issuing them ultimately rests with the states that lead them.

Finally, the ad hoc nature of these processes allows them to address emerging issues and concerns more effectively than more formal mechanisms that are often tied to specific mandates. MICIC was criticized by some civil society organizations and a few governments at its inception because its focus was restricted to migrants affected by conflict and natural disasters. The critics urged the working group to address the problems of those in crises stemming from other causes — for example, irregular migrants stranded by smugglers en route to their destination. Fearing that it would be more difficult to build consensus around solid recommendations on other populations, the working group held fast. However, MICIC made a clear statement that “Notwithstanding the limited scope of the MICIC initiative, it is hoped and expected that its outcomes will be useful for States and other stakeholders in addressing a broader range of migration scenarios” (MICIC, “About MICIC”). In fact, many of the recommendations in the MICIC guidelines do apply more broadly and civil society groups could readily use them to advocate on behalf of all vulnerable migrants. Most notably, Principle 2 states: “As human beings, all migrants are entitled to human rights, regardless of their immigration status. At all times, the human rights of migrants should be respected, protected, and fulfilled in a non-discriminatory manner and in accordance with applicable international law” (MICIC 2016,15). Members of the working group have also been supportive of the recommendation in the secretary-general’s report for the High-Level Meeting on Large-Scale Migration and Refugee Movements to form a working group similar to MICIC on vulnerable migrants more generally.

This is not to say that the ad hoc, non-binding nature of the processes is without problems. As has been seen regarding protection of internally displaced persons, progress is still highly dependent on the willingness of states to implement the guiding principles and the international community to intercede when states are unwilling or unable to fulfill their responsibilities. The attention span of key stakeholders to issues surrounding internal displacement has varied considerably. As the European migrant and refugee crisis took center stage in the media and among governments, a group of experts found it necessary to issue a statement in October 2015 stating: “there is urgent need to raise the visibility of IDPs in two principal regards: gaining access to IDPs in acute crises, such as Syria, in order to provide effective protection; and finding solutions for IDPs in the many protracted situations of displacement that have already lasted for decades.” The group called for institutional reforms to enhance the protection of IDPs both in situations of armed conflict and disasters, recommending the re-establishment of the post of special representative of the secretary-general for internally displaced persons.

Enhancing protection of those displaced by conflict, natural disasters, and other crises will require sustained attention. Mechanisms such as the Nansen and MICIC initiatives, and their follow-up, are promising ways to foster greater attention to the protection gaps and practical solutions to improve the lives of millions of people affected by crises. In
the long term, however, they will only be as effective as the willingness of states and other stakeholders to implement the recommendations and offer protection on a non-discriminatory basis to all who flee life-threatening situations.

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Borders and Duties to the Displaced: Ethical Perspectives on the Refugee Protection System

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Executive Summary
This essay proposes some ethical perspectives that can help in the task of reassessing the structure of the global refugee protection system in light of the extraordinarily high levels of refugee movement and forced migration occurring today. It addresses two chief areas. First, it considers whether ethical duties reach beyond the borders that separate nation-states and the implications of such duties for the treatment of refugees and other displaced persons. Drawing on classical ethical perspectives found in secular moral thought and in several religious traditions, the essay argues that national borders have moral weight, but that grave violations of the rights of displaced persons can create responsibilities that are more stringent than duties to co-citizens of one’s own country. Second, the essay examines whether the duties to co-citizens or to displaced persons should take priority in various contexts. Negative duties that have particular urgency in the effort to shape a more adequate response to forced migrants are proposed, drawing upon classic criteria in the ethics and law of war. These include the avoidance of aggression, war crimes, crimes against humanity, and other violations of justice that often lead to mass displacement. Positive duties to come to the aid of the displaced are also developed in light of several standards: the needs of the displaced, the proximity and capability of the responder, whether the response is a last resort, and if the response can be carried out without disproportionate burden on the responder. These negative and positive duties are then drawn upon to argue for a significantly more active response to the needs of forced migrants by developed nations in the global north, by regional and global intergovernmental organizations, by secular and faith-based humanitarian nongovernmental organizations (NGOs), and by citizens at large.

I. Introduction
The international refugee protection system is severely challenged today. In recent decades the forced movement of refugees and internally displaced persons has been rising markedly, reaching an extraordinarily high level today by historical standards. It is well known that there are more displaced people today than at any time since World War II. Despite the
efforts and achievements of many governments and many humanitarian organizations, the protection of displaced persons from the harms they routinely suffer remains a distant goal. Many analysts believe that the conditions faced by forced migrants today have brought the refugee regime to a turning point. UN Secretary-General Ban Ki-moon has called the situation a “monumental crisis” that will require a response based on “monumental solidarity” (Ki-moon 2016). The regime that has been in place since the adoption of the 1951 Convention Relating to the Status of Refugees needs to be reexamined. The challenge to develop more adequate ways of protecting the humanity of those threatened by displacement is in part a moral one. This essay will propose several ethical perspectives that may be of help in this reassessment. The moral challenges, of course, are deeply embedded in the political, military, economic, environmental, and other conditions that drive people from home. Examining the ethical issues, therefore, requires paying close attention to these social conditions. But this essay will highlight several distinctly ethical issues that arise in the reform of the refugee regime. The goal is to draw upon some existing ethical wisdom to shed light on our moral responsibilities to those who are suffering because of the displacement brought about by war and disaster today.

The first part of the essay will address the significance of the borders separating national communities and the sovereignty of states for our moral responsibilities toward displaced people. Are there duties that reach beyond the borders of diverse peoples and sovereign states? If so, how do these duties relate to the responsibilities people have to citizens of their own country? It will be argued that there are duties both to fellow citizens and to those in great need, especially to those who have no other form of protection than that provided by humanitarian assistance, asylum, or both. The second part will suggest that since we have duties both to fellow citizens and to those from other countries who are facing the crisis of forced displacement, we need to clarify priorities among these types of duty in various circumstances. Such priorities will be developed in light of several negative duties not to treat people in ways that cause displacement and several positive duties to take action when forced migration is already occurring. It will be suggested that acting in accord with these priorities will help create a more adequate refugee protection system, and that a better system of protection will in turn facilitate fulfillment of the duties proposed.

II. Nation States and Duties beyond Borders

In the face of the growth in the number of refugees and other forced migrants and the degree of their suffering in recent years, some analysts have been calling for a radical rethinking of the relevance of national borders for the ethical responsibilities toward displaced persons. Secular political philosophers such as Joseph Carens and refugee scholars like Philip Marfleet argued some years ago that the time may have come to consider making borders fully open to all who are fleeing from persecution, conflict, or disaster (Carens 1987; Marfleet 2006, 288-90). In a similar spirit, philosopher Martha Nussbaum argued that a cosmopolitan community of all human beings has primacy over narrower communities defined in terms of nationality, ethnicity, or religion. Indeed she called nationality a “morally irrelevant” characteristic of personhood, a position that amounted to an ethical call for open borders (Nussbaum 2002, 5).
Such a universalist cosmopolitan ethic echoes the first of the principles that guide the actions of the International Committee of the Red Cross (ICRC) and that is usually taken as foundation of the humanitarian movement, namely the principle of “humanity” (ICRC 1986). The chief author of the ICRC’s principles, Jean Pictet, noted that in this principle the term “humanity” refers to the whole of humankind and all its members (Pictet 1979). Concern for humanity, therefore, is concern for all members of the human race and the conditions that all are facing. To act in accord with humanity is to act with inclusive concern toward all men and women. The principle of humanity thus leads to another of the ICRC’s standards: impartiality. To act with humanity is to respond impartially to all members of the human family on the basis of their need, not because of some characteristic that differentiates them from others, such as their citizenship, nationality, race, religion, class, or political opinion.

The universality of the ICRC’s principle of humanity is also a characteristic of the normative basis of the modern human rights movement. Human rights are rooted in the universal and equal dignity of all human beings. The preamble of the 1948 Universal Declaration of Human Rights directly links recognition of the “inherent dignity” of all persons with protection of “the equal and inalienable rights of all members of the human family.”¹ The commitment of the human rights movement to the dignity of all persons, not just those belonging to particular nations, religions, or ethnicities, is evident from the fact that the United Nations titled its 1948 statement of human rights a universal declaration.

Drawing on the normative standards of both the humanitarian and human rights movements, we can affirm that all persons deserve equal protection from grave threats to their worth as persons. This is evident in the way terms such as “all,” “everyone,” and “no one” are used throughout the Universal Declaration of Human Rights. The Declaration states that all persons possess human rights without distinctions based on “race, color, sex, language, religion, political or other opinion, national or social origin.”² This relativizes all in-group/out-group boundaries. It challenges understandings of religious, national, or cultural identity that would limit respect only to those people belonging to a particular community. The human rights ethos thus seeks to tear down the walls dividing people into those who count and those who do not count, at least when the most basic requirements of humanity are at stake. No white rule over non-white; no Aryan over Jew; no European colonist over non-European colonized; no male superiority to female. Though religious convictions are deeply important to those who hold them, such convictions must never be used to deny the humanity or human rights of others in the name of God. Ethnic or national identities are never legitimate grounds for excluding people from the most basic requirements of their human dignity. Respect for human dignity also requires fulfilling the social/economic rights of all people to adequate food, work, education, and health care, and for the solidarity across economic differences required to fulfill these rights.³

This cosmopolitan vision is rooted in a commitment to human dignity that can be supported by secular philosophical argument. Pictet affirmed that the ICRC’s principle of humanity

² Id., Art. 2.
requires that “everyone shall be treated as a human being and not as an object, as an end in himself and not as a mere means to an end” (Pictet 1979, 17). This language echoes a major philosophical understanding of human worth or human dignity, namely that of Immanuel Kant. The core principle of Kant’s moral philosophy is that persons are always to be treated as ends in themselves, and never simply as means (Kant 1993, 36). All persons possess this dignity. Thus Kant was led to adopt a cosmopolitan morality that sees some important political responsibilities reaching across national borders.

This cosmopolitan orientation can also be supported on religious grounds. Both Judaism and Christianity hold that all persons are brothers and sisters in a single human family no matter what their nationality or ethnicity. Every person has been created in the image and likeness of God (Genesis 1:27). This common creation gives every person a shared dignity and worth that reaches across all boundaries that are humanly constructed, such as the borders between nation-states. These borders are in no way absolute and must be seen as subordinate to the respect due to the shared dignity of every person as an image of God. Pope Francis drew on this biblical vision during his recent visit to the Greek island of Lesbos, where he assured Syrian refugees seeking entrance into Europe that “God created mankind to be one family” and called Europe to “to build bridges” rather than “putting up walls” (Francis 2016a, 2016b). Such sensitivity to the needs of migrants and refugees is present not only in Christianity but also in Judaism and Islam. Each of great monotheistic traditions of Judaism, Christianity, and Islam traces its origins back to the Patriarch Abraham, who was himself a migrant from the home of his kinsfolk to the land of Canaan. The identity of Jews is also importantly shaped by the story of the Exodus — a migration from slavery in Egypt to freedom in the land of God’s promise. The New Testament portrays Jesus as the leader of a new Israel, who just after his birth had to flee persecution as a refugee to Egypt along with Mary and Joseph. Muslims measure time from the founding event of Muhammad’s *hijra*, or migration, from Mecca to Medina. The founding of each of these major faiths has migration across borders as one of its key elements, which is one of the reasons each of these faith communities sees its religious and ethical commitments as reaching across borders. The great Asian religions also insist that ethical duties do not stop at national or religious boundaries, particularly when refugees and migrants are in danger (for fuller development, see Hollenbach 2014). A similar sense of universal responsibility can be found in African traditions, where concepts such as *bumuntu* (humanness), *umoja* (unity), and *ujamaa* (solidarity) point to the interconnectedness of all persons (Nkulu-N’Sengha 2011, 38-40). There is little doubt, of course, that religious communities can fall into in-group versus out-group conflicts that are among the causes of forced migration. Nevertheless, most religious traditions possess a strong normative conviction that ethical responsibility reaches across religious and national boundaries and that the fullest expression of moral virtue is assisting people in distress, including strangers, migrants, and refugees.

Pope John XXIII appealed to this normative universalism in 1963 when he drew on both Christian religious warrants and secular philosophical arguments to affirm that national boundaries do not limit the reach of moral duty. Indeed the Pope explicitly argued that citizenship itself is not limited by national boundaries but has an authentically global meaning. In his words, “the fact that one is a citizen of a particular State does not detract in any way from his membership in the human family as a whole, nor from his citizenship in the world community” (John XXIII 1963, no. 25). This affirmation of the reality of global
community relativizes the moral significance of national borders and state sovereignty. It means that the duty to protect human rights reaches across borders. Such trans-border duties have particular relevance to the plight of refugees, who by definition lack the protection that would normally be provided by their home state. Since refugees have lost the protection of their home state, they will effectively end up with no rights at all unless the duty to protect rights is genuinely transnational. The duty to protect the displaced must therefore reach across borders if they are to receive any protection at all. As Pope John XXIII stressed, “Refugees cannot lose these rights simply because they are deprived of citizenship of their own States” (John XXIII 1963, no. 105).

In international politics, however, states do matter. Even in the midst of today’s growing global interdependence, national communities continue to play very important roles in relation to the rights and needs of displaced people. From a normative point of view, an authentically cosmopolitan ethos calls for recognition that while all persons share a common humanity, showing concrete respect for all will require recognizing that every person also has distinctive characteristics, including diverse bonds of kinship, culture, and shared citizenship. Thus respecting people as they are calls for respect both for their common humanity and also for the ways they differ from each other (Appiah 2006, xiv-xviii). One of the key differences between people is their nationality and citizenship. Recognition of this fact has recently led Nussbaum to reverse her earlier position that national borders are morally irrelevant. She now draws on Grotius and Kant to argue that people exercise their freedom and express their dignity by shaping the institutions of their own nation-state (Nussbaum 2006, 255-62). Seyla Benhabib has developed a similar argument (Benhabib 2004). For these reasons, protecting human dignity will require respect for the self-determination of accountable states. At the same time, both Nussbaum and Benhabib also insist that sovereignty must be understood in a way that fully supports the fundamental human rights of all, including migrants and refugees. They seek to protect these rights by calling for porous borders rather than entirely open borders. An adequate assessment of responsibilities toward refugees and other displaced persons will thus require taking into account the importance of states for the protection of dignity and rights. It will also have to assess the impact of forced migration both on the human dignity of those who have been displaced and also on the communities who receive them.

There are religious warrants for the duty to respect communal differences just as there are for the duty to respect common humanity. In Judaism, God’s covenant with Israel gives the Jewish people a distinctive religious and national identity that must be respected. This stress on religious distinctiveness gives Jews a particularly strong sensitivity to the right of diverse peoples to be different from each other. Of course, this sensitivity to the importance of difference does not eliminate Israel’s awareness of the duty to respect the common humanity of all persons affirmed in the creation story and in God’s covenant with Noah, which extends beyond Israel to all of creation (Genesis 9:1-17). Indeed precisely because of the special covenant that led God to set Israel free from bondage as strangers in Egypt, the Hebrew Bible repeatedly stresses that the Jewish people have strong duties to the strangers they encounter in the land of Israel itself: “You shall not oppress an alien; you well know how it feels to be an alien, since you were once aliens yourselves in the land of Egypt” (Exodus 23:9; see Leviticus 19:33-34 and many other places). Thus Judaism combines universalism and particularism in a way that recognizes both the right to national
self-determination and an onerous duty to migrants and refugees that reaches across the borders of Israel and the Jewish people (Sacks 2003, ch. 3).

Catholic social ethics also seeks to combine cosmopolitan universalism with respect for the distinctive identities of peoples. St. Augustine and St. Thomas Aquinas affirm a Christian duty to love all humans as our neighbors. At the same time they recognize that those with whom we have special relationships, such as the members of our family or our political community, deserve special treatment as an expression of our love for them. Thus a key task in Christian ethical reflection is to determine the order of priorities that should exist among these diverse loves (an ordo amoris). In some circumstances love for those nearer to us should take priority over concern for those at greater distances. On the other hand, when those farther away have greater needs, they can have priority. Similarly, Catholic social thought also appeals to what has come to be called “the principle of subsidiarity” to determine whether the more local or more global should take priority. This principle affirms that there are special duties within smaller and more proximate communities. In tandem with the principle of solidarity, subsidiarity also insists that when there is serious need at a greater distance or when local communities cannot or will not respond to this need, larger regional communities or the international community as a whole can have a duty to provide help (subsidium) to those in need (Pius XI 1939, nos. 79-80).

Though the subsidiarity principle was developed within Catholic social thought, it has become a standard point of reference in the European Union (the Union) in discussions of the relation between the responsibilities of the larger structures of the Union and the responsibilities of each of the European states. Subsidiarity requires that the Union itself should act only when member states cannot achieve required goals or when the Union itself is better able to achieve what is needed. In other words, the larger transnational community of the Union does not replace the communal bonds that exist in the member states but supplements the action of the states when they are unable to take needed action or when the Union itself can act more effectively. In an analogous way, subsidiarity implies that the primary responsibility toward internally displaced persons falls on the country of which they are citizens. Their own country has the primary duty to protect them. But if their country of citizenship fails to protect them or acts in a way that compels them to flee, the duty of protection moves to neighboring countries and to larger regional and international actors.

Thus national borders carry considerable moral weight in determining ethical responsibilities toward displaced persons, but there are also obligations to the displaced that reach across borders. From both a secular philosophical standpoint and in most religious perspectives, there are duties both to one’s fellow citizens and to forced migrants who need of protection through asylum or through some other form of emergency assistance. Neither of these types of duty is absolute. Duties to fellow citizens do not always trump duties to forced migrants, nor do duties to forced migrants always override duties to co-citizens. The key question, therefore, becomes what relative weight should be assigned to each of these duties in diverse circumstances.

III. The Need for Priorities

The displacement crises of today thus call for careful reflection on the relative weights of the obligations and rights that arise from our common humanity on the one hand and from our distinctive identities and citizenship in specific states on the other hand. Let me suggest several priorities among these types of obligations, focusing first on action required by negative duties not to act in ways that cause displacement and the kinds of mass movements of refugees we are witnessing today, and then on several positive duties to take action to alleviate the plight of the displaced and to improve the protection system that is currently in place. These two types of duties can be equally stringent (Shue 1980, 51-60).

A. Negative Duties

Most of the forced migration in the world today is caused by conflict and war. Half of today’s refugees have been driven from homes by the conflicts in Syria, Afghanistan, and Somalia, and most of the internally displaced have been forced to flee by conflict within their countries (Guéhenno 2016). Key negative duties relevant to displacement caused by conflict can be highlighted by drawing on the moral tradition known as the just war ethic. This tradition distinguishes morally legitimate from illegitimate use of force, so it should probably be called the just/unjust war tradition. It has roots in Christian thought, especially Catholicism, but it has analogies in other religious traditions and overlaps in important ways with the tradition of the international law of armed conflict (Walters 1971; Walzer 1977; Hehir 1980; Hashmi 2002).

In its modern form the just/unjust war tradition draws a sharp line between force used in the defense of human rights and force that violates rights. The jus ad bellum norm of just cause requires that force be strictly limited to defending the rights of innocent persons to life, freedom, and security, and the rights of nation-states to self-determination and territorial integrity. Conversely, there is a negative duty not to use force aggressively against other peoples to deny them their political freedom, to exploit them economically, or because they are culturally different. Violation of these negative duties is both immoral and criminal.

Such a violation is just what happened in perhaps the worst humanitarian crisis of recent times: the Rwanda genocide of 1994, where force was massively used to deny the basic rights of the Tutsi people. It was also appallingly violated in the slaughter at Srebrenica, where thousands of Bosnian Muslims were killed because of their identity as part of an “ethnic cleansing.” The displacements that resulted from each of these conflicts were massive. This suggests that a central priority in efforts to prevent massive forced migration should be much stronger efforts to prevent and halt the unjust resort to the use of force.

Just war norms also forbid direct, intentional attacks on civilians, as well as collateral harm to civilians that is disproportionate to the good being sought. International law sets forth similar prohibitions in the Geneva Conventions, which insist that civilians be distinguished from soldiers and be protected both from direct attack and from disproportionate collateral harm. Violations of these standards are war crimes and can become crimes against

humanity if “widespread and systematic” (Robertson, 2006, 430-39). Regrettably, several of the worst recent cases of forced migration have been due to violations of these moral and legal prohibitions of attacks on civilians.

For example, tactics used in the civil war that began in South Sudan in December 2013 have regularly violated the rights of civilians to security. Human Rights Watch (HRW) and a UN panel of experts concluded that both the government of South Sudan and the opposition forces had “committed extraordinary acts of cruelty that amount to war crimes and in some cases potential crimes against humanity” (HRW 2014; Panel of Experts 2015). Because of this mayhem, by July 2015, over 1.6 million South Sudanese had become internally displaced and over 750,000 had become refugees. The strategies and tactics used by both sides in South Sudan have themselves turned South Sudan into a grave humanitarian emergency marked by massive displacement.

The Syrian crisis reinforces the conclusion that armed conflict can lead to mass displacement when the adversaries violate their duty not to attack basic rights of civilians. The UN Independent Commission of Inquiry on Syria concluded that the war crimes, crimes against humanity, and human rights violations were so severe that the Syrian reality should “shock the conscience of humanity” (UNHRC 2014, no. 138). These violations have led to the single largest forced migration in recent history. The flight of refugees has threatened the stability of neighboring countries, including Turkey, which today hosts the largest number of refugees of any country in the world; Lebanon, where more than one in every six persons within the country’s borders is a refugee from Syria; and Jordan.

The International Criminal Court (ICC) was established in 1998 to hold people accountable for violations of standards of international law like those that occurred in Rwanda and Bosnia and that are continuing in South Sudan and Syria. The Rome Statute that created the ICC gave it jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression. The Rome Statute arose from the recognition that duties of the international community based on our common humanity can take priority over the sovereignty of independent nation-states when human rights violations rise to the level of atrocity. The ICC has so far not been able to bring to trial some of those it has charged with such atrocities due to its inability to secure cooperation on various fundamental matters. For example, while President Omar al Bashir of Sudan faces charges of genocide and crimes against humanity for his actions in the Darfur region of Sudan, he has thus far eluded arrest due to the reluctance of certain ICC member states to detain him. In another case, charges against President Uhuru Kenyatta of Kenya had to be dropped because the ICC prosecutor could not get witnesses to testify, likely because of threats to their safety and bribes. Nevertheless, the ICC has had success in a number of other cases and it has launched a process that promises to strengthen the accountability faced by those responsible for the atrocities that contribute to some of the worst refugee and migration crises occurring today. Duties not to violate basic rights are surely more likely to be enforced today than in the past, and those who do violate them are less likely to get away with it than used to be the case. People will continue to be forced to flee from their homes as long as they face the danger of being caught up in conflict marked by unjust and indiscriminate violence. Preventing displacement thus requires notably more effective ways to hold the military and political leaders who organize such violence accountable for what they do. Enforcement
of the law of war and of the standards of international humanitarian law should thus be a priority in efforts to enhance the effectiveness of the refugee protection system.

**B. Positive Duties**

Regrettably, we have learned from history and from insight into human moral weakness that threats to human rights will continue to occur. This raises the question of what positive obligations we have to come to the assistance of the displaced when crises in fact occur.

To address this issue we can draw on a mode of moral analysis originally developed in the 1970s in the context of debate about who had duties to help eliminate the apartheid regime that separated South African people by race and ethnicity. In that debate, some maintained that only those who had created the apartheid system had a duty to work to overcome it. But a very different ethical approach was proposed by several scholars at Yale University who argued that under certain circumstances persons, communities, institutions, and states can have positive duties to help remedy harms they did not themselves cause. They called their approach the Kew Gardens Principle, for it arose from their reflection on a tragic case that occurred in the Kew Gardens section of New York City in 1964 (Simon, Powers, and Gunnemann 1972). According to press reports, a young woman named Kitty Genovese was viciously assaulted, stabbed, and died a slow death while 38 nearby people watched and did nothing, failing even to call the police. It has since been learned that the initial reports of what happened were not fully accurate (Lemann 2014). But the public outrage stimulated by the press reports points to the fact that most people have a conviction that there can be positive moral duties to aid others in emergency situations. It is not enough to avoid causing harm. In some situations omission can become as morally objectionable as commission.

Drawing on this conviction, the Kew Gardens principle argues that an agent has a positive responsibility to help when four conditions are present: (1) there is a critical need; (2) the agent has proximity to the need; (3) the agent has the capability to assist; (4) the agent is likely the last resort from whom help can be expected (Simon, Powers, and Gunnemann 1972, 23-25). Subsequent reflection has added a fifth condition: (5) the action can be taken without disproportionate harm to the one providing assistance. These criteria, of course, cannot be applied mechanically. But they can help us think about the scope of positive responsibilities in the face of the crisis-level suffering that is displacing so many people today.

For example, there can be little doubt that large numbers of people are in grave need of protection in Syria and South Sudan today and that this need is driving many from their homes. Those inside the borders of these crisis-torn countries are vulnerable to harms that could lead to their deaths or to violations of other basic rights, and they are in flight because of this vulnerability. The duty to respond to such need falls first upon those whose proximity to the crisis makes them more likely to have knowledge of the need and better understanding of how to respond to it. This means, of course, that the government of the nation where the crisis occurs and local communities within that nation bear the prime responsibility. In South Sudan and Syria, therefore, both the governments and the opposition forces in each country have the negative duty to stop the atrocities that are causing crisis and the
positive duty to help lift the burdens of suffering. Duty to take positive action, however, does not end at the national borders of the countries where crisis is present. When people become aware of crisis in a neighboring country or even in a country at a great distance, this awareness leads to what might be called intellectual or psychological proximity. It puts them in moral proximity to those who are suffering.

There has been helpful though imperfect response to the duties arising from proximity by the countries neighboring South Sudan. The regional organization of Sudan’s neighboring countries — Djibouti, Ethiopia, Kenya, Somalia, Sudan, Uganda, and Eritrea — is called the Intergovernmental Authority on Development (IGAD). IGAD has played a diplomatic role in seeking to mediate the conflict within South Sudan that began in 2013, as they did in helping secure the Comprehensive Peace Agreement that ended the earlier conflict between northern and southern Sudan that ultimately led to the independence of South Sudan in 2011. Regrettably, economic and political self-interest has sometimes distorted the mediation efforts of several countries that are part of IGAD, particularly Uganda and Ethiopia. This has in turn led several countries from outside the region to become involved in an effort known as IGAD Plus, which includes the African Union (AU), United Nations, China, United States, United Kingdom, Norway, and the European Union. A sense of moral responsibility arose in these more distant countries because of their proximity through awareness. These combined regional and global mediation efforts have certainly not been perfect. Nevertheless, a fragile peace process is underway (ICG 2015). Both nearby and distant neighbors can have the knowledge that enables them to make a difference.

The criterion of capability also sheds light on positive duties to respond to crises that displace large numbers of people. In considering this issue it has become common to point out that someone who cannot swim does not have a duty to come to the aid of a child who is drowning if providing the aid requires swimming, while a good swimmer can have a duty to respond. Lebanon, Turkey, and Jordan are today already massively overburdened with Syrian refugees. They do not possess the economic and other resources to take in many additional refugees. On the other hand, the resources of the wealthy nations of northern Europe, North America, and the oil-producing Gulf states give them the capability to receive many more refugees and to share the burdens being carried by Syria’s already overtaxed proximate neighbors. The assistance being provided to the countries bordering Syria is woefully inadequate. Capability to assist gives many nations in Europe, North America, and the Gulf a duty both to receive many more Syrian refugees than they have and a responsibility to provide more assistance to Syria’s nearby neighbors (Rummery 2015). The duty to share the burden of assistance to displaced people is proportional to the capability of doing so. Countries with greater economic and political capacities to help have proportionally greater responsibilities to do so. These responsibilities may be carried out by granting asylum and refugee status to more of the displaced, and, perhaps most urgently, by providing economic and other forms of assistance to countries like Turkey, Lebanon, and Jordan who are already carrying a disproportionate burden.

The existence of duties such as these is a consequence of the fact that the responsibility to assist displaced people reaches across national borders. The fact that state sovereignty is not a moral or political absolute becomes clear in face of the needs of forcibly displaced persons. In his work on response to the needs of internally displaced people, the Sudanese
scholar and diplomat Francis Mading Deng argued that sovereignty is such an important value because it secures each country’s ability to protect its own people by preventing external powers from taking harmful action within its national boundaries, for example by invasion or colonial exploitation. Deng called this sovereignty-as-responsibility (Deng 1996). Sovereignty does not mean a government is free to do whatever it will within its own borders, such as taking actions that create large numbers of internally displaced persons or refugees. If a government fails to protect its own people, either because it is unable or unwilling to do so, the duty to assist those who are threatened by this failure can pass to the other nations. Thus the responsibility to assist and to protect the rights of persons threatened with or experiencing displacement falls first on their own government. But if their government is unable or unwilling to secure their rights, the responsibility to do so can move to other countries and their people (Martin 2010, 28-31).

Deng’s thinking contributed in an important way to the development of the doctrine of the Responsibility to Protect (R2P), initially proposed by the International Commission on Intervention and State Sovereignty (ICISS) and subsequently affirmed at the 2005 UN General Assembly World Summit (UNGA 2005, nos. 138-39; ICISS 2001). R2P states that the international community can have positive duties “to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” Protective action should come in the first instance from people’s own government. Only if that government is failing to provide this protection should other countries consider action. When violations of human rights reach the level of atrocity and lead to the displacement such violations often cause, action by other countries through “diplomatic, humanitarian and other peaceful means” can become appropriate and even required.

The responsibility to protect has been the focus of heated controversy since it was endorsed by heads of state at the UN General Assembly in 2005. Political realists oppose it because they hold that foreign policy should be determined by the interests of one’s own people, not by a supposed moral responsibility to other countries. Others see it as a form of neo-imperialism. Still others say that the situation in Libya today in the aftermath of the NATO intervention there shows R2P doesn’t work, and that the current massive crisis in Syria and surrounding countries shows the R2P cannot work. Despite these critiques, it is important to note that the responsibility to protect has in fact been invoked on a number of occasions since 2005 and that it has led to effective protection of people from grave rights violations.

For example, when conflict flared in Kenya following the disputed 2007 elections, nonviolent, diplomatic initiatives were taken by numerous international actors to stop the conflict that took several thousand lives and displaced half a million people. Kofi Annan stated that he saw the crisis in Kenya through “the R2P prism” (Cohen 2008). This led to intense diplomatic initiatives by the United Nations, the African Union, and a number of other governments from Africa and around the world, including the United States (International Coalition for R2P, sec. II). A power sharing agreement was reached and the downward spiral into civil war and perhaps even genocide was stopped. The Kenyan case illustrates that the responsibility to protect can be successfully carried out through nonviolent political and diplomatic means.

The R2P doctrine has also been invoked on several occasions in the past decade to justify the use of military force to protect people from atrocities, following the UN General
Assembly’s affirmation that if diplomatic initiatives do not succeed, the use of armed force can become legitimate as a last resort under chapter VII of the UN Charter. For example, in 2012 France and the Economic Community of West African States took military action with UN approval in the pursuit of peace in Mali, and in 2013, the UN Security Council supported the use of force by French and African Union troops to stop the atrocities that were occurring in the Central African Republic and the displacement of nearly one million refugees and other forced migrants.\(^6\) Though these cases are certainly not resolved, they indicate that the doctrine of the responsibility to protect can lead to action that can help prevent grave crisis from becoming much worse and can lead to some improvement in crisis situations that force many people from their homes. Two other cases, however, Libya and Syria, raise questions about whether R2P has any relevance to current efforts to respond to the refugee crisis.

In the Libya case, the United Nations authorized action to protect civilians when fears arose that Libya’s leader, Muammar al-Qaddafi, was about to commit atrocities. Qaddafi referred to his adversaries in Benghazi as “cockroaches,” the very epithet Hutu used for Tutsi during the Rwanda genocide (BBC News 2011). As a result, the UN Security Council, with the notable support of the Organization of the Islamic Conference and the League of Arab States, called for the use of “all necessary measures” to protect civilians.\(^7\) NATO intervened with airpower, Qaddafi was killed, and his regime was overthrown. Sadly, Libya has since fallen into political chaos, with armed conflicts among several groups, significant violations of human rights on the basis of religion, the displacement of many, and the unsafe flight of migrants across the Mediterranean (Amnesty International 2015, 5-6). These consequences confirm for some observers the conviction that pursuing humanitarian goals not required by national self-interest is likely to do more harm than good (Kuperman 2015, 66-77). I would argue, however, that the intervention in Libya failed not because it was excessive but because it was incomplete. Following the norms that some specialists in the ethics of war are today calling *jus post bellum*, justice after conflict, NATO and the United States should have followed up their intervention with action to rebuild and to prevent the chaos that developed (Chollet and Fishman 2015, 154-57). What happened in Libya was an incomplete implementation of R2P, not a simple failure. Had the intervention followed through with the peace building and reconstruction efforts that were clearly required, the situation on the ground in Libya would not have disintegrated in the way that it has, and many fewer people would be in flight from the chaos of that tragic situation.

Syria has also been invoked to suggest that R2P is dead. The political complexities and moral ambiguities of the Syrian situation go very deep. But these complexities do not discredit the existence of a duty to protect people facing atrocities when protection is possible. Thomas Weiss has argued that the wisdom of the use of military force to protect people from atrocities is governed by three factors: legality, moral legitimacy, and feasibility (Weiss 2014). In Syria it is clear that the *legal* prohibitions of war crimes and of other atrocities have been massively violated. The *moral legitimacy* of efforts to stop a conflict that has

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displaced over half the Syrian population and killed hundreds of thousands of civilians is also evident. The feasibility of military intervention to alleviate the crisis, however, is unclear. This does not undermine the idea that there is a responsibility to protect people from atrocity and from being driven from home by mayhem when it is possible to do so. The apparent lack of presently feasible ways to overcome the crisis in Syria suggests that intervention is not now called for by R2P. I would argue, however, that the duty to protect the Syrian people does call for continuing political and diplomatic initiatives to find a path toward their protection. Not only Assad and the rebels, but also Russia, Iran, some Gulf states, and others are keeping the crisis in Syria alive. The global community, therefore, has a duty to continue engage these powers diplomatically and possibly through other forms of continuing engagement.

There is also continuing responsibility to the large number of Syrians presently seeking refuge in Europe and other parts of the developed world. At a minimum, we need to live up to 1951 Refugee Convention’s call for refugees fleeing persecution to be granted protection. Countries in Europe and North America have the capability and resources to grant asylum or refugee protection to a considerably larger number of Syrians than is happening today. The number of Syrians seeking asylum in Europe is not even close to the number already within the borders of Syria’s neighbors (ICG 2016). When in the fall of 2015 UK Prime Minister David Cameron announced that his country would grant refugee protection to 20,000 Syrians over the next five years, he was appropriately reminded that Lebanon had admitted that many Syrians over the past two weekends. Indeed, developing countries today host 86 percent of the world’s refugees, with the very poorest countries hosting 25 percent of the global total (UNHCR 2015, 2-3). The rich nations of the North have the capability and therefore the responsibility to admit a larger number of refugees and asylum seekers and to assist the poorer countries already hosting most of the world’s refugees. A substantial increase in the funds being provided to Syria’s neighbors for this burden sharing by the North should be a priority today.

To achieve this, the rich nations of the northern hemisphere will have to overcome tendencies to racially or religiously driven xenophobia and the mistaken fear that terrorists are often refugees. In addition, European powers such as France and the United Kingdom that gained economically from their colonies in Africa and Asia have duties to be open to refugees from these regions. A country with a history of military involvement in another nation can also have special obligations to people in flight from that nation. The United States recognized its particular duty to receive refugees from Vietnam after the Vietnam War. Though the US intervention in Iraq was certainly not the sole cause of the displacement of many Iraqis, it was a significant factor that contributed to the political chaos that led to the huge forced migration of Iraqis that has occurred. Political scientist Stephen Walt recently observed that if the United States and its allies had not invaded Iraq in 2003, there would almost certainly be no Islamic State today (Walt 2015). Thus there would be fewer people from Iraq and Syria seeking asylum and refugee protection. This deepens the duties of the United States and its allies toward those refugees.

Finally, it is well known that many observers believe there are good reasons to wonder whether national self-interest may not overshadow the duties and prevent the actions advocated here. Nevertheless, the work of Martha Finnemore and Kathryn Sikkink has shown that advocacy for normative standards in some domains of contemporary international politics
has had significant positive impact (Finnemore and Sikkink 1998). The standards of the international law of refugee protection and for the regulation of armed conflict were the result of normative advocacy by groups such as the Red Cross over the past century. More recently, though the ICC is still a developing institution, “normative entrepreneurs” have advanced the effort to hold political leaders accountable for violating normative standards in several international tribunals. This suggests that, contrary to the standard realist argument, ethical standards can come to have real impact on the conduct of nations. There is hope, therefore, that the September 2016 UN Summit on Refugees and Migrants can lead to genuine innovation in the protection of refugees and other victims of war and humanitarian crisis. Normative pressure from nongovernmental bodies, including religious communities and faith-based agencies, can make important normative contributions to action more fully in accord with the responsibilities incompletely sketched in this article.

IV. Conclusion

The refugee crisis that is occurring today means that the high moral value that has been assigned to national borders and state sovereignty in the modern, Westphalian international system must be reassessed. Human rights have been proclaimed as universal norms, and this universality can be supported by secular philosophies such as that developed by Kant and by the major religious traditions of the world, including Judaism, Christianity, and Islam. These rights require that all political actors, both states and non-state agents, refrain from grave abuses of human rights such as war crimes, crimes against humanity, and other abuses that effectively treat people as if they were not human at all. Atrocities such as these are among the major causes of refugee movement and other forms of forced migration today. Acting to prevent such crimes and holding accountable those who nevertheless commit them will be a crucial step in making the global system of refugee protection more adequate. Doing so should be a main objective at the September 2016 United Nations Summit, and elsewhere as well. Similarly, taking positive steps to come to the aid of those who have been driven from home will be essential to a more effective refugee regime. The duty to provide such assistance to those already displaced falls on neighboring countries, on those in the local region, and on the global community as a whole. The responsibility of countries to provide help is proportional both to their proximity to those in need and, more importantly today, to their capacity to provide effective assistance. The rich nations of Europe, North America, and the oil-rich Gulf states thus have urgent duties to assist the very poor countries who are hosting most of the world’s refugees today. Developing fair and politically effective ways of assigning the share of the responsibility that different developed nations should carry will be essential to the creation of a more effective refugee system. It will be a great disappointment if the September 2016 meeting at the UN General Assembly fails to make substantial progress on this task. But while the leadership of the United Nations and its constituent national governments is essential, the task is not theirs alone. Many humanitarian NGOs, both secular and faith-based, have broad experience in responding to the needs of the displaced across national borders. These organizations are thus well positioned to help in the development of a system that is more effective. Hearing their voices will be important as revisions in the refugee regime are being considered. It can be hoped that all available practical wisdom will be drawn upon to create more adequate ways of responding to the present crisis. Many millions of lives are at stake.
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Rethinking the Assumptions of Refugee Policy: Beyond Individualism to the Challenge of Inclusive Communities

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Executive Summary

The values of individualism developed in the post-Enlightenment West are at the core of the contemporary refugee protection system. While enormously powerful, this tradition assigns priority to the individual as distinguished from the community. Based on patterns established in centuries of religious thought and practice as well as on the insights of key thinkers in the tradition of Western individualism, this paper argues that consideration of communities should receive greater emphasis. In terms of the refugee protection system, this shift requires examining how best to address the needs of communities that are uprooted, as well as the needs of communities into which displaced persons are received, rather than only focusing on individuals who cross a border and seek refugee status.

In seeking to “rethink the global refugee protection system,” we must examine the ways in which it has been built upon a foundation of individualism in order to ascertain how we can devote more adequate attention to the communities both from which refugees come and into which they need to become integrated.

The Power of Individualism

The values of individualism as developed in the post-Enlightenment West are at the base of the contemporary refugee protection system. The 1951 Geneva Refugee Convention is a further development of Article 14 of the 1948 Universal Declaration of Human Rights. Both landmark documents certainly build on earlier traditions, arguably tracing back to Egyptian, Greek, and Jewish precedents. But the core of the foundation is the tradition of human rights that evolved in the West from the Enlightenment to the present. At the heart of that tradition is a fierce defense of the rights of the individual over against the unlimited imposition of social control through the coercive authority of the broader society as expressed through unaccountable leaders.

This focus on individual rights has been enormously powerful, impressively productive of a range of social innovations that have come to exert influence around the world, and
remarkably compelling even in regions outside of the European and American social systems in which it has been generated. To offer only the most cursory of overviews, individualism as it has developed in the West since the eighteenth century has provided leverage against authoritarianism of all sorts. It has also pressed for freedom of expression and empowered choice among alternatives at the level of individual selection. It has been correlative with the development of market economies and has supported entrepreneurial initiatives. Finally (in this brief overview), it has served as a foundation for civil society and representative government.

In sum, individualism has been central to the development of core practices of the Western worldview that has come to be globally influential, in particular over the past century and a half. But powerful, productive, and even compelling as it has been, the tradition of individualism has not been without its adverse impacts. This other side of its influence is evident especially in its tendency to assign priority to the individual over against the community.

Even here, the effects are very complex. One form of community that is characteristic of individualistic societies in general and the United States in particular is voluntary associations. Think of an evangelical Protestant church that requires a personal testimony that a member has been born again. Or consider voluntary membership in such clubs as the Kiwanis, Rotary, or Lions, reading or theater groups or other hobby gatherings, hiking clubs, professional or vocational associations, and so on. But important as they are, such voluntary associations construe communities as the consequence of individual decisions to join together to form a larger union.

This assumption of the priority of the individual is evident in the understanding of refugees as individuals who have a warranted fear of persecution and therefore have fled their societies to seek safety across a national border. The Geneva Convention specifically states that the rights of the individual refugee are extended to include his or her family. But the basic model or pattern is that of an individual who is applying for refugee status after fleeing from home.

The Role of Community

This individualistic focus of refugee policy is the more problematical in view of the indisputably communal character of the conflicts that are generating enormous numbers of displaced people. To take only a sampling of the places that are producing significant numbers of refugees at the moment, Syria, Afghanistan, Somalia, Nigeria, and Myanmar are all indicative of the extent to which displaced people are the result of communal differences that lead populations to conclude there is no future in their home country. Consequently, rethinking the refugee protection system needs to examine how best to address the needs of entire communities that are uprooted rather than only to focus on individuals who manage to cross a border and seek refugee status.

The international community and certainly the United Nations High Commissioner for Refugees have long recognized that the distinction between refugees and internally displaced persons is an artificial one and is often counterproductive. That recognition
testifies to the extent to which rethinking refugee protection issues requires a focus on issues of community rather than only on individuals and their families. It also underscores the ways in which much earlier intervention is crucial.

It is stunning — and dismaying — how refugee crises command attention only once they have impinged on the developed world. To take a recent and deeply discouraging instance, it is only once bodies began to wash up on the northern shores of the Mediterranean and photographs started to appear in newspapers and magazines that the crisis of displaced Syrians registered in the awareness of the West. The fact that a country of some 22 million had half of its population displaced and more than four million already refugees across the borders of the neighboring countries of Lebanon, Jordan, Turkey, and Iraq was not much noticed for over four years.

Earlier awareness and intervention are crucial for keeping refugee crises from spiraling out of control. How to achieve such earlier awareness and intervention is certainly an enormous challenge for the international community. It will require major investments in economic and political development and also in support for displaced populations inside countries when communally based conflict is leading to chaos. It will also almost certainly entail more adequately trained and funded peacekeeping operations. There is no way to rethink refugee policies without also addressing this need for more effective and earlier intervention in the countries that are producing substantial numbers of displaced people.

Internally displaced people are almost by definition not individuals who are seeking to start their lives anew on their own initiative. Instead, they are members of communities who have been attacked because their ethnic or religious identities differ from those who oppose them. Resolving such conflicts therefore requires taking into account social differences rather than simply individual aspirations.

Refugees from countries with communally based conflicts may fit the individually based conception of refugees a bit better than internally displaced persons do, but here too refugee policies cannot ignore the dimension of community affiliations that go beyond family bonds.

As all who work with refugees know, there are three ideal typical routes out of refugee status: to return home when it is safe to do so; to be accepted for residence in the country to which the refugee has fled; or to be admitted for resettlement to a third country. For the first two of those outcomes, community affiliations will almost certainly be dispositive as to the viability of the exit plan. It is accordingly imperative that refugee policy take into account this dimension of community rather than focus only on the individual family.

Even in the case of the small proportion of refugees accepted for entry into a third country, it is crucial that refugee policy recognize the role of communities in facilitating successful resettlement. To seek new homes in settings that are not refugee ghettos but that still do include some previously resettled members of the same ethnic or religious or linguistic group is an important consideration. So too is the availability of employment that calls for skills that the refugee can offer or develop.

My father came to the United States as a penniless immigrant. He was not a refugee but rather an economic migrant. With what in retrospect is a remarkable misreading of the world
economy, he concluded that employment prospects in his native Black Forest Germany did not look promising when he graduated from secondary school, and so he borrowed $100 and arrived in Manhattan at the age of 20 — in 1930 just as the Depression was getting deeper and deeper. In a sense he fits the individualistic model of the refugee who seeks a better future. He did come alone. He began by sweeping floors in a grocery store. But he very quickly developed a network of fellow immigrants (which after six years also included the woman who would become my mother). Through this network, immigrants over the years provided each other friendship and support. As they married, it also came to include their families. This extended network gathered very frequently in the YMCA on 23rd Street in Manhattan and has now celebrated reunions for more than eight decades and over three generations.

I allow myself the self-indulgence of mentioning my father and our family because his immigration illustrates that even those who exemplify the individualism of moving out on their own cannot succeed without the bonds of community that sustain them and afford ways to move forward. As we rethink refugee policies, we need to keep that lesson in mind. As much as we celebrate personal initiative and the power of individualism, we also must recognize its significant limitations, including its failure to recognize fully the dependence of all individuals on the communities that have nurtured them and that will sustain them in the future.

**A Further Look at Western Individualism**

The limitations of individualism as it is represented in modern Western free-market ideology and mass culture are evident even when current patterns are evaluated in terms of their own historical antecedents. Central to this patrimony are the powerfully influential figures of John Locke and Adam Smith in Britain and Immanuel Kant on the Continent. Yet none of these thinkers provides support for the kind of uncritical individualism that characterizes the rhetoric of so many of those who presently invoke their names.

As a matter of historical fact — notably in his *Letters on Toleration* (1690, 1693) and in the second of his *Two Treatises of Civil Government* (1690) — Locke certainly gave considerable impetus to the traditions that have come to characterize the political and economic orientation of Western liberal democracy. In particular, his second *Treatise* delineates his view of humanity in the state of nature. Arguing against the position of Thomas Hobbes that humans originate in a state of hostility and antagonism, Locke envisions equal and independent individuals who enjoy a natural happiness. Yet even though he is far more positive about human nature than is Hobbes, Locke too moves quickly to the formation of the state as a means of protection against the excesses of individualism. Thus the social contract is required to guard against any who might attempt to live outside the law of nature.

Like Locke, Kant is appropriately counted among those who have shaped modern Western individualism. His central concern to preserve human freedom and moral autonomy while also acknowledging the power of scientific understanding places him squarely in this tradition. Indeed, his preoccupation with establishing a solid foundation for personal moral agency and responsibility in the impersonal world of modern science is emblematic
for Western individualism, even among those who have scarcely heard of him and who certainly are not aware of the intellectual revolution that his thought constitutes.

Yet, like Locke, Kant is far from advocating an uncritical individualism. Knowledge, for Kant preeminently exemplified in Newtonian physics, can never be a matter of individual idiosyncrasy but rather must be universal and necessary. Similarly, moral action — reason in its practical employment, to put it in terms of his conceptual apparatus — presupposes a shared context of meaning and common criteria for adjudicating alternatives. (In Kant’s technical terminology, the postulates of practical reason constitute the shared context of meaning and the categorical imperative in its various formulations specifies the criterion for determining which actions are moral). This embedding of attention to human freedom and moral autonomy in more inclusive contexts is integral to the analyses of the *Critique of Pure Reason* (1781) and the *Critique of Practical Reason* (1788). But it becomes ever more central in Kant’s later writings: the *Critique of Judgment* (1790), *Religion Within the Limits of Reason Alone* (1793), and in such pieces as the extended essay *Perpetual Peace* (1795).

Like Locke and Kant, Adam Smith is appropriately enlisted in the cause of Western individualism. His thought also represents the close historical connection between this tradition of individualism and modern Western *laissez-faire* economic theory. Yet what Smith actually wrote lends little support to the more recent arguments for unconstrained markets and unrestrained individualism on behalf of which his name is so often invoked.

In his *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), Smith certainly contends that the individual pursuit of self-interest can contribute to the public good and general welfare. But he also recognizes that the ambitions of individuals and private groups might be opposed to the public interest and in such cases would require restrictions imposed by the state. More fundamentally, Smith, who was a professor of moral philosophy, affirms the pursuit of individual interests only in the context of a network of social relations, as is clearly articulated in his *Theory of Moral Sentiments* (1759).

### Religion and Individualism

In affirming the role of the community in constraining the excesses of individual self-assertion, Locke, Kant, and Smith all in effect stand with the vast preponderance of human wisdom and experience over against only the modern West that so often invokes their names.

Perhaps the most radical insight into the inadequacy of idealization of the individual is the position of Buddhist traditions that there is no self. This teaching of *anattā* or *anātman* is shared across a remarkable range of Buddhist communities, from Theravāda traditions in South and Southeast Asia, to their Mahāyāna counterparts in East Asia, and to all of their offspring in the West. To construe the self as an individual entity is to fail to apprehend the codependence of all of reality. It is to be captive to an illusion and therefore to live in delusion.

Other religious traditions express this same position in various ways. Traditions as disparate as Confucianism on the one hand and Judaism and Islam on the other deem individuals to be constituted through their social relationships. In short, for Confucians, Jews, and
Muslims, the community has logical, temporal, and normative priority over the individual. Even those religious conceptions that seem to glorify the individual in the end subordinate the self to a more encompassing normative structure or reality. I offer two examples. The Hindu affirmation that *atman* is *brahman* — that the self is identical with the ultimate — does celebrate the dignity of the human person. But for Hindus this equation precisely does not exalt the discrete individual as separate from the whole of which it is an integral part. A second example is the Greek and then Christian idea of the soul. This conception confers enduring worth on the individual and, unlike the Hindu affirmation of *atman*, it does not dissolve this individual into the ultimate. Yet even when the soul is construed as an enduring individual entity, its end is to love, to enjoy, and to worship the divine reality for which it is destined.

In sum, as with influential Enlightenment thinkers like Locke, Kant, and Smith, so too for the major world religions, individuals cannot be deemed independent of the communities that nourish and support them — and that also can pose dire threats to their survival.

**The Challenge of Inclusive Communities**

Rethinking refugee policy must take into account these lessons from centuries of religious traditions and also from more recent secular Western thinking, the more so because recent experience offers overwhelming evidence that focusing exclusively on persecuted individuals who cross borders to seek relief is an inadequate approach to ongoing crises. The goal of the rethinking underway must be to preserve the indispensable core of respect for individuals and their courageous actions while also affirming the crucial role of communities (including but not limited to families). Further, this integration of individualistic roots with crucial community considerations must be embraced not only in dealing with the consequences of communally based discrimination and conflict but also in identifying and seeking to address its causes.

While it is widely acknowledged that there must be earlier attention and more effective intervention through development assistance and more adequately trained and supported peacekeeping operations, there is very little action based on this recognition. In the best of worlds, everyone would agree on the need for large-scale efforts to prevent the conflicts that create the largest numbers of displaced people. Unless and until there is much more such action, the refugee crises worldwide will continue to be massively challenging.

It is urgent to launch concerted programs to address conflict prevention through development and peacekeeping operations. But the rethinking of refugee policies cannot and should not be deferred because such larger questions of international policy also require attention. I will therefore conclude this essay with a summary of the steps that need to be taken in rethinking refugee policies, and I will thereby state explicitly the imperatives that I have already suggested or implied in my less prescriptive observations.

The first step that can and should be taken is to declare as a matter of policy that the distinction between internally displaced persons and refugees is not only unhelpful but fundamentally misleading. Crossing even an arbitrarily drawn border is certainly a significant move that will require adjustments in how the situation is addressed and how civil authorities are
engaged. But such adaptations of responses should not change the status of the uprooted persons who should be the focus of attention.

A second step is to acknowledge that not only individuals and their families but also entire communities must become the focus of attention in refugee policy deliberations. This requirement obtains for understanding the needs both in “sending countries” and in “receiving countries”: protection must be afforded when tensions rise in home countries, which requires earlier and more substantial investments in conflict prevention and development; and acceptance and support must also be provided in the places of resettlement. While the former may be beyond the current purview of those directly responsible for refugee protection and resettlement, the latter is emphatically at the heart of the enterprise.

A third step is to build on this attention to communities as well as individuals and therefore to invest concerted thought and effort in considering how best to incorporate displaced persons into larger communities even if those communities represent differences in ethnic, religious, and other features of identity. Here again, the goal of inclusive communities is extremely relevant to “sending” as well as “receiving” countries, though those responsible for refugee protection and resettlement usually do not have direct responsibility in “sending countries.” But in the case of “receiving countries,” the requirement needs to be at the core of the enterprise.

Too often resettled refugees remain segregated in their own ghettos. For initial support, living and working in communities that include other recently resettled refugees, especially ones from the same area, may be quite salutary. But the long-term aim must be for refugees to become integrated into the larger society — not to denigrate or break with their land of birth but to be fully accepted and affirmed as a member of their new nation.

This third step embodies what I take to be the core values that should inform “rethinking the global refugee protection system.” All of us — whether recent refugees or not — need to aspire to belong to communities that are inclusive in the sense that members affirm quite particular convictions without requiring that every member share the same convictions. Such communities may be utopian in the sense that Sir Thomas More intended when he invented the term, namely they are literally (in Greek) “no place.” But for the sake of the world we share, newly arrived refugees and longer-term residents alike, we had better work toward this admittedly only very partially achieved ideal. May rethinking refugee policy be a series of steps in that direction!
Responding to a Refugee Influx: Lessons from Lebanon

Ninette Kelley

Executive Summary

Between 2011 and 2015, Lebanon received over one million Syrian refugees. There is no country in the world that has taken in as many refugees in proportion to its size: by 2015, one in four of its residents was a refugee from Syria. Already beset, prior to the Syrian crisis, by political divisions, insecure borders, severely strained infrastructure, and over-stretched public services, the mass influx of refugees further taxed the country. That Lebanon withstood what is often characterized as an existential threat is primarily due to the remarkable resilience of the Lebanese people. It is also due to the unprecedented levels of humanitarian funding that the international community provided to support refugees and the communities that hosted them. UN, international, and national partners scaled up more than a hundred-fold to meet ever-burgeoning needs and creatively endeavored to meet challenges on the ground. And while the refugee response was not perfect, and funding fell well below needs, thousands of lives were saved, protection was extended, essential services were provided, and efforts were made to improve through education the future prospects of the close to half-a-million refugee children residing in Lebanon. This paper examines what worked well and where the refugee response stumbled, focusing on areas where improved efforts in planning, delivery, coordination, innovation, funding, and partnerships can enhance future emergency responses.

I. Introduction

Over a three-and-a-half year period, beginning in the spring of 2011, Lebanon, a small country of just 4,000 square miles, received over one million Syrian refugees. The impact of both the Syrian conflict and the refugee influx on Lebanon has been profound. By 2015, one in four residents in Lebanon was a refugee from Syria, and Lebanon hosted the second largest number of refugees in the world. In relative terms, the number of Syrian refugees

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Lebanon has received would be the equivalent to the United States receiving approximately 108 million refugees, or Europe receiving approximately 169 million refugees.\(^2\)

This paper examines the international and national response to what is considered one of the severest challenges faced by Lebanon in all its complex history. It covers the four-year period from the spring of 2011 until February 2015, when border restrictions effectively stemmed the flow of refugees to the country. The refugee response was not short of missteps. But it was also full of great accomplishments: hundreds of thousands of refugees were received and protected, and basic needs were met, while efforts expanded to support local communities and national institutions in what was, and continues to be seen as, an existential challenge for Lebanon.

The war in Syria continues: its impact now reverberates beyond the region while other new and ongoing conflicts force millions to flee or remain in protracted displacement. There is much to be learned from the response to the extraordinary challenges in Lebanon. This paper examines the key lessons learned during the four years from 2011 to 2015. It focuses on areas that can improve the timeliness and effectiveness of refugee responses, including in regard to preparedness, scaling up, protecting refugees, coordinating efforts, mobilizing resources, expanding partnerships, engaging innovative practices, and ensuring humanitarian actions are fully accountable to those being helped.

II. Context

A. Political Environment

At the start of the Syrian crisis, Lebanon had hosted Palestinian refugees for over 60 years, estimated in 2010 to number 280,000 persons living in conditions considered among the most marginal in the Middle East.\(^3\) A country that was officially at war with Israel, that suffered from severe and often paralyzing internal political divisions and frequent security breaches, was on the cusp of becoming the largest recipient of refugees in the world, and arguably the most challenged by the influx.

The experience of hosting Palestinian refugees influenced to a great degree Lebanon’s fears and responses to Syrian refugees. Hundreds of thousands of Palestinians fled to Lebanon in 1948, and as their stay became prolonged, restrictions on their rights within Lebanon were imposed, including being confined to camps that through time became over-crowded and under-serviced urbanized areas. Ongoing marginalization contributed to Palestinian support for the Palestinian Liberation Organization (PLO), which relocated to Lebanon following its expulsion from Jordan in 1970. PLO involvement in Lebanon’s brutal civil war (1975-1990), which politically and economically devastated the country, fueled resentment within Lebanon against Palestinians and stigmatized the entire Palestinian community. From the

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\(^2\) For the United States (US) and European Union (EU) population data see respectively: http://www.census.gov/popclock/; https://data.oecd.org/pop/population.htm.

\(^3\) United Nations Relief and Work Agency for Palestine Refugees in the Near East (UNRWA) registration numbers since 1948 show that as of 2011, 425,000 Palestinians had registered in Lebanon. A socioeconomic survey of Palestinians in Lebanon published at the end of 2010 estimated that due to mass migration, 260,000–280,000 Palestinian refugees resided in Lebanon (Chaaban et al. 2010).
Responding to a Refugee Influx: Lessons from Lebanon

early days of the Syrian refugee influx, and based on the experience with Palestinian refugees, Lebanese authorities, with few exceptions, ruled out any possibility of establishing formal refugee camps for fear they would become permanent. Similar reasons were given for the refusals to enable legal recognition of temporary residence and to facilitate registration of Syrian refugee births.

Lebanon’s long and close history with Syria was another factor that influenced the Lebanese government’s response to the refugee crisis. During the Ottoman Empire, Lebanon was considered part of “Greater Syria” which geographically embraced Lebanon, Syria, Jordan, and Palestine. From 1976 to 2005, Syria maintained a military presence and wielded strong political influence in Lebanon. Syrian ties inside Lebanon therefore were and remain strong. Throughout the Syrian crisis, successive Lebanese governments have adopted a policy of neutrality, officially known as “disassociation,” towards the situation inside Syria. Nonetheless, the two major political coalitions within Lebanon were divided, with one supportive of the Syrian opposition cause and the other backing the government of Syria. Public policy formation, including concerning refugees, often faced gridlock due to these divisions.

Between 2011 and mid-2015, Lebanon had three different governments. There were also periods of caretaker governments when policy decision making reached a standstill. The government of Prime Minister Tamam Salam was formed in February 2014, and in May of that year, with the end of the presidential term of Michel Suleiman, the dominant political actors agreed that executive decision making would be reached by consensus. In many fundamental matters of basic governance, as well as issues pertaining to refugees, such consensus was hard to secure. Political divisions further exacerbated gridlock at the executive and legislative levels by forestalling for over two years the election of a president and the reaching of an agreement on a roadmap for legislative elections.

An additional challenge facing the government in the management of the refugee response was the lack of a specific legal framework or dedicated and comprehensive administrative system for the management of refugee affairs. Suggestions to create an administrative system were perceived as an attempt to perpetuate the presence of refugees in the country and therefore were not advanced. All humanitarian activities had to be coordinated across a number of ministries, each of which faced severe capacity issues in addressing their regular responsibilities, let alone the additional ones brought on by the refugee influx.

Finally, although the governance system is largely centralized, the absence of comprehensive policies to manage the refugee influx meant that decision making often devolved by default to the local level. Lebanon, which can comfortably fit within the state of Connecticut, has eight governorates, 26 districts (whose leaders are centrally appointed) and 1,108 municipalities whose leaders are elected by their constituents. Municipal authorities were the first responders and, despite significant administrative and financial constraints,

4 From the outset, UNHCR did not seek a camp option for refugees but did advocate for greater support to host communities so that refugees could live with as much dignity, independence, and normality as possible. When the numbers of arrivals exceeded available shelter supply, UNHCR discussed with the authorities the possibility of establishing temporary shelter sites to relieve the situation of hundreds of thousands of refugees living in insecure informal sites. This idea was supported by some politicians as a humanitarian necessity but never received the consensus required.
had to make decisions to deal with the massive influx of refugees in their communities. Humanitarian efforts, therefore, had to navigate a complicated web of at times competing political agendas between the various levels of government. This was essential to ensure activities were appropriately authorized and to maintain the real and perceived impartiality of humanitarian action.

B. Overview of the Influx

The Syrian refugee influx into Lebanon initially was relatively modest. The first group of Syrian refugees fled to northern Lebanon in April 2011. They came from areas in and around Tallalakh, Homs, which had been the locus of confrontation between opposition protesters and government forces. Several thousand Syrians fled from this confrontation and traversed the few kilometers between Talkhalekh and Wadi Khaled in north Lebanon. Most sought refuge with friends or family and many returned over the ensuing months to areas where tensions had subsided. At the end of the year there were only 5,000 Syrian registered refugees in Lebanon.

In the next 12 months, however, the number of Syrian refugees in Lebanon increased to 175,000 before further swelling to over 800,000 at the close of 2013. By this time they were spread throughout the entire country. For 21 months, between January 2013 until border restrictions began to be progressively imposed in September 2014, the United Nations High Commissioner for Refugees (UNHCR) was registering on average over 48,000 refugees per month.

By this time, the Lebanese had gone beyond being uneasy about the influx, and across all political lines there was a consensus that the unabated arrival of refugees threatened the continued stability of the country. The incidents in Aarsal, a small town perched on the rocky slopes of the Anti-Lebanon Mountains bordering Syria, marked a turning point. Aarsal had been a port of safety for over 40,000 Syrian refugees whose number by August 2014 eclipsed that of the local population of 35,000 inhabitants. Syrian opposition fighters moved freely in and out of Aarsal and, in early August 2014, they engaged in a violent stand-off with the Lebanese Army that left 19 Lebanese soldiers and 42 civilians dead, hundreds of soldiers and civilians wounded, and 29 policemen and soldiers captured by Al-Nusra and ISIS forces.

Lebanon had reached a crossroads. At the time of the Aarsal stand-off, the Syrian refugee population exceeded one million. Refugees were living in very dire circumstances. Most rented overcrowded and very basic apartments or small plots of land to pitch a tent. Others found shelter in garages, worksites, and unfinished buildings. As the crisis progressed, more and more Syrians without any shelter populated the streets of Beirut, including refugee children who, in states of abject poverty and neglect, could be found shining shoes, begging, and living under bridges. Of the 400,000 school aged child refugees, only one quarter were enrolled in formal education and less than half had access to any education at all.

Other consequences of the Syrian refugee influx also had become clear by the time of the battle at Aarsal. Primary health care clinics were overstretched, with Lebanese experiencing
long waits for medical attention as more Syrian refugees sought service. An already frail infrastructure (water, electricity, sanitation) was severely taxed by the additional demand. Electricity interruptions, which had been a flash point of protests before the refugees arrived, were now more frequent. Lack of appropriate waste disposal and waste and water treatment — endemic in Lebanon — was more pungent and visible, with river beds near refugee settlements choked with garbage and land around collective centers similarly overflowing with refuse. Low-wage Lebanese workers saw their limited employment opportunities shrink as Syrian adult and child refugees were willing to work for even lower pay than they were.

Every town and village across the country had Syrian refugees, and many villages contained more refugees than local residents. Lebanese saw their small country being transformed and Aarsal, it was widely felt, pointed to the risks the refugee influx posed. Tightening the borders was well supported by all political parties, as were broader efforts to restrict refugee movement within Lebanon, evict refugees from sensitive areas, and discourage prolonged stay.

C. Operational Response

While a full description of the expansion of agency responses to the refugee influx in Lebanon is beyond the scope of this paper, mentioning a few highlights is warranted. In virtually all areas of the agencies’ engagement, responses matured. Reception moved from an ad hoc process to ensuring a border presence that provided information to prospective refugees on how to register with UNHCR and referred those in urgent need to care providers. Registration went from relying largely on mobile teams, to permanent registration centers in four locations fitted with biometric iris scan technology. Registration centers were equipped with places for children to play and for mothers to nurse their babies in privacy, as well as with immunization centers run by the Ministry of Health and the United Nations International Children’s Fund (UNICEF). UNHCR and the Ministry of Social Affairs provided social and protection counseling at the registration centers. Shelter interventions that initially focused on provision of in-kind assistance (materials, renovations of empty buildings for collective centers, and the provision of small housing units to landlords for installment on their land) gradually shifted to greater reliance on cash for rent or to buy shelter supplies.

In-kind provision of food, initially by the government and later by the World Food Program (WFP), was eventually replaced by a WFP-run cash voucher system. Initial reliance on trucking of water to refugees in informal settlements was progressively overtaken by more sustainable options, such as investing in wells and reservoirs which also benefited local communities. Ad-hoc assistance in meeting primary and secondary health care needs eventually gave way to investing more in primary health care centers, and a new and innovative means to engage a private sector health administrator to apply guidelines, monitor costs and efficiencies, and approve more costly secondary care. In regard to education, the goal was to ensure as many school-age refugees as possible were accommodated in the public system. The efforts gained significant traction when a consortium consisting of the Ministry of Education and Higher Education (MEHE), UN agencies, the World Bank (WB) and donors formed a steering committee to assess the investments needed to ensure every
refugee child was enrolled in school, to approve the budgets necessary, and to endorse and promote the collective appeals that followed.

Investment in community support projects also grew exponentially over the years. For UNHCR, this was important from various perspectives. In the first place, local communities were the first responders, opening up their homes and their properties to an ever-increasing number of refugees. Investing in community projects, some related to the refugee presence and others to address systemic gaps in local services that predated the refugee crisis, was both an important measure of appreciation and helped to maintain a positive environment towards refugees. Initial investments in community support projects by UNHCR of $170,000 in 2012 increased to over $24 million by the end of 2014.5

Combined with national efforts, international contributions had an important impact. Over a million refugees who fled into Lebanon were received and registered. Hundreds of thousands of refugees required and received food, shelter, and health assistance. Tens of thousands were provided with specialized services to meet their specific needs. Community centers grew to provide services to refugees and local residents, and projects to address systemic gaps in service delivery at the municipal level were expanded, while targeted support to ministries was increased. This was made possible by international humanitarian contributions that increased from less than $20 million in 2011 to $1 billion in 2015. At the same time, persistent budget shortfalls6 meant that food security remained precarious, shelter for tens of thousands of refugees was substandard, sanitation remained a constant challenge, and various negative impacts of the crisis — including illness and death from preventable causes — remained a constant scar on the refugee landscape.

Moreover, refugees faced considerable risks to their security which humanitarian assistance and protection advocacy could not lessen. The Lebanese authorities remained reluctant to relax the residency permit system, which remained too costly for most refugees to afford. This left refugees open to arrest and detention, and vulnerable to abuse and extortion from unscrupulous landlords. Similarly, while Lebanon has always relied on Syrian workers, progressive restrictions on the issuing of work permits left many refugees unable to secure work, while others who could find informal employment were exposed to serious exploitation by employers. The authorities also would not agree to facilitate the registration of refugee births, which were estimated to exceed 40,000 in 2015. Lebanese law mandates the registration of all births in Lebanon. However, refugees had great difficulty obtaining birth certificates for their newborns due to complicated administrative processes, burdensome fees, and arbitrary actions by local authorities. In the absence of a birth certificate attesting to the place of birth and nationality of the parents, refugee children in Lebanon have no official legally recognized identity and therefore are at risk of being stateless. The consequences can be severe and include the inability to attend school, to receive medical care, to travel, to work legally, to marry, or to pass on one’s nationality to one’s children.

5 Notwithstanding the positive impact on communities, it is also the case that development support in areas such as water, waste management, electricity and health, and other service provision fell woefully short of what was required to address the impact of the refugee presence in Lebanon. This is discussed more fully in section III(D).

6 The inter-agency refugee and resilience response plan for Lebanon was consistently underfunded with shortfalls averaging 55 percent in 2015 and 2016.
III. Lessons Learned

A. Preparedness

Reflecting back on the early years of the Syrian crisis, it is perhaps surprising to see the short term planning time frames used and what turned out to be erroneous contingency scenarios engaged. However, buoyed by the initial phases of the Arab Spring that had swept through Tunisia, Yemen, and Egypt, there was a general view that the crisis inside Syria would be short-lived. To be sure, there were those who predicted otherwise, but this was not the dominant view of the refugees or the Lebanese, nor was it the dominant view of the humanitarian actors whose initial contingency planning underestimated by far the influx to come. Humanitarian forecasting in the Syrian situation seemed to be based more on previous experience elsewhere, than grounded in a firm understanding of the social, political, and economic history within Syria.

Certainly throughout 2011 and the first half of 2012, the expectation was that displacement would be contained — through political concessions inside Syria, the Syrian government exerting control over areas of insurrection, or a stalemate in parts of Syria. In Lebanon, UNHCR contingency planning in December 2011 estimated a refugee population of 7,000 for the next year, accounting for future arrivals. Nine months later, when the refugee population reached 57,000 persons and was rising by 10,000 persons per month, the influx was projected to reach 300,000 by mid-2013. By June of 2013, however, over half a million Syrian refugees were registered with UNHCR, with more than 65,000 newly registered each month.

Initially, projections were based on the expectation that — as in Tunisia, Egypt and Libya — mass refugee flows would abate. As the conflict spread and the volume continued to grow, other factors limited projections. Of these, the most significant factor was the sense that humanitarian planning based on projected political outcomes was fraught with risks. Humanitarian action is grounded in four principles: humanity, neutrality, impartiality, and independence. These must be upheld at all times to ensure access to persons in need. A contingency plan based on projected outcomes, especially in highly politicized conflict situations, risks being seen as being partial. In the Syria context, projecting mass outflows could have been perceived poorly by the Syrian government, hindered humanitarian operations there, and caused panic in neighboring countries.

It is also the case that once the influx reached a critical mass, agencies were stretched to meet daily and growing needs, and so there was simply no time to spare for projecting further increases and what that would require for agency scale-up.

Contingency planning that fell far short of what materialized was not unique to Lebanon. In fact, by 2013, UNHCR realized that a new planning vehicle was needed and developed a Preparedness Package for Refugee Emergencies, which is now complemented by an inter-agency one (UNHCR 2017; IASC n.d.). Essentially, this methodology facilitates planning informed by assessing risks but not exclusively so: Agencies can plan on what may be needed in various different escalating scenarios without formally assessing the likelihood of those scenarios occurring. In effect, this methodology removes the need to forecast a
political outcome and allows for preparedness planning for a range of scenarios from the modest to most grave. It also assists in ensuring advance planning and readiness and avoids multiple revisions of contingency planning due to rapidly changing realities on the ground.

B. Agency Scale-up

Enhanced preparedness planning may have helped to avert some of the difficulties agencies had in ensuring necessary staffing and program implementation capacity to meet growing demands. Other challenges, however, would have remained regardless of the effectiveness of preparedness measures.

For humanitarian actors, keeping up with the increase in scale of the influx was a major challenge, not the least for UNHCR. The crisis was a slow burn, starting with a small influx in 2011, building slowly through 2012 and then expanding massively throughout 2013 to 2015. The government could not cope and it fell upon UNHCR along with UN and NGO partners to receive and assist an ever burgeoning refugee population scattered across the hundreds of small communities in which they settled. In 2011, when the crisis began, UNHCR had one small office in Beirut, assisting 10,000 mostly Iraqi refugees with an operating budget of just four million dollars. Within four years, UNHCR had six offices strategically located throughout the country, assisting over one million refugees with an operating budget of $322 million.7

Managing such a rapid expansion required overcoming a variety of challenges. Between 2012 and 2014, UNHCR struggled to find physical space to register and receive all refugees. Many landlords were hesitant to provide space or willing only to provide it for limited lengths of time. As a result, UNHCR experienced 16 office set-ups and relocations throughout the country. The number and needs of refugees sky-rocketed, requiring constant expansion of programs and the staff to design and deliver needed assistance. UNHCR went from having a few implementing partners to having over 40, and from having just 65 staff members initially to having 800 when the influx was at its peak.

Rapid emergency scale-up is part of UNHCR’s DNA. It relies on the quick deployment of experienced professional international staff in critical functional areas (protection, program, shelter, administration, finance, and human resources), bolstered by recruitment of national staff who often need rapid training to assume their functions. National staff typically outnumber international staff by a factor of 3:1. This formula usually ensures a smooth capacity increase, but 2013 proved anything but usual. The magnitude of the Syria displacement, coming on the heels of the Arab Spring and consequent mass displacement in North Africa, and occurring at the same time as emergencies in Central African Republic, South Sudan, and the Philippines, created challenges in identifying and deploying experienced staff in sufficient numbers and with the functional background needed to establish fully effective operational responses.

UNHCR reinforces its emergency staffing capacity in a staggered manner, starting with initial emergency deployments of a few months’ duration, drawing from expertise available

7 UNHCR’s budget, although consistently less than projected needs, rose continually throughout the period and cumulatively amounted to $907 million for the 2012–2015 period.
in the region and beyond. These emergency deployments, often managed through rosters and partner stand-by arrangements, are frequently engaged several times, as they were in Lebanon, until a more stable staffing structure can be put in place.\textsuperscript{8}

Other emergency-oriented international partners also had rapid deployment schemes. However, many Beirut-based international agencies who wanted to contribute were unable to deliver programs at the desired level of speed or breadth because of insufficient capacity to expand quickly and effectively outside the capital as the situation demanded. This created challenges, for it meant that capacity on the ground was simply not able to match the need during the initial years. It also led to concerns that UNHCR was too dominant, and engaged in areas where its operational partners were believed to have a comparative advantage, notwithstanding delays in being able to deliver on that advantage.

Moreover, despite UNHCR’s ability to deploy quickly, the refugee emergencies that swept the globe from 2012–2014 highlighted shortages of staff trained in the areas of administration, finance, project control, and supply. These competencies are all critical in managing the heavy procurement, disbursement, project monitoring, audit, and strengthening partner capacity necessary in an emergency response. UNHCR has since engaged in recruitment exercises to attract new staff with the required competencies, and has expanded the number of national officers with these skill sets. These actions are appropriate. The Lebanon crisis has made clear the need for extremely forward-looking human resource planning by UNHCR and all partners to ensure that staff with required skills will be available to meet emergency needs.

\textbf{C. Coordination}

In Lebanon, as in 136 countries, around the world, UN agencies ensure coordination of their activities as part of a UN Country Team (UNCT). Agencies jointly plan using a UN development planning framework, and generally the plan becomes operational once endorsed by the government of the country concerned. The UNCT is led by a resident coordinator who also serves as head of the United Nations Development Programme (UNDP). Within the UNCT, agencies lead in areas according to their mandate and expertise, with UNHCR in the lead on refugee responses. The planning framework extends for five years. In Lebanon, prior to the refugee influx, most UN agencies were engaged in providing policy guidance to the Office of the Prime Minster and to government ministries in one or more of the following five areas: governance, human rights, gender, socioeconomic development, and the environment. The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) ran the largest humanitarian program, while UNHCR had a rather modest program to meet the needs of 10,000 mostly Iraqi refugees.

Given its specialization, and pursuant to its mandate, UNHCR, alongside the government, coordinated the work of UN and partner agencies in regard to the refugee response. Although

\textsuperscript{8} A more stable second phase, beyond emergency deployments, was facilitated in Lebanon by the initiation of an accelerated redeployment scheme, which enabled advertising, selection and redeployment of existing UNHCR staff much more quickly than under normal procedures. This redeployment on a fast-track basis ensured a relatively efficient staffing scale up, although admittedly by placing a strain on other UNHCR operations which saw their staff leave earlier than anticipated to meet emergency needs in Lebanon and the region.
the government’s capacity was limited, seeking and helping to capacitate government leadership early on was essential in ensuring necessary approval and authority for the expansion necessary to meet the needs of refugees and the communities that were assisting them.\footnote{\textit{For example, initially registration was done jointly with the government, as was food distribution, until the number of refugees eclipsed the ability of the government to continue. But the early engagement was critical, and helped to counter later allegations that UNHCR had registered and assisted refugees without government approval.}} It was the case, however, that regardless of this early engagement, coordination with the authorities remained a challenge given the many different government actors involved and the absence of detailed policy guidance being issued at the central level.

No less challenging was coordination among UN and partner agencies. Here the problems were threefold: initial lack of capacity, insufficient local focus, and overlapping and duplicative UN processes.

Firstly, agencies were initially short of capacity in the form of staff and information management tools to meet growing demands. The scale-up of appropriate staff remedied the former while the introduction of new automated tools greatly enhanced the latter. But these remedies should ideally have come far earlier in the crisis.

Related to this challenge was the fact that UN and international partner agencies had a relatively heavy presence in Beirut and readily attended coordination meetings there but had little presence in the field areas where the majority of refugees and communities in which they lived needed support. As a consequence, there were insufficient links between policy decisions taken in the inter-agency meetings in Beirut, and implementation taking place in the field. Similarly, policy decisions were limited by an incomplete understanding of the opportunities and constraints faced by humanitarians in the field, which varied in each location. This heavy Beirut-based focus shifted gradually with a more proportionate engagement in the field as UNHCR and its implementing and operational partners delegated more program management and decision making to field offices in late 2013 and 2014. Again, this decentralization should have come sooner.

Secondly, since most agency activities had been traditionally Beirut-based, they did not have a significant understanding of the local governance structures at an early stage. One clear lesson from Lebanon, applicable across many humanitarian contexts, is that it is not sufficient to coordinate only with central authorities. Engaging local authorities is also critical and investment in both must occur at the outset. This is also an area where good preparedness planning prior to an emergency is essential. In the Lebanon situation, UN and partner agencies did not have a detailed enough view or understanding of the governance structure in Lebanon from the central to the local level nor deep connections to local authorities. UNDP had invested heavily in strengthening capacities of both central and local authorities but this experience was not widely shared. A mapping of government actors at various levels, accompanied by clear analysis of their respective accountabilities and authorities, would have helped to produce stronger area-based coordination earlier in the crisis, and would have improved outcomes for both refugees and impacted communities.

A third constraint to effective inter-agency coordination was the duplicative coordination mechanisms of the United Nations. Consistent with its relatively rapid initial scale-up,
UNHCR assumed leadership positions not just for the overall refugee response but also in sectors where other agencies felt they had a comparative advantage. UNHCR took this approach because many such agencies initially faced substantial constraints in deployments and operational delivery. A system of co-leadership was undertaken from the outset in sectors such as social cohesion and livelihoods, education, water, sanitation, and health. While this made sense initially, UNHCR could have more readily relinquished its co-leadership of these sectors as soon as its operational partners were able to take them on, and focused instead on areas in which UNHCR’s capacity and leadership are recognized: protection, shelter, and overall coordination of the refugee response. This would have helped to ease the tension and competition between agencies which characterized the early years of the response.

An additional complicating factor in the Lebanon situation was an overlap and duplication brought about by the creation of a humanitarian country team (HCT) that worked in parallel to the refugee coordination structure and the UNCT.

In June 2012, when the number of Syrian refugees in Lebanon was just 8,300 persons, the UN emergency relief coordinator appointed a humanitarian coordinator (HC) for Lebanon. While this appointment was not intended to organize a refugee response, the fact was that the refugee influx was the dominant humanitarian concern in the country. The designation of a humanitarian coordinator, who was also the resident coordinator (RC) serving in a dual capacity, was followed by the creation of a HCT consisting of UN agencies, the International Organization for Migration, NGO representatives, and members of the International Red Cross and Red Crescent Societies. Donor representation was later added.

As the situation became more complex inside Lebanon, the need for a more robust response to strengthen Lebanese institutions and support communities affected by the Syrian crisis became more readily recognized. This was a pivotal moment. The work could have been pursued as part of the UNCT. Relevant agencies of the UN Development System, which provides the policy advice to UNCTs, should have worked to reinforce the capacity of the UNCT to reorient its work accordingly and to engage NGOs and donors in the process. Instead, the RC was designated as HC with a mandate to initiate a parallel coordination structure.

There were now three coordination mechanisms operating in tandem with the government: the refugee response led by UNHCR; the humanitarian response led by the humanitarian coordinator; and the longer term development response within the UNCT. For the former, while policy was set in Beirut, the bulk of the efforts — assessments, implementation, monitoring, and evaluation — were done in the field. In contrast, both UNCT and HCT meetings generally were information sharing, with a heavy focus on the refugee response.

The cost of the additional HCT process, in terms of time, and also arguably in diminished relevance of the UNCT, was notable. Throughout 2014 and 2015 there were separate and often bi-weekly meetings of the HCT and UNCT, with each meeting 1.5 to 2.5 hours in duration. Both meetings occurred in Beirut and often covered the same agenda items. The meetings regularly occurred a few days apart and were attended by over 24 agencies. The most significant difference between the two meetings was that donors and NGO partners attended the HCT.
In the end, there was a consolidated plan, with UNHCR leading on the refugee response component and UNDP leading on the resilience and stabilization side. By this time, the growth of UNDP’s capacity allowed it to embrace its role. However, rather than starting with this approach from the outset, as part of a capacitated UNCT, an additional layer was added which depleted the already stretched time and resources of humanitarian and development partners.

The value of an HCT is indisputable in humanitarian emergencies, particularly when there is widespread internal displacement, which was the reason for their creation. Ideally, however, even in such situations, the life of the HCT should be limited and investments made to capacitate the existing UNCT and bring in additional partners from donor, NGO, and private sector spheres as necessary, to holistically support a country with its humanitarian and development challenges. This would prevent duplication and reflect the growing consensus that humanitarian and development actions should be linked from the outset of an emergency. Coordination should be streamlined and the UNCT held accountable for delivering on its mandate, as calls for empowered RC and UNCT leadership increasingly demand.

**D. Development Action**

While there is no doubt that the creation of the HCT added an additional layer of coordination, it is also the case that the UNCT failed to flexibly reorient itself to the changing situation in Lebanon. Within the UNCT, agency joint planning — often referred to as joined up planning — was based on desired development outcomes conceived and approved well before the Syrian crisis. Many agencies were pursing objectives with various ministries that had little or nothing to do with humanitarian relief to refugees. The concern was frequently expressed that the humanitarian response not overshadow or distract from the important development priorities in which agencies were already engaged. Even in 2013, when it became clear that the crisis in Syria was likely to be protracted, it was difficult to reorient development priorities and actions to the new reality in Lebanon.

This was a result of many factors. In addition to initial erroneous forecasting of the length of the conflict in Syria, the development actors faced difficulties in readjusting programs, most of which were the product of detailed design and long negotiation to secure government approval. Moreover, as readily as UNDP saw the need to invest in providing support to local communities assisting refugees, it had an extremely small funding envelop to draw upon. Additionally, because Lebanon is a middle-income country, direct support to its institutions beyond technical and policy advice was often not accounted for in agency or donor program designs. Coupled with these challenges was a historically poor record of accounting by government agencies for support such as was provided for the post-2006 Israeli-Lebanese conflict reconstruction efforts.

As a consequence of these factors, the UNCT missed opportunities to unify and reorient UN agency work early on towards a resilience agenda (for support to institutions and host communities impacted by the Syrian crisis). Interventions to help institutions and communities impacted by the refugee influx were initially introduced by UNHCR in inter-
agency funding appeals for the Syria situation in 2014. Subsequently, UNHCR, with the support of several partners, implemented over 270 community support projects throughout the country in areas where poverty levels, refugee numbers, and tensions were high. Projects included new wells; water, sanitation and waste management facilities; community centers; improved medical facilities; youth education and sport activities; rehabilitation works; and livelihood projects. Yet as important as these projects were, they alone could not address the serious impact of the Syrian crisis on Lebanon, including the refugee influx, which was far beyond humanitarian funding to address.

The extent of that impact was dramatically illustrated by the publication in September 2013 of the Economic and Social Impact Assessment (ESIA) of the Syrian conflict on Lebanon. The assessment concluded that the Syrian crisis had a significant economic impact on Lebanon. Trade, tourism, consumer confidence, and investment all had fallen, contributing to a loss of government public revenue of $1.5 billion. Moreover, increased numbers of refugees had taken a toll on public services (health and education) and infrastructure (electricity, water, sanitation, and transportation), such that Lebanon would need approximately $2.5 billion to restore public services and infrastructure to pre-conflict levels. The report further estimated that an additional 170,000 Lebanese would be pushed into poverty.

Several months later the World Bank established a trust fund to help the Lebanese government deal with the fiscal impact of the Syrian crisis. The objective was to ensure a timely and reliable flow of international grants to finance projects that would have immediate impacts on Lebanese communities affected by the influx of Syrian refugees. Unfortunately, the trust fund failed to meet expectations in the ensuing years due to a lack of political consensus to ensure that necessary mechanisms were in place and that disbursements were made as planned.

Another relatively early partner on the development side was the European Union (EU). The EU responded quickly to UNHCR’s concerns that hosting communities needed assistance to cope with the increase in arrivals of refugees. Through various funding sources, the EU financed a range of projects designed at the municipal level, including efforts to improve waste collection, water distribution, community services, and the delivery of public health. These efforts went a long way in assisting communities and lessening prospective tensions between refugees and the Lebanese. EU funding was also directed towards strengthening the capacities of the Ministry of Health and the Ministry of Education to improve service delivery and to do so in a manner that included refugees in the provision of services.

10 During 2014 and subsequently, there were six Refugee Response Plans, i.e., regional strategy documents, with specific country chapters, designed to present an inter-agency assessment of humanitarian needs resulting from the crisis in Syria, and aiming to ensure a coherent response to those needs.
11 Funding was provided by a variety of donors including the European Union, France, Germany, Italy, Kuwait, Mexico, the Russian Federation, the Said and Asfari Foundations, Saudi Arabia, the Swiss Agency for Development and Cooperation and the United States (UNHCR 2014).
12 The 2013 assessment was led by the World Bank (WB) in collaboration with a number of UN agencies (notably UNDP, UNICEF and UNHCR), the European Union, and the International Monetary Fund (IMF). Its background can be found in 2012 discussions held between UNHCR and the WB regarding how UNHCR’s data could be used together with WB expertise to analyze the economic impact of the Syrian crisis, including the impact of the refugee influx on Lebanon and the institutional support that would be needed.
These efforts by the EU, and others, started to become more entrenched in the refugee response from late 2014 onwards. Unlike the community support projects, these investments were of a larger scale and were intended to be multi-year. The benefits were particularly visible in the area of education: the Minister of Education and Higher Education (MEHE), with the support of several donor states, UNICEF, the World Bank, UNHCR, and other specialized agencies, made a concerted push to strengthen the capacity of the public school system. The ambition was twofold: to improve the quality of public education, and to expand capacity to ensure the inclusion of refugee children. The former was important since weaknesses in the public system had resulted in 75 percent of Lebanese children attending private institutions and rendering the public system populated largely by poorer children whose need for a good education was every bit as essential. The push to achieve these aims was concentrated in a new three-year program, Reaching all Children with Education (RACE) that was initiated in 2014 (MEHE 2014). RACE encompassed a combination of efforts including physical rehabilitation of schools, teacher training, accelerated learning programs, and technical support to the Ministry.

This broad-based partnership, which engaged humanitarian and development actors in an effort both to expand education to children and improve the outcomes for Lebanon, has had significant impact. Although it is too early to know whether the efforts will translate over time into longer school retention rates, and more primary and secondary graduates within refugee and Lebanese communities, the initial results were positive. Lebanon went from accommodating just 62,664 refugee children in the public system in 2013, to accommodating over 100,000 in 2015 with plans for an additional 100,000 the following year.

The refugee influx into Lebanon, particularly from 2013 onwards, focused international attention on Lebanon and the level of financial engagement by donors was much larger than existed before the crisis. While the mass arrival of refugees strained the delivery of public services, the relatively early linkages of humanitarian and development planning in the education sector helped to ensure improved outcomes for both refugees and Lebanese. It is a useful example of what is increasingly being seen as the advantages of comprehensive joined up humanitarian and development planning, which should become less of an exception and more of a rule in future responses.

By 2015, this approach was fully reflected in funding appeals which were based on meeting the needs of refugees as well as providing more robust support for Lebanese institutions. The lesson learned from Lebanon is that this joined-up humanitarian and development programming should be embarked upon early in the crisis, and extend beyond education to delivery of other critical services.

## E. Funding

As funding depends on voluntary contributions, and was neither predictable nor (but for a few exceptions) multi-year, stable programming was not possible. In 2013 alone, UNHCR in Lebanon experienced nine budget increases.

13 The Regional Refugee and Resilience Response Plan launched in that year, which included Lebanon and other hosting countries in the region, appealed for $4.3 billion to respond to refugee needs in the region, and $1.75 billion for Lebanon alone.
The practical constraints of such a situation cannot be underestimated. UNHCR and partners could not be sure whether they would have the funds needed to meet very basic shelter, protection, health, and food needs throughout the year. Limited funds secured at the beginning of the year had to be planned to meet basic needs for a limited number of months, in the uncertain hope that more funding would be forthcoming, or strictly rationed from the beginning, in the hope of maintaining some thin coverage until the end of the year. The consequences were often brutal. In 2013, for example, agencies did not secure funding by mid-year to purchase materials needed to procure shelters for the winter months, which would begin when temperatures started to plummet at the end of September. When funding arrived in the last quarter, it was too late to secure all the materials necessary and distribute them to the thousands of refugees trapped by snow and freezing rain.

As the operation matured, and as the crisis in Lebanon garnered more international coverage, funding became less of a challenge insofar as agencies could plan with more certainty at the beginning of the year that the level of pledges made (which were never in excess of 50 percent of what was needed) would be followed by disbursements throughout the year. This meant that UNHCR and partners could plan with a higher level of certainty, although always with significantly less funding than what the situation demanded.

For their part, many donors were pledging amounts far above previous levels and without such support there would have been considerable loss of refugee life in Lebanon and greater instability throughout the country. At the same time, the tight earmarking of contributions meant that agencies had little flexibility to move funds from areas that were relatively well resourced to life saving interventions that were less well funded. Relatively tight earmarking of contributions also led to multiple and complicated reporting on funds received: within a donor country, different sources of funds had different reporting requirements, and no donor country had the same requirements as another.

While donors are generally sympathetic to the constraints earmarking imposes on agencies, they nonetheless continue to favor earmarking because contributions to a specific cause, such as education, allow them to show constituents concrete benefits arising from the funding, in exactly the area in which improvement was sought. Earmarking also assures them that their priorities will be met and not displaced by priorities that the recipient agency may favor. It is perhaps not surprising, therefore, that earmarked contributions for UNHCR in Lebanon from 2013 to 2015 grew from 52 to 62 percent of total contributions received. Meanwhile, the number of separate donor reports increased during that same period from 21 to 61.

As the number and size of donor contributions grew, naturally so too did donor interest in visiting refugees and seeing firsthand the conditions in which refugees lived, the consequences of the influx on Lebanon and the impact of their own contributions. The number of days each year that UNHCR hosted such donor missions, complete with briefings and site visits, increased from 50 in 2013 to 150 in 2015.

Another challenge faced in Lebanon, which is also present in other operations, is that donors often had bilateral agreements with many of the partners that UNHCR and other UN agencies used to implement their programs. There was little coordinated assessment of partner activity, either as between UN agencies, between UN agencies and donors, or
between donors themselves. This was unfortunate for each donor and/or agency engaging the same partner in a particular sector that had a separate review, monitoring, assessment, reporting, and auditing mechanism. This was certainly cumbersome for the partners and did not advance improved programming overall.

The limitations imposed by the lack of significant multi-year funding for humanitarian action and the constraints that are consequent upon heavily earmarked funding were recently addressed as part of the discussion of the Grand Bargain at the World Humanitarian Summit (UN Secretary-General 2016). The goal should be to limit earmarking, establish adequate multi-year funding whenever possible, and harmonize reporting requirements and partner assessments between donors.

**F. Innovation**

Increasingly donors call for, and humanitarian agencies pledge, to deliver programs more efficiently, including through innovative means. Indeed, innovative means of service delivery are coming on stream at an accelerated pace. What is very much needed is better linking of these initiatives to benefit more operations.

The response to the refugee influx in Lebanon brought together an extremely diverse array of humanitarian actors across agencies, which met regularly, formally and informally to enhance information and data analysis across all sectors. Among them was a core of extremely savvy and technologically adept national and international colleagues who, faced with constraints in program design and delivery, set about creatively to overcome them. Sometimes these efforts drew from best practices elsewhere, which were often subsequently enhanced; at other times, new means were adopted.

**1. Registration Using Biometrics**

The move to biometric registration in Lebanon was one of the most significant enhancements to registration, needs identification, coordination, and refugee protection. Adapting the technology piloted in Jordan, UNHCR introduced biometric iris scanning as part of registration processes in late 2013. That move greatly sped up the process of registration and permitted daily and disaggregated information on arrivals and trends throughout the country. It also helped to ensure the integrity not only of UNHCR’s registration data but also of the systems that depended on reliable registration data, including for assistance and resettlement. As the data was secure and linked eventually to UNHCR offices in the region, it facilitated early detection of multiple claims. The registration process was further enhanced by the development of an electronic Syrian ID card reader, which eliminated the risk of human error in transcribing a name from the ID card to the registration data base. The card reader became part of a package of efforts to strengthen the capacity of the Lebanese government that until then relied largely on manual data entry.

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14 The Grand Bargain refers to a package of reforms to humanitarian funding launched at the World Humanitarian Summit. Donors and aid financing agreed to 51 commitments to make emergency aid finance more efficient and effective in order to better serve people in need (“The Grand Bargain” 2016).
2. **Refugee Assistance Information System**

Registration data was linked to a refugee assistance and information database developed by UNHCR and known as the Refugee Assistance Information System (RAIS). RAIS is an assistance tracking and referrals database. It allows UNHCR and its partners to share information on who has been assisted and how, and what further follow-up is needed. The system is synchronized daily with the registration system. Refugees consent to having their data shared with only those partners who sign a data sharing agreement with UNHCR and meet data security protocols. The system dramatically reduces the chance of duplication of assessments, reduces the risks of overlap in partner activities, and improves the delivery of services to refugees by facilitating the ability of partners to monitor whether assistance has been provided to persons in need of it and whether referrals to appropriate services have been made.

Beyond the tracking of assistance provided to individual refugees and households, RAIS is also used in post-distribution monitoring to assess the status and changes in expenditure patterns and coping strategies of refugees. This is done through household visits using a RAIS mobile data collection solution. The mobile data solution was also applied to taking case histories and referral of persons to specific services, and for ongoing monitoring including as a means to track school enrollment. In large operations like the Lebanese one, RAIS also permits humanitarian actors to respond to inquiries from refugees, and to provide them with up to date information on whether they have been determined to be eligible for assistance and whether they have been registered with UNHCR.

3. **Electronic Reporting**

As the number of partners and donors grew, consistent reporting became a serious issue. Multiple sectors and agencies were using different means and different time periods to report on their assessments and their activities. This was creating confusion and inhibiting a clearer picture of needs, interventions, and gaps. To address this problem, an open source tool called Activity Info, first piloted by UNICEF and the Office for the Coordination of Humanitarian Affairs (OCHA) in the Democratic Republic of the Congo, was adapted to the Lebanon context. All partners were trained in its use. Partner reports were henceforth streamlined into a single electronic database, using harmonized data sets and with predictable frequency. The tool significantly enhanced coordination by permitting the tracking of agencies’ activities throughout the country and the identification of areas and needs that had yet to be met. Activity Info is one of the most significant data management tools and one that should be employed in other emergency and large operation settings.

4. **Data Collection and Consolidation**

In the early years of the emergency, most field data was collected by hand, using paper, clipboards, and Excel spreadsheets. Data clerks then had to be employed to encode the data into databases, so that the data could be analyzed. Within a couple of years, this methodology gave way to mobile data collection using open source software. The data collected was automatically linked to the relevant sector-based database. This enhanced efficiency and improved reliability and analysis.
Moreover, just as Activity Info harmonized and facilitated agency reporting and coordination, so too did the application of Spongebase, developed for the Lebanon context by UNHCR and UNICEF. Spongebase provides a means to automatically collate information from different data sources and aggregate them onto a web-based map. Prior to its use, agencies received only a partial view of data, given that multiple databases and data sets were being used and were not pulled together and linked to geographic areas so as to provide a consolidated overview.

Significant time and effort can be saved, coordination enhanced, and analysis improved with the use of such data management and analysis tools early in an emergency.

5. Cash-based Programming

While cash-based programming is often cited as an example of innovative programming, the use of cash to meet needs is neither particularly new nor innovative. Its expanded use in addressing refugee needs, however, is relatively recent. The advantages of properly designed and monitored cash-based programming include: cost effectiveness; the empowerment of recipients by enabling them to determine what to prioritize given their specific needs; the provision of a more dignified means of receiving help compared to receiving in-kind assistance; benefits to local markets and economies; and a reduction in fraud.

The use of cash in Lebanon to provide assistance for refugees had always been rather modest. In the early days of the Syrian crisis, the WFP introduced a food voucher system, but it was not until much later in the crisis that some agencies tested the use of cash cards as an alternative means of delivering assistance. Cash-based programming through multi-purpose cash cards had already been successfully implemented in Jordan, but its introduction in Lebanon met with initial resistance from the government on the grounds that poor Lebanese would resent cash being provided to refugees. This reticence was overcome in large part due to the willingness to link cash-based programming to improvements to Lebanon’s National Poverty Targeting Program (NPTP). Specifically, with technical guidance from the World Bank, an emergency project was launched to expand and improve the social assistance package of the NPTP, including to those affected by the Syrian crisis (World Bank 2014).

The greater reliance on cash-based programming through the use of multi-purpose cash cards in Lebanon proved to be a boon and would have helped even more if it had been initiated earlier. For example, investment in communal shelters made sense initially when refugee numbers were small and seemingly temporary. But their use proved difficult as problems were encountered in ensuring proper site management by partners and refugees and in maintaining good relations with surrounding communities. Such investment ultimately proved unsustainable given the relatively high cost of maintaining communal shelters amidst burgeoning shelter needs which could not be met by the extremely limited number of sites available for collective accommodation. An early recourse to cash for rent, in hindsight, would have been a better option. In addition, the provision of winter assistance initially in kind, and later through partial reliance on fuel vouchers, turned out to be very problematic as the numbers grew. The use of fuel vouchers left agencies open to

15 An additional financing grant was sought in June 2016 from the World Bank.
intimidation by petrol suppliers who wanted to be included in the scheme but did not meet the selection criteria. Moreover, vouchers also left refugees open to intimidation by gangs who insisted that they sell the vouchers for less than the face value. Finally, some types of in-kind shelter support, such as weatherproofing materials, were excessively costly in terms of warehousing and transportation expenses. Winter support was more sustainable and better able to meet needs when in-kind support was selectively provided — for example, for high efficiency and safe heaters of good quality that were obtained through established and competitive suppliers.

Reaching more harmonized approaches by WFP, UNHCR, and several NGOs was complex given that initially they used different methodologies to determine needs, and provided cash for different purposes (food, shelter, multi-use) and in different formats (vouchers, cash cards). Moreover, the move to cash cards entailed complicated negotiations with banks, technological interfaces to link registration and eligibility data with cash delivery, monitoring mechanisms and most importantly, a common means for determining — across agencies and amongst donors — the criteria to determine who was entitled to such support and at what level.

Through prolonged and exacting negotiations, a common methodology was agreed upon to address these issues. In the first instance, a statistical model was applied to the information gathered during registration in order to predict the needs of a household. This was followed with information gathered by sectoral specialists through their visits, which could indicate higher or lower levels of vulnerability upon which eligibility would be adjusted. In short, collective action was brought to bear on a situation-specific challenge, one which UNHCR, WFP, UNICEF and partners are examining further as they explore employing joined and single-cash delivery systems elsewhere.

G. Accountability

Humanitarians must remain accountable to those they seek to assist. It is not sufficient solely to assess needs and deliver assistance. Assistance must be informed by what refugees feel they need and can use, and their feedback on the utility of humanitarian efforts must be communicated to improve responses. While achieving such accountability is important in operations of all sizes, it is especially challenging in large operations like Lebanon, with sizable and dispersed beneficiary populations.

For many years, UNHCR has been using participatory assessments, which include holding separate discussions with women, men, girls, and boys in order to gather accurate information on the specific problems they face and also to hear their proposed solutions. Participatory assessments help to ensure that humanitarian action reflects refugees’ priorities and that refugees are able to contribute to the design, modification, and implementation of efforts.

Print and electronic media (flyers, posters, signs, and videos) are standard forms of communication at registration centers, community centers, health clinics, and elsewhere to deliver important information regarding protection, service availability, public health, fraud prevention, and response messages. UNHCR has also developed specific websites for refugees that convey all manner of information needed to address refugee concerns.
and provide advice regarding available services. Refugees can rate the usefulness of the information provided and suggest means to improve it. In addition, in Lebanon, radios were distributed by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and UNHCR, and a weekly radio program for refugees was used to supplement other information-sharing efforts.

Relying on refugees to assist in program delivery was also hugely valuable in ensuring that the humanitarian response was optimally directed at real needs. In Lebanon, where refugees were spread across 1,700 locations, it was difficult to ensure timely access to all locations. The Refugee Outreach Program was designed to engage up to 1,000 refugees to provide specialized information to refugee communities in the areas of health, education, law, and child protection. Refugees engaged in these efforts often have pre-existing training in specialized areas, but also receive specialized support. In Lebanon, they received induction training on the situation in the country, the humanitarian response, UNHCR’s code of conduct, and protection and humanitarian principles. They circulated regularly in their communities, providing advice and referring refugees in need to specialized services. They met weekly with UNHCR and partner agencies, and received updates on the latest information and stipends for their services.

Reliance on refugees for outreach greatly improved communication with refugee communities, and led to more persons at risk coming forward to seek advice and help. It also helped to ensure that agencies had up-to-date information about refugees’ concerns, which was especially vital in communities that, due to security threats, were out of bounds for most humanitarian workers. Moreover, the program benefits the refugees it engages, who appreciate the evident impact their involvement has and the useful employment of their time and talents.

A relatively simple but useful tool that was developed in the Lebanon operation was a two-way instant messaging system to advise refugees on their eligibility for assistance. Refugees in Lebanon had access to mobile phones and could opt to receive messages from UNHCR on their phones. This was especially useful in communicating time-sensitive information regarding changes in government policy and other important information. A system was developed to enable refugees to contact UNHCR by instant message regarding their eligibility for assistance and to receive an immediate automated response.

The recognition over time of the need for multiple means to ensure open and informed communication lines with refugees was an important development in the Lebanon refugee response. It is another lesson learned: to maximize the breadth of communication lines, complementary tools should be launched at the outset and not rolled out consecutively.

**H. Local Partnerships**

Lebanon had no shortage of national NGOs or civil society groups responding to the refugee crisis. There were over 8,000 such groups registered with the authorities, with approximately 1,000 registered groups actively involved in providing assistance to refugees (BRD 2015). A core set of local NGOs had long worked as implementing partners for UNHCR and other agencies in responding to the needs of Iraqi refugees prior to the
Syrian crisis. Like everyone else, however, national NGOs were challenged by the scale of the Syrian refugee influx and it was extremely difficult for them to scale up quickly and ensure that the financial and accountability controls necessary for expanded partnerships with UN agencies were in place. Moreover, for some, complying with these requirements proved to be a problem that could not be easily remedied, as the requirements (demanded by international accounting practices and auditing regulations) were quite burdensome.

The result was that international NGOs dominated the scene for the initial years. When the situation escalated so quickly, there was insufficient time to invest sufficiently in the needed capacity building of national partners. This started to change when the refugee inflows subsided. In 2015, UNHCR introduced a system of area mentoring, whereby experienced international implementing partners, as part of their agreements with UNHCR, worked alongside national NGOs under what were known colloquially as “umbrella agreements.” The idea was that over time the national NGOs would replace the international NGOs in implementation, once the former’s implementation and financial control accountabilities were strengthened.

The lesson learned, which also saw expression in the commitments arising from the World Humanitarian Summit of May 2016, is for greater reliance on national partners. This means investing in capacity building prior to crisis, including through the use of “umbrella agreements” and evaluating their effectiveness over time.

It is important to note, however, that the Lebanon experience pointed to instances where direct contracting through the private sector also proved beneficial. For example, Lebanon suffered from a lack of clean drinking water in areas of high refugee concentrations. This was due, in part, to weak water supply networks that suffered excessive loss because of old and leaking pipes, as well as to increases in demand. With financing from the EU, and technical support from the Swiss Development Corporation, UNHCR worked with private Lebanese companies, the Ministry of Water and Energy and local water establishments, for the construction of new water wells and storage tanks, and for the replacement of water supply networks. The project (with initial funding of €14 million) sought to bring clean water supply to over 11,000 homes upon completion.

By and large, the engagement of the private sector in the Lebanon refugee response in the early years was not robust. Subsequent years have seen much greater engagement. Today, there are multiple fora seeking to harness not just the funding potential of the private sector, but, even more importantly, to forge partnerships for humanitarian action in new and creative ways.\(^\text{16}\)

\(^{16}\) UNHCR is investing in innovative approaches with its partners. UNHCR’s Innovation Unit collaborates with UNHCR divisions, refugees, academia, and the private sector to creatively address complex refugee challenges (see http://www.unhcr.org/innovation/). See also the New York Declaration on Refugees and Migrants, G.A. Res. 71/1, U.N. Doc A/RES/71/1 (Oct. 3, 2016), Annex 1, which establishes the Comprehensive Refugee Response Framework (CRR). This will engage a wide array of stakeholders and include both humanitarian responses and development actions. It embraces private sector engagement, diverse forms of investment, and innovative humanitarian delivery: http://www.unhcr.org/en-us/events/conferences/57e39d987/new-york-declaration-refugees-migrants.html.
IV. Conclusion

Since the onset of the refugee influx in Lebanon, there have already been a number of developments which bode well for ensuring more effective emergency responses. First, the whole model of contingency planning has been reviewed and replaced by what is turning out to be a better means to prepare for crisis than what was used in the early years of the Syria conflict. The new model gives agencies an enhanced means of doing scenario planning that is not constrained by political considerations. This in turn can help to ensure that the standby arrangements for staffing, program delivery, and financial management are in place before a planning scenario takes effect.

Significantly, as well, is that the divide between development and humanitarian action is, at least theoretically, dissolving, with more states, development actors, and financial institutions recognizing the need to shore up public institutions, services, and infrastructure earlier in an emergency to meet the needs of refugees and hosting communities. This should lead to humanitarian responses that are complemented by development ones — conjoined action rather than consecutive action, which has been the situation in the past. While the United Nations will continue to be a large player in the humanitarian sphere, it will need to partner more alongside much larger development partners for better outcomes for refugees and their hosts. The Comprehensive Refugee Response Framework, adopted by the UN General Assembly as part of the New York Declaration of 2016, is a promising blueprint.\(^\text{17}\)

Another positive development has been the increased interest in and appetite for the use of innovative technologies to help provide assistance in cost-effective ways. In Lebanon, such innovations enhanced data collection, brought new means of communication and learning to refugees, and improved needs assessments, planning, implementation, monitoring, and evaluation. If there is a weakness here, it is in the sharing of such innovative measures in ways that operations around the world can benefit. And while these new technologies are assisting in inter-agency coordination, the United Nations could revise its own processes to ensure they are streamlined, non-duplicative, and engage a wider set of partners.

Just as the United Nations could positively rationalize its coordination processes, emergency responses would be enhanced with efforts by donors to streamline their reporting requirements, coordinate more on partner assessments, provide more flexible and multi-year funding, and join up their humanitarian and development programming. These ambitions are prominent in the 2016 World Humanitarian Summit, with some also reflected in commitments found in the New York Declaration for Refugees and Migrants.

At the local level, more needs to be done to ensure that humanitarian agencies fully understand the full range of relevant accountabilities and responsibilities from central to local authorities, and that there is an appropriate level of engagement with both. UN agencies have recently pledged to invest in local partners (for example, in discussions during the 2016 World Humanitarian Summit). Efforts underway to move forward on these matters with NGOs and private sector partners need to be shared and evaluated. Enhanced engagement of beneficiaries is already a tried and tested means for achieving appropriate program design and delivery, but lessons and best practices still need to be more widely shared.

\(^{17}\) New York Declaration for Refugees and Migrants, Annex 1.
Finally, the best planned emergency refugee response is one that never needs to get off the ground because the anticipated causes for flight are mitigated and safety and security restored. The fact that the Syrian crisis has extended as long as it has, with such devastating effect on individual lives, the country and the region, speaks to the enormous international deficit in conflict prevention and mitigation. None of the lessons covered in this paper address that deficit, nor will remedying the gaps identified above solve this most difficult foundational problem.

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Prospects for Responsibility Sharing in the Refugee Context

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Executive Summary

The current state of forced displacement today, with record numbers and rising levels of need, poses challenges of a scope and complexity that we have not had to face since the Second World War. Yet, if we make every effort to place refugee protection at the heart of our response, these challenges are not insurmountable. The international refugee regime provides us with tried and tested tools to address them. What is needed now is to put our collective resources and capacities to their most effective use. We are already seeing this in the recent move towards creating a proposed Global Compact on Responsibility Sharing for Refugees, as set out in the UN secretary-general’s report, In Safety and Dignity: Addressing Large Movements of Refugees and Migrants. We are also seeing this with innovative directions in protection, assistance, and solutions for refugees that are helping us to operationalize long-standing principles of protection, transforming them into tangible results for refugees. New forms of group determination, combined with community-based protection and other measures, can help to ensure an appropriate legal status while at the same time identifying specific protection needs. Protection strategies can inform frameworks for governing migration and meeting the needs of the most vulnerable migrants. The integration of services to refugees within national systems and the expansion of cash-based programming can meet essential needs for assistance more effectively. Finally, the humanitarian-development nexus, the progressive realization of rights — including the right to work, and the creation of complementary pathways for admission — can provide the building blocks for achieving longer-term solutions, which remain, as ever, the ultimate aspiration of the international refugee protection regime.

I. Introduction

Human mobility is increasingly defined by forced displacement in today’s world. Conflicts not only persist, but also proliferate, often compounded by environmental degradation and food insecurity, driving growing numbers of people from their homes and communities. Now more than 65.3 million people are forcibly displaced, of whom nearly two-thirds are

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Prospects for Responsibility Sharing

displaced internally and one-third across state borders. More than half of the refugees in the world today have fled from Syria, Afghanistan, or Somalia. Pressures are rising in countries in the immediate regions surrounding conflicts where 90 percent of all the world’s refugees are hosted, with Turkey, Pakistan, Lebanon, Iran, and Ethiopia receiving the largest numbers of refugees. Multiple displacement has become a regular feature in the experience of flight, as refugees are compelled to move from one place to another in search of a community sufficiently equipped to receive them. Hence, the pressures are also mounting on countries further afield, as some refugees move onward across seas and deserts, hoping to find safety and solutions and to reunite with family members. Germany and the United States of America, for example, received the highest number of asylum applications in 2015 (UNHCR 2016a).

Reactions by host communities in the face of growing numbers and the commensurate rising levels of need have been mixed. While there have been demonstrations of overwhelming generosity and volunteerism by many sectors of civil society, this has been tempered somewhat by expressions of fear, manifested in xenophobic attacks, pushbacks, the erection of walls and fences, and restrictions on entry and access to asylum. These unwelcoming efforts often drive refugees into the hands of smugglers and traffickers. The situation is not tenable either for the protection of refugees or for the stability and cohesiveness of host communities. With 24 persons now displaced every minute, it is clear that maintaining the status quo is no longer an option. The international community needs to find approaches that go beyond business-as-usual, yet at the same time remain centered on the principles of protection at the heart of the international refugee regime.

This paper focuses on new or emerging approaches in the areas of responsibility sharing — with regard to protection, assistance, and solutions — that may offer hope for the future, as they can more effectively translate long-standing principles of refugee protection into concrete and meaningful action. Section II examines the legal and practical foundations for possible future arrangements on responsibility sharing. Section III proposes ways that protection and asylum systems can be strengthened to ensure that the principles enshrined in international refugee law can be upheld in the face of both mixed movements of refugees and vulnerable migrants and increasing security concerns. In Section IV, the paper considers future directions in assistance for refugees, highlighting the opportunities for protection and solutions that may be found through embedding services to refugees within national systems as well as through cash-based programming. Section V explores prospects for facilitating solutions through linking the humanitarian and development sectors, facilitating the right to work, and expanding complementary pathways for admission. Finally, Section VI summarizes the article’s recommendations and provides a few concluding thoughts.

II. Sharing Responsibility for Refugees

In the face of rapidly shrinking protection space, it is imperative that we find ways to safeguard the institution of asylum while responding to the concerns raised by states. Current failures to ensure access to and the quality of asylum have been attributed to

2 Including 3.2 million asylum seekers, 21.3 million refugees, 40.8 million internally displaced persons (mostly in Colombia, Syria, Iraq, and Yemen, as well as in the Lake Chad Basin and South Sudan), and an estimated 10 million stateless persons (UNHCR 2016a).
perceived shortcomings in the 1951 Convention and its 1967 Protocol, leading some to call for revisiting its parameters and scope. There are certain risks in such an exercise, as reopening this discussion could inadvertently result in many of the hard-won advances made in negotiating international refugee protection being undermined. It would also be an exercise that would not address the deeper issue, which is not the Convention itself, but the failure of political will — both to abide by or fully implement the Convention in the face of populist opposition arising out of fear, misinformation, and xenophobia, and to address more concertedly the root causes of displacement. Principled leadership is urgently required to counter damaging narratives that harm both refugees as well as the institution of asylum itself at a time when it is needed more than ever before.

The 1951 Convention was crafted 65 years ago as both a moral and legal response to people who were fleeing their countries for many of the same reasons people are fleeing today — and in even larger numbers. It has been applied successfully over the years in situations of mass influx to ensure admission to territory and protection on a group basis or through accelerated procedures, and it is equally well positioned to do so today. It was designed from the start to protect individuals at risk for a variety of reasons, including persons fleeing armed conflict and other situations of violence that may accompany changes in political systems. It does not distinguish between refugees fleeing from situations of war or peace, and it recognizes that persons fleeing situations of armed conflict or violence may well fear persecution on the basis of one or more of the Convention grounds (see UNHCR 2012a). The application of the Convention has evolved to address modern forms of persecution, such as those related to gender, sexual orientation, children, and gang-related violence. It can also accommodate new approaches to large-scale movements such as the strategic use of refugee status determination or temporary protection in the immediate term, complemented by community-based protection approaches to identify individuals with specific needs, such as unaccompanied or separated children, survivors of sexual and gender-based violence, or victims of trafficking.

It is an ironic turn of events that some of the countries that so greatly benefited from refugee protection in the past following the adoption of the 1951 Convention, are the same ones now closing their borders. The need to find more effective ways to implement the 1951 Convention to protect persons from persecution has clearly become more pressing than ever. The 1951 Convention and its 1967 Protocol, complemented now by regional instruments and customary law, are still widely acknowledged as the main legal tool that we have at hand for saving lives. It is not something that we can risk losing at such a critical juncture. As we have seen so many times in recent years, departures from the fundamental principles of international refugee protection have neither reduced nor stalled refugee movements. Rather, they have resulted in ineffective management of large-scale influxes, the diversion of refugee movements, the creation of tensions between states as burdens and costs are shifted from some onto others, and ultimately the revictimization of those most in need of protection and support.

Prospects for Responsibility Sharing

These challenges invite us to consider how we might approach this differently — to ensure both that refugees are able to access and enjoy asylum, and that the countries most affected by refugee movements can count upon international support. The provisions for the reception and treatment of refugees are set out clearly within the 1951 Convention and its 1967 Protocol, but compliance with these provisions is inconsistent, and gaps in implementation create practical problems that may lead refugees to move onward. Also, if more states acceded to, and implemented fully, the 1951 Convention and other refugee law instruments, then it may be possible to realize more widely shared and consistent approaches to asylum and refugee protection.

The importance of international cooperation and responsibility sharing likewise has been recognized in various iterations, from the Charter of the United Nations,4 to the Preamble to the 1951 Convention, United Nations General Assembly resolutions,5 and Conclusions of the UNHCR Executive Committee.6 At the regional level, many states have also committed to share responsibility under regional instruments and laws in Africa, Asia, Latin America, and Europe.7 The question we are faced with now is how we move from principle to practice — to translate the concept of responsibility sharing into concrete practical commitments.

Since the inception of the United Nations, the international community has come together many times to find solutions for refugee situations on every major continent.8 Yet, we have always had to reinvent our responses anew. The scale and complexity of refugee movements today have brought to the fore the need for making such responses more predictable, systematic, and equitable. Sharing responsibility can help alleviate tensions between states and mitigate against potential negative consequences for refugees. It can also ensure that states are able to respond to refugees more effectively. In the current context, the provisions of the 1951 Convention could be supplemented with additional agreements amongst states on responsibility-sharing arrangements, defining when such arrangements would be needed, articulating measures that would be taken, and setting out a framework

8 For example, in resettling Hungarian refugees in the late 1950s, convening the International Conferences on Assistance to Refugees in Africa I and II, implementing the Comprehensive Plan of Action in the Indochinese crisis, and convening the International Conference on Central American Refugees. In the past two decades, international cooperation was mobilized through the Global Consultations; the Agenda for Protection (UNHCR 2003); the 2007 Iraq Conference; and the Refugee and Resilience Response Plans for the Syria and South Sudanese situations, as well as the 2014 Brazil Declaration and Plan of Action; the 2015 49th Mercado Común del Sur (MERCOSUR, “Southern Common Market”) Summit; the Bali Process; and the 2016 Lake Chad Regional Protection Dialogue.
for states to contribute in line with their capacities and to receive support according to their levels of need (see Türk and Garlick 2016). In recognition of this, the UN secretary-general’s report, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, calls for global commitments to uphold safety and dignity in large movements of refugees and migrants through both a proposed Global Compact on Responsibility Sharing for Refugees, and a proposed Global Compact for Safe, Orderly, and Regular Migration (UN Secretary-General 2016).

The proposed Global Compact on Responsibility Sharing for Refugees, as envisioned in the secretary-general’s report, would be the centerpiece of humanitarian action for future engagement in mass influx situations as well as in situations of protracted displacement. It would be a commitment by states to better share responsibility for refugees based upon existing legal obligations and normative frameworks and would draw upon best practices and our wealth of experiences from the past. It would promote more equitable participation in a comprehensive refugee response to alleviate some of the pressures on states hosting the largest numbers of refugees. It would also provide a framework for addressing root causes and planning for solutions from the outset of an emergency. UNHCR would be called upon to initiate and develop a comprehensive refugee response whenever there is a large-scale influx, working closely with states, partners, and civil society. This “whole-of-society” approach would help garner public support and build the momentum needed for states to commit to and invest in admission, protection, assistance, solutions, and host community support.

### III. Upholding Obligations to Protect Refugees

Despite the enduring nature of the 1951 Convention and the prospects for upholding it through new commitments to share responsibility, some have questioned whether the Convention is fully equipped to deal with modern realities of mixed movements and security concerns, particularly those related to human smuggling and trafficking. This article next addresses in turn each of these concerns. It outlines what the Convention and its 1967 Protocol have to offer in each of these respects, as living instruments that have proven to be adaptable to changing circumstances over time (see Türk and Nicholson 2003), and suggests proposals for strengthening our responses to these issues in ways that complement rather than undermine the Convention.

#### A. Responding to Protection Needs in Mixed Movements

The complexities and growth in mixed movements of refugees and migrants demand that we find ways to ensure that the human rights of all people on the move are respected, protected, and fulfilled. Refugees will not be able to return home or enjoy protection in their country of origin. As such, the specific international regime developed to protect them ensures that they are not forcibly returned to their countries of origin or penalized for unauthorized entry or stay. When refugees are included under the category of migrants, this obscures the specific protections that refugees require.

At the same time, while refugees and migrants have different legal statuses and international protection needs, many of their immediate needs for safe travel, protection from smugglers
and traffickers,\(^9\) dignified reception and shelter, protection from xenophobia and racism, humane treatment, and support for basic needs are the same. In addition to the international protection regime, we therefore need to find ways to improve the governance of international migration. We can draw upon principles and lessons learned in the refugee protection regime to help inform the process. This is essential for ensuring that for individuals who are at risk, but who may not fall within the definition of a refugee, responses are appropriate and respect their human rights and dignity. Some individuals, such as unaccompanied children, victims of trafficking, or stateless persons, will have specific needs for assistance and protection regardless of whether they also have a claim for refugee status. Such responses could include expanded pathways for safe and regular migration, frameworks for protecting human rights of people on the move, and proactive planning to address new forms of displacement related to climate change.

Climate change-induced displacement, causing some 26.4 million people to leave their homes each year (IDMC 2016), is one area in particular where there is strong potential for complementary responses at the international level, particularly with regard to cross-border protection. The vast majority of persons of concern to UNHCR live in climate change hotspots around the world. The salience of displacement as an aspect of climate change was recognized in the *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, endorsed by 110 countries at the Nansen Initiative Global Consultation in October 2015 (Nansen Initiative 2015), the Platform on Disaster Displacement,\(^10\) as well as in the Climate Change Agreement in Paris at COP 21,\(^11\) which created a task force to develop recommendations to address this issue. This task force will be an important forum for sharing research and analysis, strengthening national and regional coordination, sharing best practices and guidance, and integrating climate change adaptation and displacement considerations into disaster risk reduction strategies. UNHCR will lend its protection experience and legal expertise to these efforts, both to help analyze the causes of displacement, to better understand the link between conflict and environmental degradation, and to define and respond to the specific categories of people

9 International instruments addressing smuggling and trafficking in persons, in particular two protocols to the Palermo Convention (United Nations Convention against Transnational Organized Crime [New York, 15 Nov. 2000] UN Doc. A/55/383, entered into force 29. Sept. 2003. http://www.refworld.org/docid/3b00f55b0.html), include provisions relating to the rights of migrants and refugees. Both protocols also include savings clauses requiring that law enforcement measures be consistent with other rights, obligations, and responsibilities under international law, including international humanitarian, human rights, and refugee law, especially with respect to the principle of *non-refoulement*.

10 The Platform on Disaster Displacement was created to follow up on the Nansen Initiative and implement the recommendations of the Protection Agenda, to better prepare for displacement and respond to situations when people are forced to find refuge within their own country or across a border. It will constitute a multi-stakeholder forum for dialogue, information sharing, and policy and normative development.

11 On December 12, 2015, the United Nations Framework Convention on Climate Change (UNFCCC) 21st Conference of Parties (COP 21) in Paris adopted the Paris Agreement to limit greenhouse gas emissions and establish bases for a new international climate regime, including the creation of a task force on displacement (UN Framework Convention on Climate Change, FCCC/CP/2015/L.9/Rev.1 [2015], para. 50). UNHCR is leading discussions with other stakeholders (Advisory Group) and with states to define terms of reference and a roadmap for the task force, including by participating in the Executive Committee of the Warsaw International Mechanism for Loss and Damage (February 2-5, 2016; April 26-30, 2016) and by providing states with technical support and expertise on climate and disaster-related displacement, based on joint recommendations from the Advisory Group on Climate Change and Human Mobility (Advisory Group 2016).
on the move. Towards this end, UNHCR is commissioning a study on the protection of people fleeing disasters and events related to the adverse effects of climate change.

While solutions to the plights of refugees and migrants will often be quite different, they can be better achieved through cooperation and commitment to meet the needs of both. Both migration and forced displacement are central features of human mobility and require specifically tailored responses to each at the international level, which remain perennial gaps in the international response. In this respect, the proposed Global Compacts set out in the UN secretary-general’s report hold much promise (UN Secretary-General 2016).

B. Addressing Security Concerns While Ensuring Refugee Protection

In the wake of recent serious security incidents around the world and large-scale movements of people across borders, often with the assistance of smugglers, some have questioned whether the 1951 Convention is fully equipped to deal with these threats. The Convention was devised specifically to protect individuals from acts of terror and violence and to ensure the refugee protection regime would not provide a cover for persons who perpetrate such acts. Specific provisions within the Convention therefore provide a system of checks and balances that take into account both the security interests of states and the protection of refugees. Under the 1951 Convention, refugees and asylum seekers must abide by the laws of their host countries and are not immune from prosecution for crimes committed on the territory. They may be subject to other measures, such as detention, cancellation or revocation of refugee status, extradition, or even expulsion in certain circumstances where they may pose a risk to national security or public order, provided that they would not be at risk of serious harm in the country to which they are returned.

In line with these principles, UNHCR has issued guidance to governments, proposing measures to ensure proper reception and screening at borders and assessment of claims (see UNHCR 2015). This requires systems, such as those outlined in the Refugee Protection and Mixed Migration: The 10-Point Plan in Action (UNHCR 2011), developed almost a decade ago, providing practical suggestions for implementing “protection-sensitive” border procedures and systems for receiving individuals who arrive in mixed flows. Registering arrivals using biometrics, referring them to appropriate procedures, and determining their status in a fair and efficient manner ensure that states can make the necessary distinctions early on between those in need of international protection and those who may pose a security risk. It is often at this stage that many states conduct security screenings by checking travel documents against security databases. However, this may not be a foolproof system, as many refugees either are forced to flee without the required documents due to the loss

12 The 1951 Convention and its 1967 Protocol (see footnote 2), as well as human rights law, do not preclude restrictions on the movement of asylum seekers, including the use of detention, if necessary in circumstances prescribed by law and subject to due process safeguards; for example, when there are strong reasons for suspecting links with acts of terrorism and violence in an individual case.

13 See the 1951 Convention, Art. 32, allowing for the expulsion of refugees in certain circumstances, on grounds of national security or public order, where due process is followed and there is no risk that the expulsion would result in return to a place where the refugee’s life or freedom would be threatened on account of a Convention ground.
of documents or difficulty in accessing embassies, or may have had to resort to fake documents to escape life-threatening situations. Also, security checks should be conducted in a manner that does not compromise the safety of refugees or their family members in their country of origin.

On the other hand, restrictive border management measures that are largely punitive and enacted in the name of protecting national security rarely have the desired effect. They do not result in a more secure world. Pushbacks of people at borders, detention, and limited channels for regular entry simply result in diverting refugee movements along other routes, forcing people to resort to irregular travel and unauthorized entry, and creating new markets and victims for smugglers, who become more reckless and clandestine. Smuggling in such situations can in practice evolve into situations of constraint and exploitation more akin to human trafficking. At the mercy of such criminal smuggling networks, refugees are vulnerable to endangerment, abuse, exploitation, trafficking, or kidnapping for ransom. Restrictive border management policies in this sense may be counterproductive both in combatting criminal networks engaged in smuggling and trafficking and in facilitating protection for the victims of such crimes. They also further aggravate already precarious security situations in regions caught up in conflict as refugees may amass in border areas or be forced back into situations of internal displacement or, even worse, entrapment in conflict zones. They also send a message of exclusion that feeds into xenophobia and can be used to legitimate violence against asylum seekers and refugees.

Long experience has taught us that to be truly effective, measures to ensure security must go hand-in-hand with measures to provide protection. While states have the sovereign right to control their borders, they also have an obligation under international human rights and refugee law to ensure that individuals in need of international protection are able to access and enjoy asylum and be protected against refoulement. An integrated approach is required, combining complementary and mutually reinforcing measures to ensure the safety of both refugees and host communities. The provisions in the 1951 Convention are set out specifically to achieve this. They provide the legal basis for reception, registration, and screening measures to ensure that persons who may pose threats to security do not take advantage of large-scale movements of refugees to try to enter countries for the purpose of endangering public safety. Early screening measures also help to identify individuals at risk, such as victims of trafficking, survivors of sexual and gender-based violence, or children at risk, and to connect them with the appropriate procedures and support services. Efforts to bring smugglers and traffickers to account for their crimes not only need to be in keeping with the international legal framework on combatting trafficking, but also need to be sensitive to the protection and support needs of the victims, as part of an integrated approach.

From a social perspective, such legal measures could be complemented by broader initiatives to address root causes, strengthen human rights protection, promote development, facilitate peace and reconciliation, and invest in education and youth. Community policing and engagement with refugees can also counter mindsets that give rise to extremism. Knowing refugees, speaking their language, and understanding their relationship with their host communities enable law enforcement authorities to detect potential problems — whether rooted in xenophobia or in extremism — and to address them at an early stage.
Perhaps the most effective tool for ensuring both security and protection is facilitating integration. Effective integration is achieved when refugees are able to participate fully in the social, cultural, and economic life of their host communities, and when host communities come to know refugees personally and value their presence. Ensuring that individuals have sufficient access to resources, services, and health care; realistic prospects for livelihoods and a future; and a sense of belonging in their communities — whether within their countries of origin or their countries of asylum — can perhaps do more than anything else to counter the forces that may lead some of the most disenfranchised towards violent extremism.

**IV. Ensuring Protection through More Effective Assistance**

Recent developments in the means and methodologies for providing assistance to refugees have the potential not only to meet essential needs more effectively, but also to yield protection results. Funding from the international community to capacitate national health care, education, and social assistance systems to serve refugees also, would be an essential step towards ensuring refugee access to rights and services. Where such local service delivery systems do not yet exist, it is likewise necessary to find ways for development planners to absorb the systems developed by humanitarian organizations, so that they can be made available to both refugee and host communities. Embedding services to refugees within national systems not only reduces duplication, but also can promote integration and social cohesion over the longer term.

In addition, the increase in cash-based interventions in refugee situations has proven in many cases to be an effective means of focusing assistance and identifying individuals with specific needs (see Gentilini 2016; World Bank Group 2016; UNHCR 2012b). Cash-based interventions can complement, as relevant, in-kind assistance, vouchers, and services to help address a spectrum of social welfare needs, such as facilitating access to food, water, shelter, health care, and essential material assistance. They can also play an important role in building livelihoods and facilitating longer-term solutions, such as voluntary repatriation and reintegration in countries of origin.

In this sense, cash-based programming empowers refugees and provides avenues for protection interventions. It can preempt and address negative coping mechanisms, such as child labor, survival sex, family separation, forced marriage, or other forms of exploitation, that can emerge when refugees are otherwise unable to meet their basic needs. As cash-based assistance is less visible than in-kind assistance, the risk of extortion and theft can be reduced. Good program design has proven to protect against the diversion of funds, and even in some cases, against gender-based violence. In mass influx situations in particular, when individual refugee status determination requiring in-depth interviews may not be feasible or practicable, for example, cash-based interventions can be one means by which we can continue to identify and respond to evolving needs at the point of identification upon registration as well as at the point of delivery, especially for individuals at risk.

Cash-based programming can foster self-reliance and economic empowerment. It also has the potential to contribute to greater social cohesion and reduce tensions between host communities and refugees, as it can benefit and stimulate local economies. When
refugees’ purchasing power is increased, they can participate in and contribute to local economies, protect their assets, and use the assistance to build livelihoods. In addition, cash-based interventions to host communities to renovate homes or fund refugees’ access to national social protection and health care systems can benefit both refugees and their host communities.

V. Realizing Protection through Solutions

The full realization of refugee protection ultimately hinges on finding durable solutions to situations of forced displacement. New initiatives promoting local solutions through the inclusion of refugees in development planning and facilitating their right to work have great potential. Also, efforts to widen opportunities for refugees to access third countries in a safe and regular manner would ensure that refugees are able to seek asylum and reunite with family members in safety, undercut the market for smuggling and trafficking, and share the responsibility more equitably with countries hosting the largest numbers.

A. Enhancing Self-reliance in Countries of Asylum

Within host countries, self-reliance is important from protection, solutions, and security perspectives. It is not only a moral and legal responsibility, but also makes good economic sense regardless of whether longer-term solutions are later found for refugees outside the country. Studies have outlined the economic, social, and cultural contributions that refugees can make to their host communities when the right policies are in place. For example, the OECD outlined the potential benefits to host communities that can result if they ensure that refugees and asylum seekers have access to language, employment, and integration services as soon as possible after their arrival (OECD 2016; see also UNHCR 2016b; OECD and UNHCR 2016).

Planning and support for solutions from the outset of a refugee situation require a progressive approach aimed at the gradual achievement of rights over the course of displacement. The emerging humanitarian-development nexus in programming and funding, as set out in the “Grand Bargain,” agreed between major donors and aid providers and launched at the World Humanitarian Summit in May 2016,14 is an encouraging step forward in promoting solutions and facilitating integration and greater social cohesion over time. It not only focuses on being better prepared from the outset of a humanitarian emergency to meet immediate needs, but also on planning for longer-term development outcomes. The key is to remain engaged throughout the cycle of displacement, from the onset of displacement to finding solutions. Protection interventions and monitoring, fostering access to livelihoods, and reducing vulnerabilities from the start can prevent a worsening of the humanitarian situation over time and the consequent pressure on host communities. Humanitarian and development interventions within such a framework can more effectively complement

each other, and allow for humanitarian funding to focus more pointedly on protection work for the most vulnerable refugees for the duration.

Partnerships between humanitarian and development actors to include refugees in national development plans are one way to achieve this, provided that they are accompanied by the necessary shifts in political, policy, and institutional arrangements to enable refugees to secure effective protection, engage meaningfully in their host societies, and become self-reliant. More predictable humanitarian financing throughout the displacement process and more resources directed through national and local systems will be essential to this process.

Central to effective self-reliance is ensuring that refugees can develop their skills and access livelihood opportunities to support themselves and their families and contribute to their communities. Access to education and work allows refugees to live with dignity and plan for their futures. It capacitates refugees to contribute to not only their countries of asylum, but also their countries of origin, should safe and dignified return become a possibility. A shift in thinking is needed to emphasize this aspect, as it is empowering for refugees and can strengthen local economies. Lifting reservations on the right to work under the 1951 Convention would be an important step in facilitating this. Engaging refugees in work related to the provision of assistance and services to their own communities is another possibility, if such programs are both formulated according to a rights-based approach recognizing the right to work and providing for safe and dignified conditions of employment, and grounded in an analysis of the local context (see UNHCR 2014).

Labor mobility schemes, either within the country of asylum or a third country, are making headway in realizing the right to work and are beneficial for refugees, companies, and national and regional economies. They enable refugees to move to increase their levels of income and standard of living. They can address human resource and capital shortages as well as promote innovation and the transfer of skills. The protection benefits of labor mobility schemes are myriad, as employment and improved household income contribute to self-reliance and resilience, reduce negative coping mechanisms, prepare refugees for longer-term solutions either in or outside the country, reduce dependency on humanitarian aid and, in some cases, facilitate a path to permanent residency or naturalization. We are already starting to see this emerge in regional arrangements that may help facilitate the movement of refugees with specific skills to the countries where such skills are most needed.15 UNHCR has also recently entered into memoranda of understanding with the OECD and the International Labour Organization, respectively, to promote employment opportunities for refugees both within their countries of asylum and beyond.

15 Examples may be found in the Economic Community of West African States (ECOWAS) freedom of movement protocols, which provide eligible nationals with secure residence and work entitlements; the Common East African Community (EAC) passports allowing citizens of member states to travel and, possibly soon, to work freely in the region; the Southern Common Market (MERCOSUR) agreement permitting citizens of Argentina, Bolivia, Chile, Colombia, Paraguay, Peru, and Uruguay and their legal dependants to obtain temporary residence and work rights; the Economic Community of Central African States (ECCAS) framework providing for the Right of Establishment, including employment, in four countries; and the Common Market for Eastern and Southern Africa (COMESA) implementing a protocol on the gradual relaxation and eventual elimination of visa requirements and a protocol on the free movement of persons, labor, services, and the right of establishment and residence.
B. Expanding Complementary Pathways for Admission

Labor mobility schemes are just one example of how countries can help shoulder the responsibility for refugees by offering them opportunities outside of their first countries of asylum. This not only empowers refugees, but when offered in significant numbers, can also alleviate some of the pressure on host communities. Other such opportunities for safe, regular admission to third countries include resettlement, humanitarian admission, family reunification, medical evacuation, and student visas and scholarships, as well as easing or lifting legal barriers or administrative requirements for admission. Taken together, these channels for admission are frequently referred to as “complementary pathways” that can facilitate both protection and solutions, as well as demonstrate responsibility sharing. They can also provide viable alternatives to refugees who may otherwise consider resorting to dangerous onward movements or turning to unscrupulous smugglers for assistance.

In the humanitarian and refugee protection world, resettlement has long been the primary tool for securing admission of refugees to third countries. Over the past decade, more than one million refugees have been resettled to some 30 countries, and the number referred by UNHCR to resettlement countries is expected to grow by up to a third each year. Yet, despite these encouraging numbers, they still fall far short of the global resettlement needs, as UNHCR estimates that in 2017, 1.19 million refugees will be in need of resettlement (UNHCR 2016c). This situation requires that we find ways in the immediate future to complement traditional resettlement with new programs aimed at broadening opportunities for refugees to access other admission channels, as long as provisions are made to ensure their protection in light of their unique status. Refugees who benefit from such schemes should, of course, continue to retain protection against refoulement, have access to non-national travel documents, be able to reenter first countries of asylum if needed, and enjoy the protection of their rights, including workers’ rights, in the third countries of admission. Countries offering such programs will also need to demonstrate some flexibility with regard to requirements for admission, bearing in mind that travel documents, proof of study or certification, access to embassies, or prohibitive fees could pose barriers to refugee access. When such opportunities are provided, in full consideration of the legal and protection needs of refugees, they may also serve as stepping stones to longer-term solutions — whether it be remaining in the third country and building a new life there or returning to one’s country of origin to participate in reconstruction and reconciliation processes.

Recognizing this imperative, the Migration Policy Institute and UNHCR recently joined efforts in 2016 to facilitate a roundtable entitled Additional Pathways for Refugees: Exploring the Potential and Addressing Barriers (see UNHCR and MPI Europe 2016). UNHCR also convened a series of High-Level Meetings on Global Responsibility Sharing through Pathways for Admission of Syrian Refugees over the past three years, which have secured offers of more than 201,000 places for Syrian refugees to date (UNHCR 2016d). A number of countries in both Europe and Latin America have also begun exploring possibilities for scholarship schemes, family reunification, and skilled migration. Family unity is particularly important, as many refugees travel onward to reunite with close family members. Not only is this a right that needs to be respected, it has also proved

16 In 2015, UNHCR submitted some 107,100 refugees representing 65 nationalities to 30 countries in 2015; in 2016, UNHCR will submit 143,000 for resettlement, and in 2017 nearly 170,000 (see Türk 2016).
to be critical for the effective integration of refugees. When refugees know that their family members are safe with them and that they can rely upon each other for support, they are able to participate and integrate into their host communities more effectively.

VI. Recommendations and Conclusion

The challenges that the international refugee protection regime faces today are immense, but are not insurmountable. What is needed now is to put our collective resources and capacities to their most effective use. This article has made numerous recommendations regarding how to accomplish this goal, including the following:

1. **Commit to share responsibility for refugees:**
   - Support the proposed Global Compact on Responsibility Sharing for Refugees, as set out in the UN secretary-general’s report.
   - Agree upon responsibility-sharing arrangements, defining when they would be needed, measures that would be taken, and a framework for states to contribute in line with their capacities and to receive support according to their levels of need.

2. **Uphold obligations to protect refugees:**
   - Institute new forms of group determination and the strategic use of refugee status determination, combined with community-based protection and other measures, to ensure an appropriate legal status while at the same time identifying specific protection needs.
   - Develop wider and more consistent applications of refugee protection principles through accessions and lifting reservations to the relevant refugee instruments.
   - Use protection strategies to inform frameworks for governing migration and meeting the needs of the most vulnerable migrants.
   - Implement “protection-sensitive” border procedures and systems for receiving individuals who arrive in mixed movements to ensure the security of both refugees and host communities.

3. **Ensure protection through more effective assistance:**
   - Fund national health care, education, and social assistance systems to also serve refugees and ensure refugee access to rights and services.
   - Expand cash-based programming, alongside, as relevant, in-kind assistance, vouchers, and services, to help identify and address protection and social welfare needs, build livelihoods, and facilitate longer-term solutions, such as voluntary repatriation and reintegration.

4. **Realize protection through solutions:**
   - Enhance self-reliance in countries of asylum, for example by including refugees in development planning and facilitating their right to work.
   - Create opportunities for safe, regular admission to third countries through, for example, resettlement, humanitarian admission, labor mobility, family reunification, medical evacuation, and student visas and scholarships, as well as easing or lifting legal barriers or administrative requirements for admission.
Prospects for Responsibility Sharing

Taken together these recommendations not only will ameliorate the existing hardships experienced by refugees, but also will provide the building blocks for achieving longer-term solutions, which remain, as ever, the ultimate aspiration of the international refugee protection regime.

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Matching Systems for Refugees

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**Executive Summary**
Design of matching systems between refugees and states or local areas is emerging as one of the most promising solutions to problems in refugee resettlement. We describe the basics of two-sided matching theory used in a number of allocation problems, such as school choice, where both sides need to agree to the match. We then explain how these insights can be applied to international refugee matching in the context of the European Union and examine how refugee matching might work within the United Kingdom, Canada, and the United States.

**1. Introduction**
Refugee resettlement is difficult. It is a complex administrative task, often conducted with inadequate funding and staffing, and, by necessity, often hurriedly. It frequently requires coordination across multiple agencies — public and private — operating on different sides of the globe.

Public attention and activism often focuses on the question of “how many?” In the context of incredibly limited supply of resettlement spaces, this is not unreasonable. The proportion of refugees in situations of “protracted displacement” (where more than 25,000 refugees have been in exile for more than five years) was estimated at two-thirds in 2009 (Loescher, Gil, and Milner 2009), prior to the current Syrian crisis. For refugees in protracted situations, the average length of stay is 17 years. There are now some 21.3 million refugees in the world, out of some 65.3 million forcibly displaced worldwide (UNHCR 2016a). In this context, global resettlement capacity is awesomely, ludicrously inadequate: in 2015, states admitted 107,100 refugees for resettlement, of which the United States accepted more than half (66,500) (UNHCR 2016b, 3). As one recent group of refugee experts uncompromisingly put it, “the current global system for refugee protection is broken” (Dauvergne and Hathaway 2016).

However, as with any scarce resource, it is also vital to consider how the limited resettlement capacity of the states can be used most effectively. In this paper, we focus on the question that arises after it has been decided that a given group of refugees will be resettled. Instead

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1 We are grateful to Alex Betts and especially to the participants of the Center of Migration Studies Rethinking the Global Refugee Protection System Conference (New York, July 2016) and the HCEO Market Design Perspectives on Inequality Conference (Chicago, August 2016) for their comments and suggestions.
of “how many?” we consider “who goes where, and how should it be decided?” Importantly, none of the methods discussed in this paper should ever be used to determine which refugees get resettled, only to determine where those who are being resettled could be best placed. Currently, national resettlement agencies or the United Nations High Commissioner for Refugees (UNHCR) conduct assessments in refugee camps and elsewhere to identify those most in need of resettlement, usually on the basis of vulnerability. Nothing in this paper suggests any change to that system. But after it has been determined that a refugee or refugee family is being resettled to a particular state, there is the need to decide the particular regional in which the refugee will be resettled.

This process is often committed, well-informed, and animated by a genuine desire to make the process work best for the refugees. However, it remains “bespoke”: refugee resettlement officers are manually attempting to collate and process vast amounts of information. Refugees are sometimes asked if they possess any particular preferences over where they might want to go, but their preferences are not comprehensively sought out and acted on in a systematic manner. In such processes, the preferences of refugees are in general inferred, rather than directly collected, which runs the risk that agencies make incorrect assumptions about what refugees want (for example, we often assume people wish to be near their extended family networks, but in some instances this could not be further from the case). Further, resettlement agencies constantly face trade-offs — for example, a given refugee has skills which suggests one area, but ensuring proximity to her co-linguists suggests another — but lack information as to how to prioritize the various factors. When such trade-offs arise between conflicting priorities, there is currently no transparent attempt to resolve the trade-offs, except by assuming in advance that a given dimension of priority (health or employability) is the most important one. In no systems that we have encountered in our research are refugees themselves asked directly how they would wish that trade-off to be made.

There is ample evidence, however, that placing refugees in the best areas for them has profound consequences for their long-term flourishing. Backing out of resettlement or simply outright refusal to participate in the process is more common than is generally thought: refugees may be understandably reluctant to embark on another long journey to a destination about which they know little, particularly if leaving the immediate region in which they have sought asylum involves losing contact with communities and economic networks which they have been relying on. Most extremely, when resettlement places refugees in areas where they do not want to go, they make the appalling choice to return, as when thousands of Iraqi refugees who arrived in Finland last year decided to cancel their asylum applications and to return home “voluntarily” (Forsell 2016). This is still comparatively rare: it is more common that refugees are placed and remain living in areas that lack the resources they need to embark on flourishing lives. For example, in the early 1990s Sweden deliberately placed refugees randomly around the country, hoping they would integrate better. The research done by Olof Åslund at Uppsala University based on this petri-dish human experiment has shown conclusively that the initial placement of refugees into less prosperous communities lowered their job prospects, health, income levels, and education (Åslund 2005; Åslund and Rooth 2007; Åslund and Fredriksson 2009; Åslund, Östh, and Zenou 2010; Edin, Fredriksson, and Åslund 2004). More recent evidence from the current refugee crisis in Germany suggests that refugees do not naturally gravitate
towards areas with more jobs and housing, but instead prioritize living close to their co-ethnics (Economist 2016). Getting resettlement right, therefore, requires paying attention to who goes where. Although this proposal is not designed to increase participation in resettlement directly, getting it right may make states, voluntary agencies, and communities more willing to participate in resettlement in the long run, thereby raising capacity.

In this paper, we suggest a friendly amendment to the status quo based on a rich literature in economics on “market design.” What we propose is a matching system — the refugee match — that can be used to match refugees to countries, to local areas, to agencies, or to different forms of protection status. This system uses no money or trading, better respects the freedom and choices of refugees, and serves the core interests of the states, agencies, and communities participating in resettlement.

First, we consider the basics of “matching theory”: how it works, and what it can do (Section 2). Then, we consider two possible uses of matching systems for refugee resettlement, internationally (Section 3) and locally (Section 4). An international refugee match would involve a hypothetical burden-sharing system between some set of states (e.g., the European Union) which wished to adopt a joint resettlement scheme (Jones and Teytelboym 2017a; Moraga and Rapoport 2014; 2015a; 2015b) A local refugee match would consider how refugees are allocated across localities within one jurisdiction (Jones and Teytelboym 2017b; Delacrétaz, Kominers, and Teytelboym 2016). Local refugee matching systems look rather different depending on the institutional context of a given country. Therefore, we consider what matching might look like, and what benefits it could provide, in three different contexts: the United Kingdom, the United States of America, and Canada.

2. Matching in Theory and in Practice

Two-sided matching theory is a mathematical framework for allocating resources where both parties to the transaction need to agree to the match in order for a match to take place. A running analogy throughout this paper is going to be with the match between children and schools. In many school districts (in many large American cities and across several European countries, including the United Kingdom), parents are allowed to express preferences over schools they wish to send their children to. They submit a ranking reflecting that they prefer the Rydell to Bronson Alcott to Sunnydale High and so on. Schools, on the other hand, have fixed (non-manipulable) priorities regarding children: for example, they would prioritize children who have siblings in the same school and live in the neighbourhood over children who only have a sibling or only live in the neighbourhood. Importantly, schools know in advance that they are going to get some fixed number of students, so they have only incentives to be as attractive as possible. Parents’ and children’s preferences clearly matter — the government would have no way of reliably figuring out which of the tens of thousands of children would fare best at what kind of school. This is the sort of information that only parents and their children have and one of the roles of a designed matching system is to aggregate this information similarly to how a competitive market does (Hayek 1945). A centralized application process is also important: it would be unfair if children missed out on a place in an appropriate school only because their parents did not spend the night before application day outside the school doors.
What makes a good school choice matching system? Economists have identified three key potentially desirable characteristics of a successful and fair allocation system, all of which cannot exist in a single system and thus must be prioritized:

- **Stability** — no student should miss out on a place in a school she prefers because a student with a lower priority has taken it. This is known as the “elimination of justifiable envy” in economics, because it means schools and students do not end up dissatisfied with their match and seeking to “re-match” under the table, thus leading the whole system to unravel.

- **Efficiency** — no student should be able to get a place in a more preferred school without another student’s ending up in a school he prefers less. Put simply, there is no potential “swap” of any two students that would make anyone happier without making someone else unhappier.

- **Strategy-proofness** (for students) — no student should have an incentive to lie about their preferences over schools in the hope of getting a place in a more preferred school: it is logically impossible to “game” the system.

In the past decade and a half, economists have closely studied how school choice systems work (Abdulkadiroğlu and Sönmez 2003; Abdulkadiroğlu, Pathak, and Roth 2005). Abdulkadiroğlu and Sönmez showed the allocation procedure used in the past by the Boston public school authorities was not strategy-proof and therefore unlikely to have been efficient. This meant that after the allocation happened, parents sought to rematch their children to different schools. Moreover, parents were actively gaming the system. The economists offered two alternative strategy-proof matching systems: one was stable and the other was efficient. Unfortunately, the school district had to make a choice as it has been mathematically proven that no matching system can be stable, efficient, and strategy-proof: there is no perfect system (Roth 1982). As such, school districts must prioritize: in the end New York and Boston picked the former and New Orleans (for a while) and San Francisco opted for the latter.

School choice is just one of many settings that matching theorists have studied. Other two-sided matching systems include the allocation of residents to hospitals (Roth 1984) and cadets to army branches (Sönmez and Switzer 2013). We argue that insights from matching theory can play a crucial part in the global refugee resettlement process.

**Matching Theory in the Context of Refugee Resettlement**

We now describe two types of two-sided matching systems for refugee resettlement. On the one side of the matching system are the refugees. We assume that families that do not wish to be split apart should not be. Therefore, the relevant unit of analysis is a refugee family. Moreover, we take as given the determination of refugee status and the decision to offer resettlement to a given family. On the other side are countries (Section 3) or localities (Section 4) that have stated their capacities to accept refugee placements in advance. The
Matching Systems for Refugees

matching system only comes into effect after we know that a given population of refugees is to be resettled to a given set of placements. In this model, all refugees in the system would know that they were going somewhere, and all receiving countries and localities would know that they were receiving some fixed number of refugees.

The three potentially desirable properties of a matching system in the context of refugee resettlement would look like this:

- **Stability** — no refugee family should miss out on a resettlement place in a country/locality it prefers because a refugee family with a lower priority has taken it.

- **Efficiency** — no refugee family should be able to get a resettlement place in a more preferred country/locality without another refugee family’s ending up in a country/locality it prefers less.

- **Strategy-proofness** (for families) — no country/locality should have an incentive to lie about its preferences over countries/localities in the hope of getting a resettlement place in a more preferred country/locality.

In the rest of this paper, we use “stability” and “efficiency” in these narrower technical senses rather than their vernacular meanings. Of course, there might be other properties that are equally important, such as maximizing the total number of refugees or refugee families that are resettled (Andersson and Ehlers 2016; Delacrétaz, Kominers, and Teytelboym 2016). As we pointed out above, there are trade-offs in satisfying these properties and therefore implementing one algorithm over another will depend on the particular context.

### 3. International Refugee Match: The Case of the European Union

Resettlement still constitutes only a tiny fraction of the solution to the global refugee crisis: only one percent of all refugees get resettled annually. As such, it is an exceptionally scarce resource that is worth using as efficiently as is humanly possible. It is also worth recognizing that international refugee resettlement is already a two-sided matching system (Jones and Teytelboym 2017a). In order for a refugee family to be resettled, it must avail itself of the protection of the particular country that offers the family asylum. In fact, UNHCR already often acts as a matchmaker similar to the public school board by processing applications and suggesting refugees for resettlement in countries that have agreed to take the refugees. The current matching process, however, does not happen in a manner that has been systematically designed to achieve properties like stability, efficiency, and strategy-proofness. When UNHCR acts as a conduit for the vast majority of resettlement applications, it does not take into account the preferences of refugees and the priorities of countries in any systematic way. UNHCR typically suggests a family for resettlement in a particular country and the country processes the application it receives.

In most general terms, a **centralized** international matching system for refugees would allow refugees to apply for protection in several countries and allow countries to compete to protect different refugees. In one potential system, refugees could make one claim for asylum to a single centralized body, simultaneously specifying where, if successful, they
would wish to be relocated. A different system would be one where states have identified in advance a population to be resettled (either through a group determination of status, or some other special dispensation). The system would then match refugees to countries. States come to the clearinghouse with a quota of refugees they are willing to accept (we discuss minimum and maximum quotas in the next section) and a ranking of the priorities they are seeking in refugees. The countries and refugees are then matched.

A European refugee match would require a group of states to coordinate minimally with each other insofar as they would have to opt into the Refugee Match, but it need not force states to abandon any of their current agendas, be they liberal, or restrictive (for example, whether it is compatible with minimum or maximum refugee quotas, or neither). This is necessary, because although the European Union has been working towards a Common European Asylum System since 1999, including a stated commitment to the harmonization of resettlement, there is still substantial heterogeneity in the priorities of EU states over the refugees they are seeking to resettle. While, for example, France and the United Kingdom prioritize family ties, Romania puts emphasis on concerns about threats to public security (see Figure 1). Hence, a part of any solution must take into consideration these remaining different priorities among states.

Figure 1. Source: EASO Fact Finding Report on Intra-EU Activities in Malta

Refugees themselves must have very different preferences, but it is virtually impossible to know what they are from the available data. Much of the European public discourse assumes that refugees would be grateful to be resettled anywhere in Europe. But in February 2016, for example, hundreds of Iraqi refugees who were resettled in Finland asked to be sent home (Forsell 2016). To some extent, survey statistics mislead about how many refugees arriving in Europe genuinely prefer to go to Germany rather than, say, the
Matching Systems for Refugees

United Kingdom (IOM 2016). Of course, thousands of Syrian refugees set out for Germany precisely because Germany, unlike most other European countries, had virtually guaranteed them asylum there. It is not at all clear whether refugees would have so overwhelmingly preferred Germany other things being equal. And yet even imperfect anecdotal data suggest that there is a substantial degree of variation in the preferred destination countries between, say, Syrians and Eritreans. Currently, refugees overwhelmingly prioritize safety and ease of route and the likelihood of being granted status somewhere. In consequence, we know almost nothing about the full preferences of refugees once those considerations are taken out of the equation. Getting the match right would therefore considerably improve the welfare of refugees and ease the burden on the states.

A refugee matching system, therefore, has the following benefits. First and most obviously, rather than being directed by the internal procedures of bureaucracies, it can give refugees more choice than they currently possess about where they are resettled. Second, a matching system can make the process less arbitrary and contingent on ad-hoc bilateral deals by states, and dangerous journeys and lottery-like decisions to make journeys by refugees. Third, because the computer algorithm finds the matching outcome as soon as the preferences of both sides are submitted, the matching system can speed up resettlement. Fourth, because matching enables states to effectively share burdens whilst also empowering them to receive refugees that match their preferences, this mechanism may encourage more states to participate in resettlement.

There are numerous details that would need to be decided in order to implement such a system. We comment in detail on them in another paper (Jones and Teytelboym 2017a). There are also difficulties with implementing such a scheme. First, many EU countries are likely to require financial or other incentives to participate (Moraga and Rapoport 2014; 2015a; 2015b). It is worth noting, in passing, that if this can be overcome, matching produces a further advantage: if states know they are accepting some fixed number of refugees, and know that the choices of refugees will determine which refugees they receive, they would then have every incentive to be as attractive to refugees as possible. Second, even though this improved refugee match is likely to reduce secondary migration, it is unlikely to eliminate it entirely. Therefore, it is unclear how the stability desideratum can be easily maintained. Third, EU countries would need to surrender some administrative tasks of refugee status determination to a central authority. While that does not mean that refugee status determination or priorities themselves need to be entirely harmonized, EU countries might need to entrust the application of their rules and procedures to a central EU body.

Ultimately, however, a well-run international matching system delivers a sense of control for the states, value for money for the public purse, and has huge welfare benefits for refugees. This is precisely what might encourage EU states to eventually increase their quotas.

4. Local Refugee Match

Once a refugee family is given asylum in a particular country, there is still a question of where exactly they end up living within that country. This process tends to be highly

3 Author interviews, 2016.
centralized in many countries, but it is also one that almost entirely ignores both the preferences of refugees and the priorities of local areas. Indeed, Sweden experimented with random allocation of refugees in the 1990s. While the policy was eventually scrapped, it allowed researchers to study the causal effects of allocation to particular localities. The key finding was that refugees in general who are initially matched to less prosperous localities fared considerably worse over their lifetime (in terms of employment and education) than refugees who ended up in more affluent areas. It is very unlikely that this result would not extend to other countries (though to our knowledge no other country except Denmark has experimented with an explicitly random policy). However, in contexts where resettlement capacity is likely to continue to involve a mix of more and less affluent areas, it is important to make sure that refugees are placed as effectively as possible: not all areas will have the same bundle of public services, the same employment gaps, the same religious or community-based goods, and so there are potential “wins for free” in making sure that refugees are placed in the areas which best serve their particular needs.

Localities would not rank refugees individually both for logistical and ethical reasons. To do so might enable unscrupulous localities, for example, to use names as proxies for unethical criteria (e.g., second names which identify the refugee’s faith or ethnicity). Instead, they would have “priority categories” corresponding to their provision capacities, which they would rank. The full ranking of priority categories is the “priority structure” of a particular locality. The provision capacities of localities are more diverse than is usually thought: for example, some hospitals specialize in providing for particular conditions. In a locality with a hospital treating unusual medical conditions (e.g., tropical medicine), the highest priority might be for refugees who have those conditions. Other priority categories might include the suitability of accommodation, particular care services, the availability of particular forms of in-kind welfare, educational opportunities (e.g., spaces in schools), employment opportunities, the presence of particular civil society groups in a position to play support roles in refugee reception, and other integration services. Like the case of schools, higher priority will be given to refugees who satisfy several categories (e.g., those with a rare medical condition and family in the area will be prioritized over those who have either a rare medical condition or family).

The central state decides what the priority categories could be, but localities themselves could control their ranking of those categories. Deciding what categories it is permissible to rank on is important in order to prevent localities from attempting to prioritize refugees in morally repugnant ways (e.g., were a locality to try and take only white refugees). One possible way to do this would be to make the possible priority categories correspond to the categories of vulnerability and particular need already collected by UNHCR and other resettlement agencies.

We now proceed to describe how best to match refugee to localities in three different countries. Each of these states allow refugees to migrate internally without restriction; offer considerable support to refugees in the early stages of resettlement; and have considerable control of the number of arrivals due to their geographical location, thereby allowing them to determine the optimal size and frequency of resettlement batches. Yet their particular institutional arrangements also offer interesting contrasts and comparisons in how the matching systems could be run. Moreover, as Delacrétaz, Kominers, and Teytelboym
(2016) point out, the local refugee match is a more complicated matching problem than the international refugee match because of the complex constraints on the public services that are required by refugee families.

**United Kingdom**

The simplest context for a local refugee match would be when refugees are relocated via a single scheme, operated by the central state. This is the case for the British government’s Syrian Vulnerable Persons Resettlement (SVRP) program, extended by former Prime Minister David Cameron on September 7th 2015. By 2020, the SVRP program aims to resettle 20,000 Syrian refugees in families, alongside a further 3,000 unaccompanied minors from conflict situations4 in the Middle East and North Africa, and an unspecified number of unaccompanied refugee children currently in Europe. The program is managed by a joint unit between the Home Office and the departments for International Development and Communities and Local Government. The resettled refugees are given five years’ humanitarian protection status, with permission to work and access public funds (paving a path to citizenship). As of March 2016, 1,602 people had been resettled in the United Kingdom under the scheme (Gower and Politowski 2016).

Under the SVRP program, refugees are matched to a *local authority* (which undertakes responsibility for that family for the duration of the visa), as well as to a specific house. Crucially, the participation of local authorities is entirely voluntary. Therefore, local authorities need incentives to participate in this program. This also means that the UK government is keen to prevent secondary movement of refugees from their initial placements, making it particularly important that refugees are matched successfully in the first instance.

In this program, most of the costs associated with refugees in the short-term are borne by the central state (e.g., benefits are paid directly by the Department of Work and Pensions), and the government has also undertaken to support local authorities with the additional costs they will bear. The costs have been estimated to range from £8,500 (adults and children under three) to £14,000 (school-age children) (Dedman 2015). The £460 million committed by the government is intended to meet these costs in full for the first year. This funding supplements housing support and educational funding, which are separately funded. However, the subsequent costs of refugee resettlement are borne by local authorities5 or through a recently announced Full Community Sponsorship program (UK Home Office 2016).

There are non-trivial implementation issues for the British matching system. First, there are over 350 local authorities and the Home Office cannot possibly expect refugees to rank any or all of these localities without adequate information. One way to circumvent this is

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4 The current British Prime Minister, Theresa May, currently appears to have rowed back on this commitment.

5 In another paper, we describe how heterogeneous financial incentives can be used to encourage more local authorities to participate (Jones and Teytelboym 2017b). Specifically, payments which scale according to the number of refugees hosted in an area will create very different patterns of resettlement based on whether the function determining how the total payment changes with the number of refugees hosted is concave or convex.
to elicit preferences over the types of local areas that refugees prefer (e.g., whether living in an urban area is more important than living near a place of worship). Second, refugees are being matched to housing procured on the private rental market, which can be volatile and unpredictable on a local level. Ensuring an adequate and reliable supply of housing is a crucial part of designing a well-functioning system.

**Canada**

Canada is one of the largest, regular destinations of refugee resettlement in the world. In 2014, for example, it resettled 7,233 refugees, which is around 10 percent of the UNHCR total. In November 2015, Prime Minister Justin Trudeau announced that Canada would resettle an additional 25,000 Syrian refugees and by late February 2016, this target was reached. Canada plans to resettle an additional 35,000 to 50,000 refugees by the end of 2016 alone.

There are three types of refugee resettlement schemes in Canada:

- **Government assistance (GA) program** — the government resettles refugees referred by the UNHCR.
- **Private sponsorship program** — private individuals or organizations can support resettlement of specific refugees.
- **Blended Visa Office-Referred (BVOR) program** — the government and private organizations share the costs of resettling refugees referred by the UNHCR.

The Canadian welfare system operates very similarly to the British system although the total share of government expenditures is closer to that of the United States at around 42 percent of GDP. The government (Ottawa or Quebec) covers the resettlement costs for up to one year in the GA program or six months in the BVOR program (the private sponsors cover the other six months). Healthcare is mostly free at the point of use and there is considerable government support for the unemployed, alongside other forms of welfare.

Matching systems could play a great role in government assistance and in blended program. In the private sponsorship scheme, the private organizations already have the ability to name particular refugees so there is no scope for matching with preferences. Since refugees could in principle express a preference over whether they enter the resettlement process via the GA or the BVOR programs, we can describe this matching problem as one of matching with contracts (Hatfield and Milgrom 2005; Sönmez and Switzer 2013). Hence, a refugee family might reasonably prefer to be resettled in Toronto by the Lutheran Church to being resettled in Vancouver by the government. The Canadian federal system lends itself to an expression of preferences among Canadian states in addition to the types of areas the refugees might prefer. Indeed, there are only 10 provinces (and three territories to which resettlement is unlikely) so it is possible to provide refugees with enough information that they are able to indicate a reasonable preference list. On the locality level, the overall service capacity would be jointly determined by the provision of the local governments.

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6 Private sponsorship schemes could, however, gain insights from optimizing the Pennsylvania Adoption Exchange (Slaugh et al. 2016).
and by the private organizations. Provinces would be able to coordinate the relevant information (including priorities) from individual localities and private organizations and encourage other localities to participate with extra funding. This makes it easier for the central government to negotiate province-level resettlement numbers that would act as total provincial quotas in the system (Kamada and Kojima 2015).

**United States**

The United States is, by a distance, the most generous participant in global resettlement. Since 1975, over three million refugees have been welcomed to the United States. The Department of State is the coordinating government body, and resettlement is funded by the Department’s Bureau of Population, Refugees, and Migration (the “Bureau”). The number of persons that may be admitted as refugees each year is established by the president in consultation with Congress. This “Refugee Admission Ceiling” is then divided into five global regions, alongside an unallocated reserve for unforeseen emergencies. Refugees are expected to apply for permanent residency (a green card) one year after being admitted to the United States, and may apply for US citizenship five years after admission as a refugee. 

**Figure 2. US Annual Refugee Admission Ceilings, Fiscal Year 1980-2016**

![Figure 2](image_url)

*Source: US Department of State, Bureau of Population, Refugees, and Migration, “Proposed Refugee Admissions for Fiscal Year,” various years, with graph from Zong and Batalova (2015).*

7 For a fuller account of the US refugee resettlement system and actual refugee admissions by year, see Kerwin (2015).
However, the Bureau’s role in the operation of resettlement is, in contrast to the British system, extremely limited. Instead, the Department of State works with nine private voluntary agencies (or “Volags”). These agencies sign cooperative agreements with the Department of State to provide reception and placement services to all refugees arriving in the United States. The current list of Volags includes:

- Church World Service
- Episcopal Migration Ministries
- Ethiopian Community Development Council
- Hebrew Immigrant Aid Society
- International Rescue Committee
- Lutheran Immigration and Refugee Service
- US Committee for Refugees and Immigrants
- United States Conference of Catholic Bishops
- World Relief

These agencies meet weekly to review a batch of refugees based on biographical information sent to them by the Resettlement Support Centers (the overseas offices which identify refugees for resettlement). During this weekly meeting, decisions are made as to which agency will take responsibility for which refugees. Volags take turns every week in their priority to pick the cases that they want to take on. Then, the agencies themselves decide where to place refugees across some 190 communities throughout the United States. As such, in the US context, there is a two-stage match: allocating refugees to Volags, and then to local communities.

The American system is extremely well-institutionalized and can tap into a vast well of expertise and a huge network of supportive actors because it is embedded in (largely religious) community networks. However, the system also expects refugees to rapidly transition to self-reliance (within about six months) and operates in a context with a minimal welfare safety net. After that point, support and services are largely coordinated by the federal Health and Human Services’s Office of Refugee Resettlement, which similarly will have a complex and uneven national map of provision capacities. For these reasons, the priority in the match is likely to be designing a system which maximizes the likelihood that refugees can integrate, join the labor market, and cease to need extensive support as soon as possible. Furthermore, the sheer scale of resettlement in the United States makes preference-free matching particularly likely to miss important information.

As in the British case, it is unlikely that refugees will have adequate information to process and rank localities directly. Therefore, it is also likely here that the best system would encourage refugees to express preference over *types* rather than specific named areas. As in the Canadian case, refugees could have preferences over not only where they are resettled but also which Volag they are resettled by, opening another application of matching with
contracts. Refugees could be asked to rank their most preferred states (as in the Canadian refugee match) as well as properties of areas within these states (as in the British refugee match) alongside preferences over Volags. That process would greatly simplify the weekly allocation task for the Volags themselves.

5. Conclusion
This paper has argued that matching must be an important part of any durable and comprehensive response to the global refugee crisis. We have shown that centralized matching in which the preferences of refugees and the priorities of states (international) or of localities (local) are elicited directly can be used in a variety of contexts to make the resettlement process more fair, efficient, and humane. The next step would be to understand empirically the effect of matching with preferences on the lifetime outcomes of refugees and development of community relations.

While we are confident that major host countries for refugee resettlement will eventually adopt comprehensive matching systems for resettlement, there is a greater need for matching systems in places where most refugees currently are — the developing world. Designing and implementing matching systems in countries with weak institutions pose a substantial challenge to researchers and policymakers. However, this challenge must be the most fruitful area for further research.

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You are Not Welcome Here Anymore: Restoring Support for Refugee Resettlement in the Age of Trump

Todd Scribner

Executive Summary

After descending an escalator of his hotel at Central Park West on a June day in 2015, Donald Trump ascended a podium and proceeded to accuse Mexico of “sending people that have lots of problems, and they’re bringing those problems with us (sic). They’re bringing drugs. They’re bringing crime. They’re rapists” (Time 2015). It was a moment that marked the launch of his bid for president of the United States. From that point forward, Trump made immigration restriction one of the centerpieces of his campaign. Paired with an economically populist message, the nativist rhetoric shaped a narrative that helped launch him to the White House. His effectiveness partly lay in his ability to understand and exploit preexisting insecurities, partly in his outsider status, and partly in his willingness to tap into apparently widespread public sentiment that is uneasy with, if not overtly hostile to, migrants.

This paper will try to make sense of the restrictionist logic that informs the Trump administration’s worldview, alongside some of the underlying cultural, philosophical, and political conditions that inspired support for Trump by millions of Americans. This paper contends that the Clash of Civilizations (CoC) paradigm is a useful lens to help understand the positions that President Trump has taken with respect to international affairs broadly, and specifically in his approach to migration policy. This paradigm, originally coined by the historian Bernard Lewis but popularized by the political theorist Samuel Huntington (Hirsh 2016), provides a conceptual framework for understanding international relations following the end of the Cold War. It is a framework that emphasizes the importance of culture, rather than political ideology, as the primary fault line along which future conflicts will occur. Whether Trump ever consciously embraced such a framework in the early days of his candidacy is doubtful. He has been candid about the fact that he has never spent much time reading and generally responds to problems on instinct and “common sense” rather than a conceptually defined worldview developed by academics and intellectuals.

1 The opinions expressed herein are those of the author alone and do not necessarily represent the opinions or positions of the United States Conference of Catholic Bishops.
(Fisher 2016). Nevertheless, during the presidential campaign, and continuing after his victory, Trump surrounded himself with high-level advisers, political appointees, and staff who, if they have nothing else in common, embrace something roughly akin to the Clash of Civilizations perspective (Ashford 2016).²

The paper will focus primarily on Trump’s approach to refugee resettlement. One might think that refugees would elicit an almost knee-jerk sympathy given the tragic circumstances that drove their migration, but perceptions of refugees are often tied up with geopolitical considerations and domestic political realities. Following 9/11, the threat of Islamic-inspired terrorism emerged as a national security priority. With the onset of the Syrian Civil War and the significant refugee crisis that ensued in its wake, paired with some high-profile terrorist attacks in the United States and Europe, the “Islamic threat” became even more pronounced.

The perception that Islamic-inspired terrorism is a real and imminent threat has contributed to a growing antagonism toward the resettlement of refugees, and particularly Muslims. When viewed through the lens of the CoC paradigm, victims of persecution can easily be transformed into potential threats. Insofar as Islam is understood as an external and even existential threat to the American way life, the admission of these migrants and refugees could be deemed a serious threat to national security.

This paper will begin by examining some of Trump’s campaign promises and his efforts to implement them during the early days of his administration. Although the underlying rationale feeding into the contemporary reaction against refugee resettlement is unique in many respects, it is rooted in a much longer history that extends back to the World War II period. It was during this period that a more formal effort to admit refugees began, and it was over the next half century that the program developed. Understanding the historical backdrop, particularly insofar as its development was influenced by the Cold War context, will help to clarify some of the transitions that influenced the reception of refugees in the decades after the fall of the Soviet Union.

Such an exploration also helps to explain how and why a CoC paradigm has become ascendant. The decline of the ideologically driven conflict between the United States and the Soviet Union has, according Huntington’s thesis, been superseded by culturally based conflicts that occur when competing civilizations come into contact. The conceptual framework that the CoC framework embodies meshes well with the cultural and economic dislocation felt by millions of Trump supporters who are concerned about the continued dissolution of a shared cultural and political heritage. It is important to keep in mind that the CoC paradigm, as a conceptual framework for

² It is worth noting that proponents of the CoC worldview are just one bloc within the Trump administration, albeit at the moment an influential one. Other competing blocs (e.g., establishment Republicans) are also in the mix.
understanding Donald Trump and his approach to refugee resettlement and migration more broadly, is at its core pre-political; it helps to define the cultural matrix that people use to make sense of the world. The policy prescriptions that follow from it are more effect than cause.

**Trump’s Campaign Promises**

Beginning with the June announcement of his candidacy, through the Republican primary and into the general campaign, Trump honed his immigration restrictionist bona fides. Not only did he promise to crack down on illegal immigration and deport the estimated 11 million unauthorized migrants living in the United States (Lobianco 2015), he also committed to build a wall along the US-Mexico border and to make Mexico pay for it. He took aim at the refugee resettlement system along the way. Although perhaps surprising in retrospect, in a September 2015 interview with Fox News, Candidate Trump called for an increase in the admission of Syrian refugees as a humanitarian gesture (BBC News 2015a). However, it was not long before he backpedaled and embraced a hardline approach that more closely mirrored, and in some respects surpassed, the position of his Republican opponents.

Just three weeks after promising to bring in more Syrian refugees, Trump committed to sending every Syrian refugee admitted into the United States back from where they came (BBC 2015b). On November 13, 2015, gunmen and suicide bombers executed an attack on a concert hall, a sports stadium, and a series of bars and restaurants in downtown Paris, killing 130 people. The following week, at a rally in Birmingham, Alabama, Trump called for a database of refugees entering the United States from Syria and supported efforts to surveil several unspecified mosques (Haberman 2015).

In the immediate aftermath of the San Bernardino attack in December 2015, he called for a shutdown on all Muslims entering the United States (Diamond 2015). Several months later, Trump claimed that Hillary Clinton supported a program to “admit hundreds of thousands of refugees from the Middle East with no system to vet them,” and he vowed to use his executive power to stop the admission of Muslims and other people from the region (Schultheis 2016). Refugees and other migrants from this part of the world, he said, could very easily be a “Trojan Horse” for America (ibid.). Islamic terrorism was by this point for Trump an existential threat to the United States; allowing them into the country by choice would thus be a critical threat to national security.

**Efforts to Implement an Agenda**

Upon becoming president, Trump moved quickly to fulfill some of his election year promises. In the week following the inauguration he issued three different executive orders (EO) pertaining to migration. The first two orders came on January 25, 2017 and focused on different aspects of the immigration issue. The first looked at border security and issues related to the restriction of entry of immigrants, and the second focused more explicitly

on internal enforcement and the need to deal with undocumented migrants who were established in the United States.\textsuperscript{4} The beneficiaries of the Deferred Action for Childhood Arrivals (DACA) program seem to fall outside the administration’s broad enforcement priorities, at least at this writing.

More important for our purposes here, the president’s third executive order on migration, issued on January 27, focused on his concern that the refugee resettlement program was potentially allowing the admission of terrorists into the United States. To minimize this possibility, the president called for a reduction in the number of refugee admission in fiscal year (FY) 2017 to 50,000 — down from the 110,000 target that President Obama had established in his presidential determination for FY 2017. Among other provisions, the order imposed a 120-day halt to the refugee resettlement program (for the purpose of reviewing and revising the vetting process), and a 90-day ban on the issuance of any visas or refugee resettlement from seven Muslim-majority countries. The EO indefinitely suspended the admission of Syrians.\textsuperscript{5}

Efforts to implement the EO did not run smoothly. Reports surfaced that green card holders from these banned countries who had traveled overseas were refused entry back into the United States. The day after Trump signed the order, a DHS spokesperson told Reuters that the ban would bar green card holders (Greenwood 2017). This caused serious disruptions at international airports as even lawful permanent residents who sought to return home from overseas travel were forbidden from boarding planes bound to the United States. Potential recipients of special immigrant visas (e.g., individuals who served as interpreters for US troops in Iraq) were initially forbidden admission. Some military officials expressed concern about the alienating effect that this decision could have on allies and supporters in the region (Gibbons-Neff 2017).

The following Monday, Acting Attorney General Sally Yates released a memo to Justice Department attorneys ordering them not to defend the executive order in court. In the memo, she noted that she was responsible for ensuring that “the position of the Department of Justice is not only legally defensible, but is informed by our best view of what the law is after consideration of all the facts,” and to ensure “that the positions we take in court remain consistent with this institution’s solemn obligation to always seek justice and stand for what is right” (Yates 2017). She deemed that some of the provisions in the EO could not withstand such scrutiny and thus should not be defended (ibid.). Her refusal to enforce the refugee ban led to her dismissal several hours later (Lawter 2017).

More than 50 lawsuits aimed at Trump’s executive order were filed by religious groups, state attorney generals, and other organizations in the days following its release (Wilson 2017). On February 2, Judge James Robart, a federal district court judge in Seattle, issued a temporary restraining order (TRO) against several sections of the EO, including the 120-day admissions pause and the 90-day, seven country ban. Less than a week later the 9th


Circuit Court of Appeals upheld the TRO,\(^6\) thus leaving the EO in legal limbo. Rather than pursuing the legal case through the courts, the Trump administration decided to rescind and replace the initial order with a new one. The revised order was issued on March 6 and, while it maintained the general thrust of the original EO, it contained some changes that the administration hoped would pass judicial review. These included the elimination of any resettlement preference for religious minorities, the removal of Iraq from the banned countries list, and the specifying of individuals that the EO did not affect (e.g., foreign nationals with valid visas and dual citizens).\(^7\) On March 15, District Court Judge Derrick Watson issued a TRO in response to a lawsuit filed by the state of Hawaii, which prevented the travel ban from taking effect. Later that day a Maryland judge issued a nationwide preliminary injunction on part of the EO (McGraw 2017).

Given the president’s expansive executive authority to implement immigration policy, it would be surprising if President Trump does not continue to push a restrictionist agenda throughout the rest of his term, and to seek ways to reduce refugee resettlement further. What is perhaps more surprising is the extent to which efforts to enact substantive legislative changes to migration policy in recent years have failed, given the increasingly tumultuous nature of the issue. With respect to humanitarian- based migration policy, for example, the provisions laid out in the Refugee Act of 1980 have remained generally intact for more than three decades. This is not an altogether positive assessment given that improvements could have been made to the program that would have improved its efficiency and effectiveness (Scribner and Brown 2015). Nevertheless, a substantial amount of damage could also have been done if such legislation had significantly altered the United States’ longstanding tradition to resettle refugees.

Why has the program managed to avoid any significant — and long lasting — changes? In general, polarization along ideological lines has made it increasingly difficult to find any common ground to address some of the fundamental problems facing the immigration system (Dimock et al. 2014, 64-65). This polarization has been apparent in response to refugee resettlement as well, and has led to gridlock and the unwillingness among party leadership to raise broader migration-related legislation that could fracture their caucus during an election season (Magner 2016, 186-87). In addition, the tradition of welcome among many Americans remains strong, even in the face of the parallel fear and disdain for “the other,” which also has long and deep roots in American life.

This is not the first time that resettlement has stoked concerns among policymakers and the US public. From the mid-1940s, when a more formal refugee resettlement system began to take shape in the United States, through the Cold War, debates about the resettlement system surfaced. What risks did such a system pose to national security? Who should be resettled and what should be the standards used to determine their worthiness for resettlement? Finally, what legal authorities should be relied upon (e.g., executive parole power or legislation)?


\(^7\) Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13780, 82 Fed. Reg. 13209 (March 6, 2017).
During the period from about 1945-1989, Cold War politics played an important role in the growth of the resettlement system. It strongly influenced the way in which policymakers engaged refugees and marked who was worthy and who was not for resettlement. Its end marked an important transition in international politics and required a rethinking of how refugee resettlement fit within America’s approach to international relations and humanitarian engagement with the world. Understanding the growth of the resettlement program during the Cold War, its impact on the program, and the conceptual gap that emerged following its end will help to make sense of the contemporary nativist reaction to refugee admissions. In short, the end of the Cold War left an opening for the emergence of a Clash of Civilizations framework.

The Refugee Resettlement System in the United States

The United States refugee resettlement program has its origins in the response to the massive number of displaced persons created by World War II. Early efforts by the United States to resettle displaced persons were stymied by a few factors. First, the National Origins Act of 1924 complicated matters because refugee admissions fell under the purview of the quota system; at the time, there was no legal distinction made between a “refugee” and an “immigrant.” Any effort to resettle displaced persons that went beyond the quota for a specific country had to rely on special exemptions by the president or emergency legislation that would specifically provide for increased admissions (Scribner 2013). Eventually, Congress passed a series of laws, beginning with the Displaced Persons Act of 1948, that admitted substantial numbers of refugees into the United States. Regardless, there remained a significant resistance to these types of emergency legislation.

Such resistance depended on at least two primary factors. First, its opponents worried that any form of emergency legislation would undermine the practical effect of the quota system. This is evident in the fact that advocacy groups that were closely involved in advocating for the passage of such legislation were intentional in their effort to avoid the impression that debate over such legislation was in fact a debate over the quota system (National Catholic Resettlement Council 1948). Second, the growing animosity between the United States and the Soviet Union and the onset of the Cold War led to concerns that the admission of displaced persons would inevitably lead to the admission of communists who would seek to undermine America from within.

As early as 1946, Senator Chapman Revercomb (R-WV) contended that refugees from Eastern Europe were ignorant of the American system of government and, as they had come from communist countries, likely shared that mind-set. He stated that “it would be a tragic blunder to bring into our midst those imbued with a communistic line of thought, when one of the most important tasks of this Government today is to combat and eradicate communism from this country” (New York Times 1946, 4). Such a view contrasted with President Truman’s. In a 1947 message to Congress, the president emphasized that displaced populations in Western Germany, Austria, and Italy “are not communists and are opposed

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8 On this point, critics of emergency legislation were not entirely in the wrong. The passage of emergency legislation in the early 1950s, paired with the expansive use of executive power to parole large groups of people into the country during the following decade, undermined the viability of the quota system, even if it did not change it in law.
to communism” (Truman 1948). For this reason, he stated, America ought to open her
doors to them so that they would not be forced to return to their now communist countries
of origin (ibid.). Similar arguments for and against resettlement resurfaced in the following
decades, first with the onset of the Hungarian refugee crisis and then again with respect to
the influx of Cubans following the rise to power of Fidel Castro (Markowitz 1973, 51-3;

Given the resistance in Congress to emergency legislation that would resettle escapees from
behind the Iron Curtain, it became almost commonplace for the executive branch to use
its expansive parole power to provide haven to individuals escaping communist countries.
One of the reasons for exercising such power was to demonstrate a point: People living
in communist countries didn’t want to be there and by escaping to America would reveal
the undesirable character of communist countries and the superiority of the West. People
would vote against the Soviet Union with their feet, if not by ballot. It was also hoped that
these efforts would help demonstrate the depravity of the communist bloc countries and
would help reinforce in the public’s mind a national anticommmunist sentiment that would
provide essential support for the continuation of expensive Cold War programs (Harvard

Although congressional leadership was long concerned with the ad hoc approach taken by
the executive branch to admit refugees, for several decades Congress’s concerns remained
little more than that. When Congress successfully legislated on refugee matters, it generally
passed legislation that was shaped by the Cold War culture. From the passage of the Refugee
Relief Act of 1953 to the Refugee Act of 1980, refugees were generally understood in the
context of the East/West conflict between the Soviet Union and the United States. The
Immigration and Nationality Act of 1965, for example, defined a refugee as a person who
“because of persecution or fear of persecution on account of race, religion, or political
opinion they have fled I) from any communist or communist dominated country, or II) from
within any country in the general vicinity of the Middle East.”

It was not until the Refugee Act of 1980 that the United States formally conformed to the
definition of a refugee espoused in the 1951 Convention Related to the Status of Refugees
and the 1967 Protocol Relating to the Status of Refugees. Furthermore, the 1980 Act
codified the legal duty of nonrefoulement, which prohibits the return of an individual to
a country from which their life or freedom would be threatened based on characteristics
that would qualify the person as a refugee. More broadly, the act “standardized the system
under which refugees were admitted, clarified the objectives of the program, authorized
assistance programs that would be used to achieve these objectives, and delineated the
roles and responsibilities of the various federal agencies involved in the process” (Brown,
106). Nevertheless, even after its passage, the Reagan administration applied asylum and
refugee policy in a way that relied on Cold War politics, particularly in relation to Central
Americans fleeing the region’s civil wars (Bon Tempo 2008, 189). Cold War politics
remained a central consideration in refugee resettlement.

10 Convention Relating to the Status of Refugees (Geneva, 28 July 1951) 198 U.N.T.S. 137, entered into
An important takeaway from the foregoing discussion is the extent to which the conceptual framework created by the Cold War helped to shape policies and actions related to refugee resettlement. Presidents from Eisenhower to Carter used their extensive power to parole for victims of communist oppression, so as to highlight the moral and political superiority of the United States. Until 1980, Congress relied on a definition of a refugee that was directly informed by the communist threat, a fact that had important implications for people who were seeking humanitarian relief. The logic of resettlement was subservient to the foreign policy objectives that were central to the Cold War — fighting communism and defeating the Soviet Union.

The end of the Cold War created a vacuum, as the conceptual framework that helped to define international relations for a half century fell apart. Several competing frameworks were developed by intellectuals and foreign policy experts to make sense of this new reality. Francis Fukuyama put forward his “end of history” theory, which asserted that the end of the Cold War had led us to “the end-point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government” (Fukuyama 1989, 4). Charles Krauthammer argued that the United States had entered a “unipolar moment” in which it was the unchallenged superpower. With its newly established preeminence, Krauthammer argued, the United States was in a position to lay down the rules of the world order and should be willing to enforce them (Krauthammer 1990). Samuel Huntington, for his part, proposed that the fall of the Soviet Union had brought to the forefront the clash of civilizations: no longer was ideology the key to understanding the roots of international conflict, but culture.

The purpose here is not to determine which conceptual framework most accurately describes reality, but which most resonates with those in power and the constituents that function as their base of support. There is reason to believe that the Huntington thesis is the most influential paradigm at work among members of the Trump administration; this is a point that we will touch on more extensively below. So, what does the “clash of civilizations” entail?

In 1996, Samuel Huntington authored a book, the central ideas of which were published in an earlier article in Foreign Affairs, which promoted the view that the contemporary world is experiencing a series of fundamental conflicts that divide along cultural fault lines (Huntington 1993; Huntington 1996). With the ideological conflict of the Cold War in the past, a conflict that helped to keep in check cultural divisions from boiling over has moved to the forefront. While nation states remain important, they are increasingly eclipsed by power groupings made up of existing states that center around shared core cultural values. In broader terms, these groupings represent discrete civilizations, which include Western, Confucian (China), Islamic, Orthodox, and Latin American civilization (Huntington 1993, 5). Such entities remain ready to defend their interests in the face of challenges from other culturally defined groupings (Wang 1997, 69-71).

In a post-Cold War world, the West finds itself in a weaker position than in earlier decades, as other countries have become more willing to play an adversarial role in response to the perceived, long-standing cultural, political, and economic dominance by the West of other civilizations. With the decline of colonialism, the West has become more isolated and other areas of the world have become increasingly modernized — with respect to their
communications technology, militarily, economically, and in related matters — and thus
pose a greater threat or at least an evolving independence. It is what Huntington referred
to as the “the West vs. the rest” (Huntington 1996, 187-206). Central to this division is
the revival of non-Western religions, which are “the most powerful manifestation of anti-
Westernism in non-Western society” (Huntington 1996, 101). Not surprisingly, Huntington
posited that one key area where conflict would likely occur was between the Western
world and the Islamic world, because of “Western arrogance” and “Islamic intolerance”
(Huntington 1997, 185).

Although there are certainly periods and places where Christians and Muslims coexisted
peacefully with one another, conflict between the Western and Islamic worlds is not a new
one. Tensions between these competing religions extends back centuries, almost to the
origination of Islam and its early encounters with Christendom. An influential historian of
Islam, Bernard Lewis, has pointed to the fact that the current tensions between the Islamic
and Western worlds are not novel:

[T]he struggle between these rival systems has now lasted for some fourteen
centuries. It began with the advent of Islam in the seventh century, and has
continued virtually to the present day. It has consisted of a long series of attacks
and counterattacks, jihads and crusades, conquests and reconquests.

(Lewis 1990, 49)

Huntington holds that, while there has been a makeshift peace that lasted through much of
the Cold War, in its aftermath the long-standing conflict between the Western and Islamic
World are again coming to the forefront.11

How Did We Get Here?
The Republican Party of the immediate post-Cold War period under Ronald Reagan
and George H.W. Bush has a very different feel than its present-day iteration under the
leadership of Donald Trump. In a recent article for The Atlantic, Peter Beinart wrestles
with this transition and points to a fundamental split that has long been present in the
Republican Party, but has only recently broken into the open. Two strains of conservative
thought within the Republican Party formed a functioning coalition during the Cold War.
The first was comprised of a civilizational form of conservatism, embodied in the likes
of Patrick Buchanan and Jerry Falwell, and an ideological conservatism expressed in the
thought of someone like Senator John McCain and political neoconservatives. The former
espoused a more culturally oriented perspective rooted in an Anglo-Saxon and Christian
tradition, which stood up against an atheistic Soviet Union. The latter was more inclined
to an Enlightenment-oriented liberalism that espoused liberty in the face of a totalitarian
enemy (Beinart 2016).

The end of the Cold War eliminated the shared enemy that had originally joined these
different approaches, although the eventual divorce remained a generally cordial separation

11 A similar conflict was likely emergent between Western civilization and Confucian-based societies, as
the latter became increasingly influential in their respective region. More specifically, China would play an
increasingly adversarial role to the interests of the United States.
for several years. In the aftermath of 9/11, both parties backed George W. Bush’s War on Terror, if for different reasons. With the end of the Bush presidency and the ascendance of Obama, the civilizational conservatives became more outspoken in their reaction to Islam as a wicked religion and not one that aimed at living in peaceful coexistence with the West. Simultaneously, many of these individuals began to warm to Russia and Vladimir Putin, an unthinkable betrayal to the ideological conservatives who viewed Russia as an authoritarian and an adversary (ibid.).

The rationale for the civilizational conservative’s current support for Russia is their view of “Putin’s Russia as Christianity’s front line against the new civilizational enemy: Islam” (ibid.). From this perspective, Putin is “popular because he resists the liberal, cosmopolitan values that Muslims supposedly exploit to undermine the West” (ibid.). Donald Trump successfully tapped into these sentiments in several ways. He stoked the popular animosity toward Islam that had been growing since 9/11, particularly — but not only — in Republican circles, and repeatedly emphasized the threat that Islam posed to American values. He lauded Putin’s leadership style and, during the second presidential debate, said that Assad and his Russian backers “were killing ISIS” and that it would be great “if we got along with Russia so that we could fight ISIS together” (S.N. 2016). Many of his appointees and top-level advisors have reinforced one or more aspects of this general perspective.

One of the key advisors to Trump is Stephen Bannon, the former executive chairman at Breitbart News. In his daily radio show, Bannon often used rhetoric that reinforced the Clash of Civilizations paradigm, particularly as it pertained to the incompatibility between the Western and Islamic worlds. During one interview, for example, he highlighted and reinforced the growing frustration in some quarters with the federal government’s admission of Muslim refugees into the United States. He asserted that the West is in the middle of an expanding war against Islam that will take place on a number fronts, including — almost certainly — a new and significant war in the Middle East. This threat, he said, is compounded by the fact that there is a “rot” at the center of the Judeo-Christian West which will, presumably make the battle more difficult to win (Bannon 2015). Several months later, when discussing the European migration crisis, he referred to it as a “Muslim invasion” that is carrying out a process of civilizational jihad, to which the ruling elites are oblivious or even openly courting (Bannon 2016c).

The emphasis on an existing Judeo-Christian culture and its importance for Western life is, for Bannon, a point of emphasis. In a 2014 speech at a conference held at the Vatican, which was sponsored by the Human Dignity Institute, he highlighted what he understood to be an ongoing process of secularization in the West, and the corrosive role that popular

12 Trump’s admiration of Putin and his expressed desire for warmer relations with Russia is a digression from the conceptual framework promoted by Huntington in his CoC paradigm. For Huntington, Russia represents an Orthodox culture that has for centuries lived in tension with Western Christianity.  
13 Bannon has also emphasized the burgeoning conflict between the United States and China. Although it is not directly pertinent here, such rhetoric reinforces the clash of civilizations paradigm. Huntington stressed that a China-US conflict was a very real threat in the coming decades. At one point, for example, Bannon stated that there is “no doubt” that the United States and China will go to war in the next five to 10 years. Drawing the Islamic and Chinese-threat together, he noted in another show that “you have an expansionist Islam and you have an expansionist China. Right? They are motivated. They’re arrogant. They’re on the march. And they think the Judeo-Christian west is on the retreat” (Bannon 2016a; Bannon 2016b).
culture has played in this regard. When this trend is paired with the reality that we are in an “outright war against Jihadist Islamic fascism,” and are at the “beginning stages of a global conflict,” the West is seen to be in a disadvantaged position; it has lost one of the central roots that gave rise to its greatness and ability to effectively fight back: its Christian tradition (Feder 2014).

The encroaching Islamic threat is also at the core of the worldview promoted by Sebastian Gorka, a deputy assistant to the president and former national security editor at Breitbart News. In his book *Defeating Jihad*, Gorka (2016) argues that global jihadism is a new form of totalitarianism akin to communism or fascism, but perhaps even more dangerous. It is global, and thus not bound to a state or clearly defined geographic region, and absolutist in its approach. In service to Allah, global jihadism has permission to engage in the mass murder of infidels or their enslavement. The ultimate purpose, Gorka argues, is to bring the world under its complete control. Thus, confrontation with global jihadists is inevitable. The book provides Gorka’s preliminary plan to develop a strategy how the United States should proceed. His commentary also presents an appeal to a Christian worldview that will be required to engage effectively the battle ahead.

A third advisor to the president, Michael Anton, was named in early 2017 as a staff member on the National Security Council. In September 2016, Anton published a pseudonymous endorsement of Trump in an article titled “The Flight 93 Election,” a reference to one of the hijacked planes on 9/11 in which passengers fought back in effort to retake the plane (Warren 2017). Anton used Flight 93 to illustrate the stakes that the American people faced in the election — fight back and vote against Hillary Clinton or die. A vote for Trump, he argued, might lead to the same result, but at least there would be a chance that we might prevail. In short, a “Hillary Clinton presidency is Russian Roulette with a semi-auto. With Trump, at least you can spin the cylinder and take your chances” (Publius Decius Mus 2016a).

In an article published six months earlier under the same pseudonym, Anton attempted to take a first step at clarifying and systematizing some of the positions outlined by Trump in his campaign. While the essay is wide ranging, two key points deserve attention — the first on Islam and the second on mass migration. With respect to Islam, *Publius* remarks that “Islam and the modern West are incompatible,” and that “when we welcome them en masse into our country they change us — and not for the better” (Publius Decius Mus 2016b). Furthermore, “only an insane society . . . would have increased Muslim immigration after the September 11th attacks. Yet that is exactly what the United States did” (ibid.).

By this view, the threat in the civilizational conflict scenario is not only an external one, as disparate civilization orders come into contact, and at times conflict, with each other.

14 The Human Dignity Institute is think tank established in 2008 by Benjamin Harnwell for the express purpose of upholding an authentic understanding of human dignity rooted in the Christian tradition and against growing secular intolerance toward Christians. See http://www.dignitatishumanae.com/.
15 Other examples could be provided of Trump administration officials who espouse a Manichean vision of the conflict between the Islamic world and the Western one. Retired General Michael Flynn, the short-lived national security advisor, for example, expressed at different times his conviction that Islamic militancy is an existential threat to the West and that sharia law is spreading across the United States. (Rosenberg and Haberman 2016) The foregoing commentary provides a very preliminary investigation into the way that the CoC paradigm has influenced the development of migration-related policies in the Trump administration.
Inherent to the CoC paradigm is the concern that the mass migration of people from one civilization to another can bring with it threats to the common order and undermine the cultural underpinnings of a society. The migration of Muslims to the United States, for example, could result in domestic conflicts that emerge along cultural fault lines given the different hierarchies of values that each culture presupposes. Compounding the problem, per this perspective, are the national security concerns that would come along with such an influx.

It is worth noting here as well, however briefly, the application of Huntington’s thesis to broader issues of migration. In addition to the threat that Islam poses, substantial migration from Latin America to the United States could bring about a notable clash between the underlying cultural convictions of these disparate civilizations. Language differences that accrue through large migration flows could lead to a bifurcated society that undercuts any sort of coherent national identity. Huntington’s concerns do not apply simply to the Western/Islamic divide but are more comprehensive. This fact is most clearly spelled out in one of his latter books, *Who Are We?* (Huntington 2004a).

This book is in important respects an application of some of his ideas expressed in *The Clash of Civilizations and the Remaking of a World Order* to an American context. Huntington tries to unpack key characteristics of American life, including the English language, its Anglo-Protestant Christianity, its embrace of an English concept of the rule of law, and its emphasis on the individual (Huntington, 2004a, xv-xvii). In the closing decades of the twentieth century, he argues, many of these foundational elements of American life have come under assault, and multiculturalism has been exalted. The question of whether the United States will remain a country with a single national language, and a core Anglo-Protestant culture is very much in doubt. As Huntington (1997, 204) noted, “The issue is not whether Europe will be Islamicized or the United States Hispanicized. It is whether Europe and America will become cleft societies encompassing two distinct and largely separate communities from two different civilizations,” which turns on how effective host countries are at integrating immigrant populations.

The perceived failure to integrate the large numbers of migrants who have come to the United States from all over the world in the past half century has endangered the shared heritage that had helped make America great in times past. The willingness to allow admission to thousands of Muslims who espouse a cultural and religious system that is in contradiction to a traditional American culture puts Americans at risk. These preoccupations are also evident in thinking of the millions of voters who supported Trump’s presidential campaign and are at least, in part, what contributed to his grassroots support. Such support is not rooted merely in an emotional expression of fear and loathing of migrants and Muslims, but in a series of “pre-political” commitments — however flawed they may be under further examination — that commit people to a certain way of looking at the world, and thus bias them to certain political positions.

**The Restrictionist Impulse in American Life**

Making up 26 percent of the overall electorate and having turned 82 percent in favor of Donald Trump, the white evangelical vote was a crucial factor in the general election. One
can extrapolate a kind of trinity of factors that fed into evangelical support for Trump, and which he took advantage of during his campaign: the fear of Islam and the assertion that Muslims pose a national security threat, the cultural insecurities that have emerged among many white Christian Republicans in particular, and economic stagnation. Each of these factors are worth examining, particularly considering the way that each of them contributed to the development of an electorate that was broad enough to help Donald Trump win the presidency.

As of 2015, Muslims made up about one percent of the US population (3.3 million), which is on track to double by 2050, at which point in time Islam is expected to surpass Judaism as the second largest religious group in the United States (Lipka 2015). Over half of this growth is attributable to migration (Mohamed 2016). Muslims also comprise an increasing percentage of immigrants granted green cards, from about 5 percent in 1995 to 10 percent in 2012 (Pew Research 2013). Though still a relatively small population living in the United States, the Muslim community has received increased scrutiny by a range of organizations vying to determine the American publics’ attitude toward them.

A February 2017 report released by Pew Forum provided a thermometer rating for a range of religious groups, which measured the warmth or coolness that Americans felt in general toward specific religions. The higher the number, the warmer the feelings. As a mean rating, Muslims scored a 48, which was the coolest rating among all religions tested, falling shy even of atheism (Pew Research Center 2017). Broken down along demographic lines, those aged 18-29 expressed the greatest warmth toward Muslims, with a mean rating of 58, while those aged 65 and older the coolest (44) (ibid.).

Of perhaps the greatest importance here is the support or opposition given by religious affiliation and partisanship. White evangelicals rated Islam at a chilly 37 degrees, and even members of the white mainline were relatively cool toward Muslims (45) (ibid.). Republicans also expressed a coolness toward Islam, providing a mean rating of 39, up from 33 just three years ago (ibid.). This contrasted with the opinion held by Democrats whose mean score was 56 (ibid.). Given the significant support provided to Donald Trump by white evangelicals there is reason to believe that his harsh rhetoric pertaining to Muslim refugees and immigrants might have benefited him. His support among that population points to the fact that he struck a chord with these populations, on this issue and likely a host of others. Given his efforts to appeal to evangelical Christians, it is perhaps not surprising that he promised to protect Christian minorities affected by the crisis in Syria (Burke 2017).

Similar partisan divides are evident with respect to the perception of Islam: A joint study by Brookings and the Public Religion Research Institute found that while 79 percent of Republicans, and 83 percent of Trump supporters, believe that the basic value system of Islam is at odds with American values, only 42 percent of Democrats thought the same way (Jones et al. 2016, 44-48). Perhaps not surprisingly, the same poll reports that 66 percent of Republicans (78% of Trump supporters) oppose admitting Syrian refugees into the United States (ibid.). Support for a ban of this sort correlates with concerns related to terrorism; 57 percent of Americans who report being very worried about terrorism favor a ban (ibid.). Finally, 64 percent of Republicans reported supporting a temporary ban on Muslim immigration across the board (ibid.). Given the heightened sense among
Republicans that Muslims represent both a national security threat via terrorism and a longer term cultural threat due to the competing cultural values that they uphold, it is not surprising that Trump’s nativist rhetoric found substantial support.

As important as national security, the perceived cultural threat that immigrants pose was a second factor in Trump’s appeal; it is a threat that extends to other types of migrant populations. Nearly six in 10 Trump supporters, and 51 percent of Republicans overall, reported the opinion that immigrants were changing American society “a lot,” and of those who shared this belief, 74 percent say it has been for the worse (ibid., 50). Nearly six in 10 white Americans express discomfort when they are around immigrants who do not speak English (ibid., 13). Many white evangelicals and conservative Republicans have a precarious sense of place in American culture. Alongside the perceived onslaught of secularism and changing morals, the influx of immigrants is yet another blow to their long-standing preeminence in defining American cultural standards.

In short, the percentage of white evangelicals who believe that America is no longer a Christian nation jumped from 48 percent in 2012 to 59 percent in 2016 (ibid.). The perceived loss of Christianity as a defining marker for US identity among white Christians — who had taken it for granted — could be a singularly disruptive force on the American political scene. Perhaps most telling is the percentage of Republican voters (68%) who believe that things have changed for the worse since the 1950s, compared to the percentage of Democrats who are convinced that things have changed for the better (66%) (ibid.). Efforts to reclaim America’s glorious past, while perhaps expressive of nostalgia, is a powerful, politically exploitable reservoir. When such decline is viewed not merely as the product of an expansive secularism, but also a corrosive foreign influence brought about by an influx of migrants who were formed in a different cultural setting, the likelihood that nativism will emerge increases substantially.16 Robert Jones has referred to this process of dissolution as signifying the end of white Christian America (Jones 2016).

As a part of this worldview, not only do Muslims pose an external national security threat vis-à-vis terrorism, but an internal one insofar as they threaten the cultural and political foundations that have given the United States its distinctive character. This is a story as old as America. Migrants have often been deemed threats to the existing political and social system. In the late nineteenth century and early decades of the twentieth century, the fear was that a theocracy would be created as Catholics entered in large numbers and fomented revolution. By the mid-twentieth century, restrictionist sentiment hinged partially on anti-Semitism, and the overlapping concern that many Jews admitted from Europe might harbor communist sympathies. In recent decades, the threat of Islamic-inspired terrorism has become an overriding concern for many Americans.

Beyond the cultural and political threat, the economic threat that migrants pose also plays an important role. Tucked in between terrorism and immigration as the first and third priorities for white evangelicals when casting a vote for president in 2016 was the economy. The Great Recession, which began in December 2007, took a significant toll on communities across the nation. The average income for evangelical Christians today remains 1.6 percent

16 Per the Brookings study, 83 percent of Trump supporters (and 74% of Republican voters) asserted that America needed to be protected against foreign influences that were doing America harm (ibid.).
lower than in 2007, and 2.4 percent lower than the high reached in the 1990s. While white evangelicals still fare better than their non-white evangelical counterparts, many have failed to return to their previous standard of living and feel a sense of having been left behind. Donald Trump’s promise to “Make America Great Again” played into these insecurities by promising that he would take responsibility for eliminating them (Reynaud 2017).

Perhaps not surprisingly, a large majority of Trump supporters (80%) thought of immigrants as burdens on the economy because they take Americans’ jobs, healthcare, and housing (Jones et al. 2016, 46-47). Taken together, concerns related to national security, cultural dissolution, and economic insecurity contribute to a sensibility that can very easily become enmeshed in a narrative that is nativist and exclusionary. Countering this worldview will require proponents of migration and refugee resettlement to engage these issues on a variety of levels, through direct advocacy with elected officials and engagement with everyday Americans who are concerned about the danger that migrants pose to America.

**Restoring Support for Refugee Resettlement**

Critical of the Trump administration — as well as some supporters — who are supportive of humanitarian migration into the United States are understandably concerned with some of the policies he tried to implement during his early weeks in office. To take one example, his proposed reduction in the number of refugees to 50,000 during FY 2017 will likely remain the standard for the foreseeable future. This is a reduction from an approximately 85,000 resettled in FY 2016 and down further from the proposed 110,000 that then President Obama hoped to resettle in FY 2017. Taking FY 2016 as the marker, over the course of the next four years, this reduction would total approximately 140,000 people who might otherwise be resettled but are stuck in refugee camps and urban refugee situations around the world. Compare this to the fact that during calendar year 2016, the rest of the world resettled a total of about 41,000 refugees (UNHCR 2017).

Moreover, refugee resettlement complements other permanent solutions for refugees and can be used to secure greater integration opportunities for refugees in host communities abroad. For these reasons, resettlement reductions have consequences that extend well beyond the lives of those eligible for resettlement.

The difference between the number proposed by Obama for FY16 and the number Trump has proposed for FY17 is roughly equivalent to the number of refugees resettled in every other country. And, these announced reductions come despite the record 65 million forcibly displaced people in the world, a number that includes more than 21 million refugees (ibid.). This fact makes any further reduction in the number of refugees resettled all the more significant, and points to the need to expand the number resettled so as to better respond to a need that is difficult to ignore. How do we do that?

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17 To be fair, with the onset of the Syrian refugee crisis, many countries, including some notable examples in Europe, have been far more open to the admission of asylum seekers than has been the United States. As much as the United States might like to applaud itself for the number of refugees that it has traditionally admitted compared to other countries, its reticence to provide an equally generous asylum policy is worth noting. Competing approaches to the admission of asylum seekers versus the admission of refugees through the more formalized resettlement system should be examined more closely.
There is no doubt that effective advocacy is an important first step in this process, if for no other reason than to resist the further legislative expansion of restrictionist sentiment. Failure to advocate in favor of one’s own community or values leaves the door open for others to advocate on your behalf, and not always in your favor. First and foremost, it is important to advocate for generous refugee admissions program that provides funding adequate to meet the needs involved in the resettlement process. This also includes maintaining suitable foreign aid funding; any significant cuts to organizations like the United Nations High Commissioner for Refugees by the United States risks seriously disrupting the ability of UNHCR to screen potential refugees and to provide support and care for individuals who are stuck in refugee-like situations. Richard Gowan, an expert at the European Council on Foreign Relations, noted that in 2016, the United States contributed $1.5 billion of the $4 billion UNHCR budget. Cutting this contribution would “leave a gaping hole that other big donors would struggle to fill” (Lynch 2017). It will also be important to help mobilize minority communities and urge them to be more politically active so that they can help to shape political decision making on the state and national level (Young 2017). Finally, it is crucial that advocates urge administrators of the refugee program to remain faithful to its original, nondiscriminatory purpose of protecting the persecuted, including victims of religious persecution, at a time when large numbers of Americans mistakenly view Muslims as a threat to their culture and security.

In addition to direct advocacy with lawmakers on Capitol Hill and the administration, it is important that proponents of refugee resettlement engage in grassroots organizing and educational efforts in local communities. This could include efforts to publicize the tangible benefits that refugees and migrants make to their local communities, and highlight the fiscal consequences of their exclusion. Promoting integration on the local level will also prove helpful to counteract criticisms that migrant communities self-segregate and demonstrate an indifference or aversion to becoming active participants in their communities. This will require that religious institutions, immigration advocates, nonprofits and other organizations better understand what contributes to effective integration and how local organizations are succeeding, or failing, in this regard (Kerwin and Barron 2017). Getting a better grasp on these various facets and disseminating them publicly via various media and other outlets will be of assistance in the advocacy efforts and, hopefully, help to alleviate some of the tensions that emerge on the local level between native and refugee populations.

While the role and responsibility of advocates to respond to attacks on the resettlement system is crucial, policymakers have the primary responsibility to approach this issue in a clearheaded and responsible manner. In particular, they ought to refrain from exploiting existing cultural fears of religious or other minority groups who are admitted into the United States via the refugee resettlement system. Given the positions of power that elected officials occupy, it would be particularly unfortunate if they were to mischaracterize the intentions and aspirations of refugee groups for political ends. Instead, they should recognize the generally bipartisan support that the refugee resettlement system has held and, in doing so, work more closely together to ensure that the system is further strengthened and supported, while ensuring that national security concerns are addressed.

It is also important to recall that culture — broadly understood — will play a preeminent role in the promotion and establishment of policy, whether in the field of migration, poverty,
family, or some other arenas. Setting legislative agendas, promoting communication strategies, developing talking points, and coordinating advocacy efforts are important aspects of the policymaking process, but more crucial still is the importance of shaping a culture so that it is conducive to — in this instance — a more generous approach to refugees and migrants.

The centrality of culture in the legislative process might very well require that institutions that are interested in shaping legislation to the benefit of vulnerable migrant populations rethink their strategies. This could include less emphasis on advocacy efforts aimed at Congress and the administration, and more emphasis on engaging people that inhabit rural America, small towns, and big cities across the country. Cultural and personal formation would thus take center stage, while lobbying efforts and grassroots mobilization in favor of a specific legislative agenda would take a secondary — albeit important — place in the process. An effort to rethink the fundamental narratives that guide our decision making and thus our self-understanding as a nation, should become the priority in the public engagement of civic associations, faith communities, and other organizations interested in the public square. There are a variety of academically oriented resources and publications that have focused on these types of issues, but it is important that more work be done to engage the wider community on fundamental questions of national identity.

How do people understand the world, the nation, and their place in them? What kinds of paradigms and conceptual frameworks are various interest groups and individuals using to make sense of their lives and the situation in which they find themselves? Who is promoting these conceptual frameworks and for what end? Are there alternative ways at looking at the world, what are they, and how can they be more effectively promoted in the public square? The cultural underpinnings — the pre-political conditions — will continue to shape the context in which specific legislative proposals and administrative actions will be deemed viable, elections will be won and lost, and policies will be shaped that affect the lives of millions, including refugees.

REFERENCES


18 It would be a mistake to conclude that lobbying and cultural formation are mutually exclusive, but the latter should be, in my view, prioritized. If effective, efforts that are aimed at achieving migrant-friendly policies will be much easier to achieve.
You are Not Welcome Here Anymore


You are Not Welcome Here Anymore


Safe and Voluntary Refugee Repatriation: From Principle to Practice

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Executive Summary

The article discusses the principles of voluntariness, safety, and dignity in the context of refugee repatriation. It begins by setting out the applicable legal framework, and discusses how that framework has been elaborated upon and refined since 1951. The article then discusses how the principles of voluntariness, safety, and dignity have, in practice, been applied (or, in a few unfortunate cases, ignored). After noting that we are now living in an era of protracted refugee emergencies, the article concludes with a number of recommendations regarding alternatives to repatriation and the conditions under which repatriation can take place without offense to the principles of voluntariness, safety, and dignity.

I. Introduction

In April 2016, the Kenyan government announced its intention to close Dadaab, the largest refugee camp complex in the world. Dadaab currently hosts around 400,000 refugees, the majority of them Somalis. According to Interior Cabinet Secretary Joseph Nkaissery, “the decision we have made to close the camps is explicit and final. . . . The refugees must be repatriated” (Psirmoi 2016).

The plan to close Dadaab and repatriate the Somali refugees has triggered widespread condemnation, with refugees and their advocates insisting that any returns must be both safe and voluntary. A Tripartite Agreement between Kenya, Somalia, and UNHCR was signed in November 2013 to facilitate such movements, but by May 2016 only 5,200 refugees had repatriated under its auspices (Mutamo 2016).

It is clear that a large number of Dadaab’s refugees do not want to return to Somalia, and will only do so under pressure. The current Kenyan crisis thus perfectly illustrates the difficult policy issues that surround refugee repatriation. Under what conditions is it legal and ethical to promote refugee returns? Does voluntariness matter and, if so, why? Should safety take precedence over voluntariness?
This article examines these questions, setting out a brief history of refugee repatriation and underlining the reasons why the concept of “voluntary repatriation in safety and with dignity” should continue to be regarded as the foundation of all refugee returns. The article concludes with a set of recommendations involving not only how to strengthen this foundation, but also regarding possible alternatives to repatriation.

II. Legal and Normative Provisions

The cornerstone of refugee protection is the norm of non-refoulement. Codified in Article 33 of the 1951 UN Refugee Convention, it requires that “no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened.”

That principle was further reinforced by Article 5 of the 1969 Organization of African Unity (OAU) Refugee Convention, which stipulates that “the essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.” The OAU Convention also introduces the notion of “safety” to the legal and normative framework of refugee repatriation, stating that “the country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.”

These principles were further elaborated in later years. UNHCR’s Executive Committee, for instance, issued a Conclusion in 1985 that confirmed the need for voluntary repatriation “to be carried out under conditions of absolute safety” (UNHCR 1980). A 1992 UNHCR Discussion Note on Protection Aspects of Voluntary Repatriation added another concept to the discourse by insisting that the return of refugees to their country of origin “must be carried out under conditions of safety and dignity” (UNHCR 1992).

The contribution that the principle of voluntary repatriation makes to refugee protection is obvious. Yet it is equally clear that the limitations such a principle places on repatriation is frequently resented by states. Host countries are often impatient to see uninvited refugees leave. Countries of origin are sometimes impatient to see them return and signal the end of conflict. Donor states are eager to bring an end to the long-term refugee assistance programs that they fund.

UNHCR frequently plays an ambiguous role in such negotiations, seeking to uphold internationally recognized legal and ethical principles of which it is the custodian, while simultaneously meeting the concerns of these stakeholders. In the worst cases, the United Nations’ refugee agency has capitulated to such pressures and actively engaged in repatriation operations that are far from safe or voluntary.

This is in part because the question of what voluntariness, safety, and dignity actually mean is open to different interpretations. In 1996, for example, UNHCR issued its Voluntary Repatriation Handbook, which defined voluntariness as “the absence of any physical,

psychological or material pressure . . . which push the refugee to repatriate” (UNHCR 1996a).

With respect to safety and dignity, the handbook stated that such conditions are fulfilled when repatriating refugees “are not manhandled,” when they “can return unconditionally,” “at their own pace,” “are not arbitrarily separated from family members” and are “treated with respect and full acceptance by their national authorities” (UNHCR 1996b).

Despite these very clear provisions, there was considerable debate within UNHCR at this time about the extent to which voluntariness should really be considered a necessary rather than a desirable condition for repatriation to take place.

One paper, originally intended to form a chapter of the repatriation handbook, argued that voluntary return was “not a non-derogable principle. Influential though it may be, it is not codified in any manner which requires its absolute respect by states. . . .The initiative for pursuing repatriation does not necessarily or exclusively belong to the refugee.”

Such reasoning was condemned by some staff members, who insisted that voluntariness was an “essential prerequisite for safe and viable return” and whose very purpose was to “stand in the way of impatient political action for mass returns lacking basic safeguards.” As the next section of this article explains, UNHCR was soon to capitulate to such demands for impatient action, with serious consequences for the organization’s reputation.

III. The Practice of Voluntary Repatriation

The notion of voluntary repatriation emerged at a particular place and time. In the immediate aftermath of World War II, the Allies had forcibly returned to Stalinist Russia Soviet citizens who had fought alongside the Germans; many such citizens were shot or sentenced to forced labor and internal exile.

When the 1951 Refugee Convention was drafted and UNHCR established in 1950, the principles of non-refoulement and voluntary repatriation were deliberately intended to prevent a repetition of these events and to block the repatriation of refugees to Communist states. Large-scale repatriation movements did not occur until the 1960s and 1970s, when successful national liberation struggles in Africa allowed more than a million refugees to return to their homes.

In such cases, refugee returns were prompted by some very evident and fundamental changes in countries of origin. UNHCR’s engagement in these repatriations was primarily a logistical one. The safety and voluntariness of such returns were not in question.

That situation began to change in the 1980s, a period when refugee numbers in the developing world grew rapidly. Many refugee-hosting states, struggling to cope with the effects of economic mismanagement and imposed structural adjustment programs, expressed mounting concern about the impact of the increasingly large-scale and long-term refugee populations living on their territory.

Donor states were equally frustrated by the apparent need to continue to fund assistance programs that persisted for years on end, but which did nothing to bring about lasting solutions. States were increasingly eager to promote repatriation, rather than just to facilitate it, with UNHCR playing a central role in that process.

Executive Committee Conclusion 29 of 1983, for example, called on states to facilitate the work of UNHCR “in creating conditions favourable to and promoting voluntary repatriation, which whenever appropriate and feasible is the most desirable solution for refugee problems” (UNHCR 1983).

In accordance with this principle, refugees came under mounting pressure to repatriate. In the 1970s and 1980s, a number of refugee populations — the Rohingya in Bangladesh, Ethiopians in Djibouti, and Cambodians in Thailand, for example — were all subjected to coerced repatriations which were at least tacitly condoned by UNHCR and the wider international community.

In the early 1990s, the end of Cold War proxy conflicts in Africa and Asia reinforced the belief that repatriation was the best — and often the only — way to bring refugee situations to an end. UN High Commissioner for Refugees Sadako Ogata declared that the 1990s would become known as “the decade of repatriation,” and more than 10 million refugees returned to countries such as Afghanistan, Cambodia, Mozambique, and Nicaragua during this period.

While these repatriations were largely voluntary in nature, UNHCR now assumed a much more proactive role in repatriation processes. This included:

- promoting repatriation to countries which the organization deemed to be ready for refugee returns;
- creating Tripartite Commissions with countries of origin and asylum in order to initiate and accelerate repatriation movements;
- withdrawing food assistance, educational, and other services from refugee populations that were expected to repatriate;
- establishing repatriation targets and measuring operational success in terms of the speed and scale of return;
- invoking the cessation clauses of the 1951 Refugee Convention so as to make repatriation obligatory;
- cooperating with host states that engaged in forced repatriation movements; and
- developing the notions of “safe” and “imposed” return, which did not require the consent of refugees.

In some cases, the notion of “imposed return” was put into practice. In December 1996, for example, the Tanzanian government and UNHCR issued a joint statement, affirming that “all Rwandese refugees can now return to their country.” Up to half a million refugees were rounded up by the Tanzanian army, corralled into containment camps and forced to return to an authoritarian state where disappearances, arbitrary detentions, and extrajudicial killings were rife (see, e.g., Amnesty 1997).

5 This list is derived from an analysis of UNHCR repatriation operations between 1984 and 2002, focusing primarily on refugee returns from the Democratic Republic of Congo, Djibouti, Malawi, Myanmar, Pakistan, Tanzania, and Thailand.
Confronted with stinging criticism from organizations such as Amnesty International and Human Rights Watch, UNHCR quietly abandoned the notion that repatriation could legitimately take place on a non-consensual basis. It is now widely acknowledged — even within the organization — that the operation amounted to a refoulement, and thus fundamentally breached UNHCR’s duty of refugee protection.

IV. Repatriation Today

If the 1990s were a decade of repatriation, the last 10 years are best described as “a decade of protracted emergencies.” Millions of new refugees have been created as a result of intense violence in Burundi, Central African Republic, Iraq, Nigeria, South Sudan, Syria, Ukraine, and Yemen. At the same time, longstanding conflicts in countries such as Afghanistan, the Democratic Republic of Congo, Myanmar, Somalia, and Sudan have gone unresolved.

As a result of these developments, refugee numbers have jumped to an all-time high, while repatriation levels have dropped to an historic low. Thus, in 2014, the last year for which UNHCR figures are available, only 126,800 refugees returned to their country of origin, the lowest number recorded for 30 years (UNHCR 2015, 8). While there is now a degree of optimism about the potential for safe and voluntary return from Thailand to Myanmar, the same cannot be said of the other situations listed above.

And yet the pressure on refugees to return has not disappeared. While the outcome of Kenya’s camp closure announcement is yet to be seen, there is a clear danger that some Somali refugees will repatriate, believing that they have no other option.

In broader context, Australia and the European Union have both put the principles of asylum and non-refoulement at risk by establishing agreements that enable refugees to be deported to other states. The recently convened World Humanitarian Summit was signally silent on the issue of safe and voluntary refugee repatriation.

The notion of “imposed return” also continues to have its advocates, who argue that postconflict development agendas should be prioritized once repatriation is “safe enough.” Oxford economist Paul Collier, for example, has argued that “only host governments of asylum-seeking migrants have this power [to engineer a coordinated return] . . . they should use it” (Collier 2013, 263). This is exactly what Kenya is eager to do.

V. Recommendations and Conclusion

This article demonstrates that repatriation should not be engineered by states or by UNHCR. Every effort should be made to preserve the principles of safety, voluntariness, and dignity in the context of refugee returns. This is in part because refugee return is successful in the long term only if it is also sustainable. Refugees who are internally displaced upon their return, who are obliged to eke out a living in shanty towns or squatter settlements, or who feel obliged to move on to another country or continent in order to meet their basic needs, cannot be considered to have found a lasting solution to their plight.
The article consequently makes the following recommendations:

1. Voluntariness

   • If situations arise in which refugees are forced or feel pressured to return to their country of origin, the international community should make no pretense with respect to their non-consensual nature. The notion of voluntariness should not be stretched so thin as to lose all meaning.
   • UNHCR should scrupulously avoid an operational engagement in such operations where voluntariness is questionable, even in situations where it might be under pressure to engage by influential host and donor states.

2. Alternative Solutions

   • The international refugee regime should abandon the hierarchy of solutions established in the 1980s and 1990s (with repatriation at the top) and give greater attention to the potential for local integration (of both a de jure and de facto nature) and resettlement to third countries.
   • More attention should be paid to innovative approaches to solutions such as labor mobility, freedom of movement, and cross-border mobility arrangements for refugees.

3. Cessation and Promotion of Return

   • There is a need to review the way in which the cessation clauses are applied to refugee populations, especially when linked to the promotion of refugee returns.
   • UNHCR and its partners should review the practice of promoting repatriation to countries of origin which have not met the threshold for the cessation clauses to be invoked.
   • In situations where refugees have established close social, economic, and personal links with their host states and communities, application of the cessation clauses should not lead automatically to an assumption that repatriation will take place. Instead, former refugees in these situations should be granted some kind of alternative residency status (e.g., as a resident alien) even if full naturalization is not available to them.
   • Special consideration should be given to second and third generation refugees when planning for cessation of status or promotion of return, as they will never have seen their “home” country.
   • The international community should consider the extent and ways in which humanitarian organizations and other members of the international refugee regime can contribute to broader foundations of peace building and development, crucial prerequisites for any durable repatriation.

4. Negotiating Repatriation

   • In situations where safe and voluntary returns are feasible, the repatriation process should be made a more participatory one.
   • Where possible, the international community should encourage the use of Quadripartite Commissions, in which refugees would take their place alongside...
UNHCR and countries of origin and asylum to help to negotiate the conditions for return.

- Refugees should also be more extensively involved in monitoring the safety and ensuring the voluntariness of return.
- “Go and see” visits — which have become a valuable feature of repatriation operations, enabling refugees to spend some time in their homeland before making a final decision to return — should be complemented by “come and tell” visits, in which refugees who have already repatriated are able to relate their experiences to those who remain in countries of asylum.

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Executive Summary

This article considers the relationship between two human rights discourses (and two specific legal regimes): refugee and asylum protection and the evolving body of international law that regulates expulsions and deportations. Legal protections for refugees and asylum seekers are, of course, venerable, well-known, and in many respects still cherished, if challenged and perhaps a bit frail. Anti-deportation discourse is much newer, multifaceted, and evolving. It is in many respects a young work in progress. It has arisen in response to a rising tide of deportations, and the worrisome development of massive, harsh deportation machinery in the United States, Germany, the United Kingdom, France, Mexico, Australia, and South Africa, among others. This article’s main goal is to consider how these two discourses do and might relate to each other. More specifically, it suggests that the development of procedural and substantive rights against removal — as well as rights during and after removal — aids our understanding of the current state and possible future of the refugee protection regime.

The article’s basic thesis is this: The global refugee regime, though challenged both theoretically and in practice, must be maintained and strengthened. Its historical focus on developing criteria for admission into safe states, on protections against expulsion (i.e., non-refoulement), and on regimes of temporary protection all remain critically important. However, a focus on other protections for all noncitizens facing deportation is equally important. Deportation has become a major international system that transcends the power of any single nation-state. Its methods have migrated from one regime to another; its size and scope are substantial and expanding; its costs are enormous; and its effects frequently constitute major human rights violations against millions who do not qualify as refugees. In recent years there has been increasing reliance by states on generally

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1 Professor of Law, Thomas F. Carney Distinguished Scholar, and Co-Director, Center for Human Rights and International Justice at Boston College. I am most grateful to the editors of this journal and to an anonymous reader for careful, exceptionally helpful critique and commentary.
applicable deportation systems, led in large measure by the United States’ radical 25 year-plus experiment with large-scale deportation. Europe has also witnessed a rising tide of deportation, some of which has developed in reaction to European asylum practices. Deportation has been facilitated globally (e.g., in Australia) by well-funded, efficient (but relatively little known) intergovernmental idea sharing, training, and cooperation. This global expansion, standardization, and increasing intergovernmental cooperation on deportation has been met by powerful — if in some respects still nascent — human rights responses by activists, courts, some political actors, and scholars.

It might seem counterintuitive to think that emerging ideas about deportation protections could help refugees and asylum seekers, as those people by definition often have greater rights protections both in admission and expulsion. However, the emerging anti-deportation discourses should be systematically studied by those interested in the global refugee regime for three basic reasons.

First, what Matthew Gibney has described as “the deportation turn” has historically been deeply connected to anxiety about asylum seekers. Although we lack exact figures of the number of asylum seekers who have been subsequently expelled worldwide, there seems little doubt that it has been a significant phenomenon and will be an increasingly important challenge in the future. The two phenomena of refugee/asylum protections and deportation, in short, are now and have long been linked. What has sometimes been gained through the front door, so to speak, may be lost through the back door.

Second, current deportation human rights discourses embody creative framing models that might aid constructive critique and reform of the existing refugee protection regime. They tend to be more functionally oriented, less definitional in terms of who warrants protection, and more fluid and transnational.

Third, these discourses offer important specific rights protections that could strengthen the refugee and asylum regime, even as we continue to see weakening state support for the basic 1951/1967 protection regime. This is especially true in regard to the extraterritorial scope of the (deporting) state’s obligations post-deportation.

This article particularly examines two initiatives in this emerging field: The International Law Commission’s Draft Articles on the Expulsion of Aliens and the draft Declaration on the Rights of Expelled and Deported Persons developed through the Boston College Post-Deportation Human Rights Project (of which the author is a co-director). It compares their provisions to the existing corpus of substantive and procedural protections for refugees relating to expulsion and removal. It concludes with consideration of how these discourses may strengthen protections for refugees while also helping
to develop more capacious and protective systems in the future.

"Those guarantees of liberty and livelihood are the essence of the freedom which this country from the beginning has offered the people of all lands. If those rights, great as they are, have constitutional protection, I think the more important one — the right to remain here — has a like dignity."

Supreme Court Justice William O. Douglas, 1952

"We need a national effort to return those who have been rejected . . . and we are working on that at the moment with great vigor."

Angela Merkel, October 15, 2016

I. Introduction

This article considers the relationship between two human rights discourses (and two specific legal regimes): refugee and asylum protection and the evolving body of international law that regulates expulsions and deportations. Legal protections for refugees and asylum seekers are, of course, venerable, well-known, and in many respects still cherished, if challenged and perhaps a bit frail. Anti-deportation discourse is much newer, multifaceted,
and evolving.\(^6\) It is essentially a young work in progress. It has arisen in response to a rising tide of deportations, and the worrisome development of massive, harsh deportation machinery in the United States (Meissner et al. 2013, 8-9), as well as in other nation-states including (but not limited to) Germany, the United Kingdom, France, Mexico, Australia, and South Africa.\(^7\) Though largely a phenomenon of the Global North, deportation ideas and practices are spreading rapidly around the world.\(^8\)

In response, human rights discourse and emerging legal norms relating to deportation go beyond the protections against the expulsion of refugees that are primarily derived from the Universal Declaration on Human Rights, the 1951 Convention relating to the Status of Refugees (the “Refugee Convention” or “1951 Convention”), and the 1967 Protocol relating to the Status of Refugees (the “1967 Protocol”).\(^9\) Anti-deportation norms may also be derived from the Universal Declaration on Human Rights, as well as provisions and interpretations of the 1966 International Covenant on Civil and Political Rights (ICCPR),\(^10\) the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),\(^11\) the European Convention on Human Rights (ECHR),\(^12\) the American Convention on Human Rights,\(^13\) case law of the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights and the Inter-American Commission, various other regional instruments, some national case law, and such other miscellaneous sources of emerging law and discourses as the EU Returns Directive.\(^14\) This emerging human rights legal discourse also encompasses interpretations of state domestic norms (such as US due process and statutory rights), and recent scholarship and initiatives by activists and nongovernmental organizations (NGOs) relating to expulsion and post-deportation


\(^7\) For statistical compilations of worldwide trends and links to various informational and advocacy organizations, see the Deportation Global Information Project, developed by the author and colleagues at the Post Deportation Human Rights Project, available at: http://postdeportation.org/. See also De Genova and Peutz (2010), Golash-Boza (2015), and Weber (2015).

\(^8\) See e.g., Seelke and Finklea (2011) (highlighting Mexico’s increasing attention to its southern border), and Boggs (2015) (deportations of children up 117 percent in Mexico from 2013 to 2014).


\(^11\) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85.


monitoring (which is especially salient in the context of deported refugees and asylum seekers).\textsuperscript{15}

This article’s main goal is to consider various aspects of how these two discourses and legal regimes do and might relate to each other. More specifically, I want to explore how the more recent understanding and development of both substantive rights against removal for some migrants (who are not refugees) and substantive and procedural rights during and after removal might affect our understanding of the refugee protection regime.\textsuperscript{16}

My basic thesis is this: the global refugee regime, though challenged both theoretically and in practice, must be maintained and strengthened. Its historical focus on developing criteria for admission into safe states, on protections against expulsion (i.e., non-refoulement), and on regimes of temporary protection all remain critically important.\textsuperscript{17} However, a prioritized focus on other protections for those who do not qualify as refugees but who also face deportation is critically important, too (Kanstroom 2016). Deportation has become a major international system that transcends the power of any single nation-state.\textsuperscript{18} Its methods have migrated from one regime to another; its size and scope are substantial and expanding; its costs are enormous; and its effects frequently constitute major human rights violations against millions who do not qualify as refugees.

\section*{II. Non-refoulement and Its Limitations}

When it comes to expulsion, the core and most important norm of refugee law is that of non-refoulement — a strong prohibition against the deportation (functionally defined in Article 33 of the Refugee Convention ["in any manner whatsoever"]) of certain migrants in certain circumstances.\textsuperscript{19} Indeed, one might well argue that non-refoulement is the “cornerstone” of refugee protection, since refugees do not have an affirmative right to enter a particular state.\textsuperscript{20} The principle of non-refoulement applies to asylum seekers, who may of course ultimately be found to be refugees. Thus, it is an established principle of international refugee law that asylum seekers should not be returned or expelled pending a final determination of their status.\textsuperscript{21}  

\textsuperscript{15} See e.g., http://www.refugeelegalaidinformation.org/post-deportation-monitoring; see also Podeszfa and Manicom (2012).
\textsuperscript{16} I am certainly not the first to suggest connections of this type (see e.g., Gibney 2008; Gibney and Hansen 2003). However, I am unaware of any prior systematic treatment of the topic as contained herein in light of recent advancements regarding the rights of expelled and deported persons.
\textsuperscript{17} See e.g., Kerwin (2014) and Bergeron (2014).
\textsuperscript{18} See ILC Draft Articles, commentary (1).
\textsuperscript{19} I am grateful to an anonymous reviewer for highlighting this point. The protection against refoulement under Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention (the “inclusion” criteria) and does not come within the scope of one of its exclusion provisions (UNHCR 2007).
\textsuperscript{20} See UNHCR (ibid.) using “cornerstone” phrasing.
\textsuperscript{21} The Executive Committee of UNHCR (1977a), in its Conclusion No. 6, “Non-refoulement,” para. (c), reaffirmed “the fundamental importance of the principle of non-refoulement . . . of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.”
And yet, as discussed more fully below, asylum seekers may face expulsion in three distinct scenarios, each of which presents a unique challenge. First, asylum seekers might be expelled to a third country without being given access to the procedures to which they are entitled under international law. This would be manifestly illegal, though it undoubtedly happens. Second, asylum seekers whose claims are denied — either because they are deemed not to have stated a valid claim on the merits, or because they are not deemed credible or because they fall into an exception category such as the exclusion clauses enumerated in Article 1F of the 1951 Convention — face possible expulsion (UNHCR 1997). This is a rising phenomenon, especially in Europe (The Telegraph 2016). For example, the so-called “Joint Way Forward” declaration between the European Union and Afghanistan, aims “to establish a rapid, effective and manageable process for a smooth, dignified and orderly return of Afghan nationals who do not fulfill the conditions in force for entry to, presence in, or residence on the territory of the European Union” (EU 2016). However, as a prominent group of 25 NGOs stated, the declaration “gives clear signals that Europe will once more engage in a conduct that puts into question its obligation to protect those fleeing conflicts or persecution and to safeguard the human rights of all persons.” Third, even asylum seekers whose claims are granted may face expulsion for subsequent conduct. Indeed, in some cases, even naturalization may not fully protect against this.

Moreover, non-refoulement, for all its prominence and power, is a focused and limited protection. It does not prohibit deportation as such. Rather, it precludes removal, directly or indirectly, to a place where refugees’ lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group, or political opinion (Lauterpacht and Bethlehem 2003). Nor does it protect all refugees.

III. The Rise of Deportation As a Global Phenomenon

In recent years there has been increasing reliance by states on generally applicable deportation systems, led in large measure by the United States’ radical 25 year-plus experiment with deportation. Europe has also witnessed a rising tide of deportation, which has developed, in part, in reaction to European asylum practices. Deportation has also been facilitated globally (e.g., in Australia) by well-funded, efficient (but relatively little

22 Thanks to an anonymous reviewer for suggesting more specificity on this point.
23 Unless expulsion is to a “safe third country.”
24 See e.g., Human Rights Watch (2016).
27 See Macklin and Baubock (2015, 2), highlighting, for example, that the British Nationality Act authorizes the Secretary of State for Home Affairs (Home Secretary) to deprive a person of British citizenship where she “is satisfied that deprivation is conducive to the public good.”
28 UNHCR (2007) is of the view that the prohibition of refoulement of refugees also constitutes a rule of customary international law.
29 Art. 33(2) excludes those “whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”
30 See generally, Kanstroom (2007a) and Kanstroom (2012).
31 This is, of course, a controversial point about which one must exercise great care so as not to blame victims or to support reactionary politics (Gibney 2003).
known) intergovernmental idea sharing, training, and cooperation (Ghezelbash 2015).\footnote{Unpublished PhD Dissertation on file with author examining how policy makers are increasingly drawing on practices in other jurisdictions when developing immigration law and policy.}

The global expansion, standardization, and increasing intergovernmental cooperation on deportation has been met by powerful — if in some respects still nascent — human rights responses by activists, courts, some political actors, and scholars.\footnote{See generally, Wouters (2009) and Wojnowska-Radzińska (2015).}

To those primarily concerned about the dreadful plight of refugees, it might seem counterintuitive or perhaps even a waste of time to focus on these emerging ideas about general deportation protections, as refugees, as noted, already have specific rights protections against expulsion.\footnote{See e.g., Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, 2005 O.J. (L 326) 13 (EC).} However, not only are the emerging anti-deportation discourses\footnote{I use the plural intentionally to highlight the fact that discourse is taking place in various venues and is of various rhetorical and politico-legal modes. This article focuses rather narrowly on two major examples. In future work, I intend to examine other anti-deportation discourses more fully.} significant on their own merits, but, for three basic reasons, they also may be enlightening and useful as an aid to imagining future developments in refugee protection.

First, what Matthew Gibney (2008) has described as “the deportation turn” has historically been deeply connected to anxiety about asylum seekers.\footnote{Gibney (2008) notes that the UK Labour Party used a discourse of human rights protection to enforce such polices, stressing the need to protect the asylum system from “bogus” refugees. See also Gibney and Hansen (2003).} Although we lack exact figures of the number of asylum seekers who have been subsequently expelled worldwide, there seems little doubt that it has been a significant phenomenon and will be an increasingly important challenge in the future. In early January 2016, Ross Douthout wrote in the New York Times that “prudence requires . . . closing Germany’s borders to new arrivals [and] beginning an orderly deportation process for able-bodied young men.” He urged Germans to give up the “fond illusion that Germany’s past sins can be absolved with a reckless humanitarianism.” Throughout 2016, such calls have increased throughout the Global North. Germany, for example, recently announced a new plan to deport over 12,000 Afghans following a new memorandum of understanding with the Afghan government. This is an accelerating phenomenon (German Federal Office for Migration and Refugees 2016). In November 2016, new statistics showed that the number of German deportations had reached a record high in 2016. Some 19,914 people had been deported in the first three-quarters of the year, just short of the 20,888 people deported in all of 2015 (Deutsche Welle 2017). The rather chilling reality is that the German government now says that there are some 550,000 people living in Germany whose asylum applications have been rejected (ibid.). The two phenomena of refugee/asylum protections and deportation, in short, are now and have long been linked.\footnote{As Kees Wouters (2009, 2) has noted, “While the idea of protecting people from being removed to a country where they run a risk of being subjected to human rights violations seems firmly accepted by States in international law, the exact content and scope of such protection is far from clear.” This remains true. But this lack of systematic development in this realm may ironically aid creativity and innovation.} What has sometimes been gained through the front door, so to speak, may be lost through the back door.
Second, current deportation human rights discourses embody creative framing models that might aid constructive critique and reform of the existing refugee protection regime. They tend to be more functionally oriented, less definitional in terms of who warrants protection, and more fluid and transnational.

Third, deportation human rights discourses offer important specific rights protections that could strengthen the refugee and asylum regime, even as we continue to see weakening state support for the basic 1951/1967 protection regime. This is especially true in regard to the extra-territorial scope of the (deporting) state’s obligations after expulsion.

**IV. A Crisis of Both Protection and Assimilation**

The desperate plight of refugees (and other “forced migrants”) from Syria and the Middle East more generally has focused attention on various problems of the current global refugee protection system. The very naming of the situation illustrates the deep analytic — if insufficiently protective — power of the refugee idea. Is this a “migrant crisis” (Rothman 2015) or a “refugee crisis”? Is it really a “crisis” at all? However we name it, the large number of newcomers highlights certain long-standing problems relating to refugees and asylum seekers.

First, of course, is the problem of definition itself. The basic structure of refugee law is a rational, linguistic, and definitional one, seeking to differentiate ex ante the rights of certain migrants from others. There is, of course, much to be said for such an approach, but it raises substantial difficulties particularly for those who fall outside accepted definitions while still fearing harm if excluded or deported.

Second is the problem of admission and permanent status versus temporary protection. Even those (distressingly few) US and European politicians who support robust protections for refugees and asylum seekers recognize serious coordination and political problems when asylum begins to look more like permanent immigration. German Chancellor Angela Merkel, for example, highlighted the rather undramatic virtue of patience as she asserted that “[t]he refugee question requires a European solution — a sustainable

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38 For an interesting comparison between deportation and forced migration generally, see Gibney (2013).
39 See e.g., the ILC, Draft articles on Responsibilities of States for Internationally Wrongful Acts, with commentaries, U.N. Doc. A/56/10 (2001) (which embody the idea that that any act of a State’s agent performed outside its territory or producing an effect outside its territory engages the responsibility of that State).
40 See e.g., Gondek (2005), noting that extraterritorial application of treaties in general public international law differs from that of human rights treaties.
42 As one advocate noted in late 2015, Europe successfully integrated around a million asylum seekers and refugees from the Balkans during the mid-1990s. Moreover, as Europe struggled over some 800,000 migrants, Jordan, Lebanon, and Turkey were “hosting” almost four million Syrian refugees. On this view, with a population of over 500 million, “a million newcomers need not represent a crisis” for Europe (Koser 2015).
43 For example, the distinction between those fleeing desperate economic oppression and those fleeing political persecution has long been recognized as intellectually unstable, if not ideologically imbalanced and immoral.
solution — and that solution requires time” (Oltermann 2016, emphasis added). An increasingly vocal chorus, however, recapitulates the debates of the 1990s (and of course earlier) by questioning the entire asylum enterprise if it implies long-term admission and permanent status. Right-wing politicians regularly highlight the twin fears of crime and terrorism with barely concealed xenophobic undertones. Frauke Petry of the right-wing, anti-immigrant Alternative für Deutschland (AfD) Party speaks darkly of challenges to “social cohesion” and alleges an “‘ethnicisation’ of violence” (Oltermann 2016). Often, such impulses translate into calls for stricter border controls, Trumpian walls, and the like. Indeed, Ms. Petry once reportedly said that border police should be empowered to shoot refugees who cross the German border from Austria without permission (Connolly 2016). The French National Front leader, Marine Le Pen, referred to Canada’s (rather modest) plan to admit 25,000 Syrian refugees as “madness” (Mayor 2015). Particularly in the Global North, such critiques of generous refugee admission policies have often led to calls for more robust deportation systems. Stricter asylum adjudication practices then spawn more deportations. As a recent New York Times article noted, “Germany, once seen as Europe’s most welcoming country, rejected or deported thousands of asylum seekers last year, as public support for migrants waned . . . .” (Goldman 2017). In October 2016, Chancellor Merkel herself said deportations had to happen more quickly, to show the electorate that concerns over migration were being taken seriously. In a remarkable turnaround, Merkel intoned that it was “undisputed” that “[w]e need a national effort to return those who have been rejected,” and that “we are working on that at the moment with great vigor” (Deutsche Welle 2016).

It is thus apparent that the current “crisis” involves both the propriety of temporary protection and the nature of the long-term solution. A widely reported, poignant interview with a 13-year-old Syrian boy illustrates the issue well (Dore 2015). Intuitively understanding the resistance of many Europeans to merging temporary refugee protection with long-term immigration policy, he simply pled, “Please help the Syrians . . . . The Syrians need help now. Just stop the war.” To this he added a tragic, sad offer that he thought might garner additional support: “We don’t want to stay in Europe, just stop the war.”

V. The Definitional Model and Its Discontents

Let us begin with legal basics. The definition and protection of refugees — with all of its complexities, gaps, variations, and implementation lapses — must be counted as one of the great politico-legal achievements of the twentieth century, though the more general concept of asylum is of course an ancient one (UNHCR 1993). It is well-known — to the point of hardly needing to be said — that we now differentiate the very limited rights of “international migrants” from the powerful, enforceable rights claims of refugees, i.e., those who fear “persecution” for reasons of “race, religion, nationality, membership of a
particular social group or political opinion.” Thus, refugee law represents an analytic “definitional turn” in which the category into which a person may be placed has enormous implications for rights claims and systematic protections. The category necessarily involves both the person and the harm s/he may face.

This is, of course, not the only way to conceive of human rights protections, though one sees similar approaches in such other human rights instruments as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child. One could, for example, focus primarily on the nature of the harm. The Convention Against Torture (CAT), for example, aims more at the definition of the conduct of torturers than towards a categorization of the person who fears such conduct. This illustrates the significance of the name of CAT (“against torture”), as compared to the Convention relating to the Status of Refugees. One of the implications of the CAT model is its virtually total lack of exclusion criteria compared to the refugee regime.

Further along this continuum, consider the operation of such concepts as arbitrariness and proportionality, which act as functional restraints on government action without demanding a threshold definition of either the category of the rights-claimant herself or even of the substance of the relevant conduct.

Simply put, the emerging body of human rights discourse relating to deportation is more like the latter two types than it is like refugee law in this regard. It is largely functional, less categorical as to the person, and less rigid than refugee law in its exclusions. We must consider whether this matters.

There is no question that many millions of lives have been saved as a result of the basic conceptualization of the rights of refugees and the attendant protection regimes. Still, pride in this prodigious accomplishment has always — from the very beginning — been accompanied by critique, by fear of losing hard-won protective concepts, structures, and mechanisms, and by recognition of the failure to fully address the demoralizing array of humanitarian crises with which our world seems inevitably to be confronted. There are, for example, long-standing regional refugee definitions that go beyond those of the 1951

47 Persecution is generally recognized as having been designed to be a flexible concept (Grahl-Madsen 1966, 193). It has been equated with “severe measures and sanctions of an arbitrary nature incompatible with the principles of human dignity set out in the UDHR” (ibid.).
50 I do not mean to suggest that defining torture is simple, but merely that the methodology of the CAT is somewhat different from the Refugee Convention, which necessitates a definition of persecution, but also many other terms in order to create a cognizable “refugee.”
51 See e.g., Millbank (2000).
52 Indeed, as early as 1952, the distinction between millions of “displaced persons” and “refugees” was recognized as a conceptual and practical problem (Rothman 2015).
Convention and the 1967 Protocol. More recent initiatives have also sought to develop greater protections through such concepts as “forced migration,” “internally displaced persons,” “environmental refugees” and “vulnerable migrants.” Some of these trends towards a more functional approach, while others follow the definitional model of refugee law itself.

VI. The Possible Value of a Functional Turn to Deportation Rights Protection

To assess the possible value added of deportation discourses to such protective models, consider the nature of protections available to refugees and to those who seek asylum. Such protections do not include a “right” to be admitted to state territory. Indeed, state sovereignty, state control over territory, and state control over persons on state territory are venerable, foundational principles that undergird traditional formulations of the “right” or “competence” of the state to grant asylum. As Atle Grah-Madsen put it, “[t]he right of a State to grant asylum flows from its territorial integrity, which is a pillar of international law” (Grah-Madsen 1980). Thus, insofar as one speaks of a general “right” to asylum, the traditional view has been that the “right of asylum” is the right of a state to grant asylum, not the right of an individual to obtain it (Goodwin-Gill 1983). A grant of asylum in this sense is a discretionary exercise of state sovereignty. However, a “right” to seek asylum may be understood as a variant of the right to “leave any country, including his [sic] own.”

Asylum seekers do have powerful rights against removal to a place where they might face persecution. As Article 32 of the 1951 Convention relating to the Status of Refugees states, “The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order . . . .” (emphasis added). Article 33 mandates that “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, national origin, religion, or the like.”

53 The Convention Governing the Specific Aspects of Refugee Problems in Africa, for example, includes article I(2), “the term refugee shall also apply to 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.” Convention governing the Specific Aspects of Refugee Problems in Africa, adopted Sept. 10, 1969, 1001 U.N.T.S 45 (entered into force 20 June 1974)).

54 The 1984 Cartagena Declaration on Refugees expands the refugee definition to include “persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.” Cartagena Declaration on Refugees, Nov. 22, 1984, OAS Doc. OEA/Ser.L/V/II.66/doc.10 (1984-85).


56 See generally, Boed (1994).

57 The “individual . . . has no right to be granted asylum” as the right of asylum “appertains to states” (Goodwin-Gill 1983). The American Convention on Human Rights (Article 22(7)) does, however, include both the right to seek and be granted asylum.

religion, nationality, membership of a particular social group or political opinion.” These provisions stand in sharp contrast to Article 34, which is entitled “Naturalization” and is noteworthy (when compared with Articles 32 and 33) for its discretionary tone (“shall as far as possible facilitate . . . ”).

Thus, although neither the 1951 Convention nor the 1967 Protocol provide a right to be granted asylum, the evolution of human rights law has made clear that certain aspects of the asylum formulation may be understood as individual rights. Thus, as noted above, once one is recognized as a refugee, a right not to be expelled to face one’s persecutor is clear. Indeed, the right exists even prior to formal recognition. Although the Refugee Convention does not contain any explicit obligations on states if a refugee is removed in breach of Article 33 of the Refugee Convention, an abdication of adjudicative or protective responsibility would clearly nullify effective protection from refoulement. States could too easily evade their responsibility simply by removing all individuals seeking international refugee protection (Wouters 2009).

The principle of non-refoulement is thus a duty of a state (and may concomitantly be conceptualized as an individual’s right) not to return a person to a place of persecution (Goodwin-Gill 1983, 69-97). As Paul Weis put it many years ago, whereas asylum entails “admission, residence and protection,” non-refoulement is a “negative duty, not to compel a person to return to a country of persecution” (Weis 1969). Protection against refoulement has thus been well-described as “the cornerstone of international refugee and asylum law” (Wouters 2009, 23). States, in general, are obliged not to return a person to any country to face a risk of being subjected to serious harm or serious human rights violations.

59 The main restrictions result from the cessation clauses referred to in Article 1C and the exclusion clauses mentioned in Article 1D, E, and F of the Refugee Convention.

60 See Martin (1990), noting that the Convention does not guarantee asylum “even for those duly adjudged to be refugees under its provisions.” The Basic Law for the Federal Republic of Germany formerly provided at Article 16(2) that “[p]ersons persecuted on political grounds shall enjoy the right of asylum.” Grundgesetz [Constitution] [GG] art. 16(2) (Ger.). This was amended in May 1993 to preclude noncitizens from “safe” countries from receiving asylum in Germany. The fear that asylum had become in effect migration policy was a large part of the motivation for the change. See German Federal Ministry of the Interior (1993), arguing that the earlier form of the right of asylum, “gave persons suffering political persecution an entitlement to be granted asylum, leaving no scope for discretion. . . . The right of asylum has more and more turned into uncheckable vehicle of uncontrolled migration.”

61 However, one may still be sent elsewhere: a fact that has long raised serious concerns about the protective value of non-refoulement.

62 It must be noted, albeit with shame, that the US Supreme Court has interpreted the non-refoulement provision of the Refugee Convention to have no extraterritorial effect. Sale v. Haitian Centers Council, 113 S. Ct. 2549 (1993). Cf. Case 10.675, Inter-Am. Comm’n H.R., Report No. 51/96, (1997) (United States violated the petitioners’ right to seek asylum as well as their right to life, liberty, and security of the person when it summarily returned interdicted Haitians — many of whom were subsequently arrested by Haitian authorities — without providing them with a meaningful opportunity to have their claims adjudicated). Conversely, the (non-binding) 1967 Declaration on Territorial Asylum, art. 3(1) provides that “No person . . . shall be subjected to measures such as rejection at the frontier.”). Still, Article 3(2) provides an exception “for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.” Declaration on Territorial Asylum, art. 1(1), G.A. Res. 2312 (Dec. 14, 1967). Cf. UNHCR (1992) (“In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection.”
However, the principle of *non-refoulement* does not preclude a state from sending an asylum seeker to a country in which they would not be persecuted (Weis 1969, 166). It is a particular form of protection against removal to particularly defined places for particularly defined migrants. Recognition of a right against exclusion or expedited expulsion for a certain class of migrants is also recognized by other protective conventions (including regional instruments), and has been interpreted as a part of other, more general human rights regimes. For example, Article 3 of the 1984 Convention Against Torture prohibits the expulsion or return of a person where there is a real risk of torture:

1. 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.

In sum, both Article 33 of the Refugee Convention and Article 3 of CAT — the two most specific existing international law restraints on deportation — mandate very targeted, and potentially temporary, state obligations.

Let us consider in a bit more detail temporary protections against removal versus the potential accrual of long-term residence rights and more robust general protections against removal. The UN refugee regime, as noted, differentiates *non-refoulement* (Article 33)

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63 See e.g., the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969, Article III(3):

No person may be subjected by a member State to measures such as rejection at the frontier, return or expulsion, which should compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2.

See also, Article 22(8) of the American Human Rights Convention adopted in November 1969:

In no case may an alien be deported or returned to a country regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions.

64 Article 7 of the International Covenant on Civil and Political Rights (hereafter the ICCPR) and Article 3 of the European Convention on Human Rights and Fundamental Freedoms (hereafter the European Convention or ECHR) do not explicitly protect from *refoulement* but the supervising bodies have interpreted these articles to provide protection from *refoulement*.

65 CAT Article 2 provides: “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

66 Even though a person meets the criteria of the definition of a refugee of Article 1A of the Refugee Convention, there is neither an explicit obligation on the state or a right of the refugee to be granted legal status in any form, including a residence permit (Wouters 2009, 1; Goodwin-Gill [1983] 1996, 199-202).

67 Article 33(1) of the 1951 Convention, provides that:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

This is also an obligation under the 1967 Protocol by virtue of Article I(1). See also the UN Declaration on Territorial Asylum unanimously adopted by the General Assembly in 1967. In article 3(1) of this declaration it is stated that:

No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.
from Article 34’s opportunities for asylum seekers to integrate and naturalize. However, protections against expulsion continue for refugees long after the immediate period of their admission. Article 32(1) of the Refugee Convention protects refugees “lawfully in their territory” from expulsion except “on grounds of national security or public order.” In addition, Article 32(2) mandates specific procedural safeguards for the expulsion of “lawful” refugees. A refugee must be allowed to submit evidence to rebut the allegation of being a risk to the state’s national security or public order. Refugees also have a right to appeal the expulsion decision and to be represented. Article 32(3) requires that a refugee who is to be expelled must be allowed a reasonable time to seek legal admission into another country. Article 33(2) also allows the removal of refugees who are “a danger to the community” of the host country, provided that they “have been convicted by a final judgment of a particularly serious crime.” The relationship between Articles 32 and 33 is complex and its full explication is beyond the scope of this article. It does seem clear, however, that, although Article 33(2) contains no explicit safeguards, it must contain them implicitly, given the character of the prohibition of refoulement (Wouters 2009, 177).

VII. Specific Versus General Protections against Removal

The relationship between well-recognized specific rights against refoulement to face persecution or torture and broader rights protections against expulsion is complex and evolving. The allure of deportation for governments is powerful. Its utility for extended border control, national security, criminal law enforcement, labor market regulation, and various other forms of social control is enhanced by its flexibility and its anomalous legal

68 See generally, UNHCR (1977b).
69 Refugees who are lawfully within the territory of a state party include (1) a person who is admitted to a State party’s territory; (2) a person whose status has not (yet) been regularized but who has applied for a refugee status; and (3) a person whose claim for refugee status the host state has opted not to assess (Wouters 2009, 177; Hathaway 2005, 174-75, 183-85).
70 Article 32 of the Refugee Convention:

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

71 However, where compelling reasons of national security require otherwise, even lawful refugees may be exempted from these rights.
72 See generally Kanstroom and Chicco (2015). The European Court of Human Rights (ECHR) has recognized expulsion protections in the context of Article 2 (the right to live) and Article 1 of Protocols Nos. 6 and 13 (the abolition of the death penalty) to the European Convention of Human Rights (ECHR). The ECHR has also accepted a prohibition of refoulement under Article 6, in exceptional cases (the right to a fair trial); under Article 5 (the right to liberty and security); under Article 8 (the right to private and family life); and perhaps under Article 9 (the freedom of thought, conscience and religion) (Wouters 2009, 187).
status. Still, deportation can be harshly punitive. Deportation routinely separates families and causes disproportionate hardships. In the United States, the legal system provides some procedural protections, but virtually no substantive restraints on the power of government to deport even long-term legal residents with families for minor offenses. The legal picture is a bit less stark in Europe, owing to the strength of various human rights norms applicable to deportation proceedings. But even where human rights law provides a more protective framework, such as in Europe and in much of the Americas, legal protections remain insufficient.

The 1950 European Convention on Human Rights (ECHR) and the 2000 European Union Charter of Fundamental Rights (the “Charter”) protect important basic rights of noncitizens, including those facing deportation. Article 1 of the Charter protects the right to human dignity. Article 4 of the Charter and ECHR Article 3 prohibit torture, inhuman, or degrading treatment or punishment. Article 3 of the Charter also protects the “right to the integrity of the person,” which may implicate the treatment of persons during the deportation process. Article 6 of the Charter and ECHR Article 5 guarantee the rights to liberty and security of the person. Article 7 of the Charter and ECHR Article 8 govern the right to respect for private and family life. These have led to an especially important line of jurisprudence at the European Court of Human Rights. Article 8 of the Charter protects personal data, which could include exchanges of personal information among states regarding persons being or having been deported. Article 1 of Protocol No. 1 to the ECHR and Article 17 of the Charter protect the right to property (and its enjoyment), which may protect those who are deported without the opportunity to collect pay, belongings, or to arrange for the shipment or sale of their belongings. ECHR Article 14, Protocol 12, and Article 21 of the Charter protect the right to nondiscrimination on prohibited grounds.

73 Deportation is commonly defined as a regulatory, civil (as opposed to criminal), non-punitive mechanism in which government agents are given unusually wide latitude (Kanstroom and Chicco 2015, 538).
74 See generally Kanstroom (2007a).
75 See e.g., Article 13 of the ECHR, which guarantees “an effective remedy before a national authority” for “everyone whose rights and freedoms . . . are violated.” De Souza Ribeiro v. France, Eur. Ct. H.R. 2066 (2006) (finding a violation of Article 13 where the State failed to provide minimum procedural safeguards needed to protect against arbitrary expulsion).
77 Charter of Fundamental Rights of the European Union, 2010 O.J. (C 83) 2 [hereinafter Charter]. The Charter is a part of the EU constitution given treaty status in 2009 and binding the 28 EU member states. Charter rights incorporate the interpretation of ECHR rights (as determined by the ECtHR insofar as they are more rights friendly. Special thanks to Elspeth Guild for this point.
78 Article 5 of the Charter prohibits slavery and human trafficking.
79 Article 5 § 1(f) of the ECHR permits the arrest or detention of a foreigner to prevent unauthorized access to the state, or for the purpose of deportation or extradition (see Morano-Foadi and Andreadakis 2011).
80 ECHR, art. 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”); ECHR art. 21 (“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”); ECHR Protocol No. 12, art. 1 (clarifying a general prohibition against discrimination).
expulsion and expulsion where there is a risk of return to a country where there is a well-founded fear of persecution or a real risk of torture, inhuman, or degrading treatment or punishment. Articles 24, 25, and 26 of the Charter protect the rights of the child, the elderly, and those with disabilities. Articles 34 and 35 of the Charter protect the rights of “everyone” to social assistance and health care (Guild and Cahn 2013). Special protections for those who are lawfully resident are contained in Protocol No. 7, Article 1 of the ECHR, which provides in relevant part that:

An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: (a) to submit reasons against his expulsion, (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

In addition, important EU directives protect long-term resident third-country nationals and guarantee certain family unification rights. Indeed, in a 2001 nonbinding recommendation, the Parliamentary Assembly of the Council of Europe concluded that settled immigrants should not be subject to expulsion (Council of Europe 2001). It is thus apparent, even from this sketch, that this emerging body of law is more broadly protective of many rights of noncitizens — including rights against deportation — than is refugee law.

The European Court of Human Rights (the “Court”) has developed a body of jurisprudence to protect and enhance these rights. A particularly important line of cases has interpreted ECHR Article 8 relating to interference with the right to respect for family life. Cases have considered not only spouses and children but also a much broader array of relationships, such as grandparents and siblings. Indeed, long-term residence itself has also been recognized a source of powerful rights claims. The Court has expressed concern for “the network of personal, social and economic relationships that make up the life of every human being.” The concept of “private life” encompasses “the right to establish and develop relationships with other human beings and the outside world” and “aspects of an individual’s social...

81 In 2012 the ECtHR held that when Italian authorities rescued people in the Mediterranean and took them to Libya, it had breached the prohibition on collective expulsion. Hirsi Jamaa v. Italy, 2012-II Eur. Ct. H.R..
82 Article 18 of the Charter references the Refugee Convention regarding the “right” to asylum.
83 See generally Davies (2012), analyzing the ways in which the Charter has helped to frame the ECtHR’s jurisprudence on the rights of migrants to bring family members with them.
84 It does, however, allow exceptions for cases where “expulsion is necessary in the interests of public order or is grounded on reasons of national security.”
86 See generally, Boeles et al. (2008) and Steinorth (2008).
88 See Nasri v. France, 320 Eur. Ct. H.R. 11, P 44 (1995) (giving weight to the fact that several of applicant’s siblings have become French citizens); Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A), P 45 (1979) (“‘Family life’, within the meaning of Article 8 (art. 8), includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life”).
identity.” Therefore, “the totality of social ties between settled migrants and the community in which they are living” may be protected pursuant to Article 8.90

A complex legal picture involving many fact patterns has emerged. The Court has held that Article 8 does not require states to treat settled immigrants the same way as their own nationals.91 It has also, however, viewed its interpretive power as dynamic and the European Convention on Human Rights itself as a “living instrument.”92

In cases that involve expulsion due to crime, the Court will determine whether the interference with the rights guaranteed by Article 8 was “necessary in a democratic society and proportionate to the legitimate aim pursued.”93 This requires consideration of an array of factors, including the nature and seriousness of the offense, and the time elapsed and applicant’s conduct since its commission (Thym 2008). The Court will also attempt to measure the impact an expulsion order would have on the immigrant and his or her family.94 In addition, the Court will weigh “the best interests and well-being of children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of social, cultural and family ties with the host country and with the country of destination.”95

Another intriguing human rights model was developed in the UN Human Rights Committee (the “Committee”) case of Nystrom v. Australia,96 which focused on whether the right “to enter one’s own country”97 was violated by deporting a man who had lived there legally since he was 27 days old. The Committee majority held that “there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality.”98 In such circumstances, deportation is inherently arbitrary and thus illegal.99

93   See, e.g., A.W. Khan v. United Kingdom, App. No. 4786/06 PP 31-33 (2010); A.A. v. United Kingdom, App. No. 8000/08 (2011) (applicant who was a minor when he had committed the offense and the nature and seriousness of the act was not significant). Cf. Balogun v. United Kingdom, App. No. 60286/09 (2013) (applicant’s family ties were not strong enough to amount to “family life.” His deportation would have a serious impact on his private life, given his length of stay in the United Kingdom since the age of three and the limited ties with Nigeria. However, his repeated history of drug-related offences, the majority of which were during his adulthood, led the Court to conclude that the interference with his right to respect to private life was not disproportionate.)
94 Criteria include the length of the applicant’s stay in the country from which he or she is to be expelled, the nationalities of the various persons concerned, the applicant’s family situation, whether the spouse knew about the offense when she or he entered into a family relationship, whether there are children of the marriage and their age, and the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled. Id. at 94.
97   International Covenant on Civil and Political Rights art. XII, P 4, Dec. 16, 1966, 999 U.N.T.S. 171 (“No one shall be arbitrarily deprived of the right to enter his own country”).
99 See Hannum (1987) (arguing that the proper interpretation of this phrase “includes nationals, citizens and permanent residents” and is “most consistent with the ordinary meaning of the words in the text, and with at least portions of the travaux preparatoires”); Nowak ((1993) 2005); and Foster (2009) (“One’s connection to one’s own country is . . . in a fundamental way, about a person’s identity.”).
Such jurisprudence has inspired some interesting recent initiatives relating to the general rights of those who face deportation.\textsuperscript{100} For example, Article 11 of the International Migrants Bill of Rights (IMBR)\textsuperscript{101} restates well-accepted protections against “discriminatory or arbitrary expulsion or deportation, including collective expulsion.” Article 13 provides that “[e]very migrant has the right against refoulement.” This right is linked to such well-accepted protections against expulsion as, “where there are substantial grounds for believing that the migrant would be subjected to torture or cruel, inhuman or degrading treatment or punishment;” and “where the migrant’s life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.” The IMBR then goes further, however, protecting against expulsion “to another State where there are substantial grounds for believing that the migrant would be subjected to a serious deprivation of fundamental human rights;”\textsuperscript{102} and even suggesting that no migrant “should” be expelled, “where there are substantial grounds for believing that the migrant would be subjected to other serious deprivations of human rights.”\textsuperscript{103}

Such general human rights prohibitions on refoulement tend more clearly to affirm rights of individuals than to define specific state obligations (Wouters 2009, 15).\textsuperscript{104} Still, as we shall see, human rights protections relating to the deportation process itself may augment and clarify such duties.

**VIII. The International Law Commission’s Draft Articles on the Expulsion of Aliens**

The International Law Commission (ILC) was created by the UN General Assembly in 1947 as part of its mandate to “initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.”\textsuperscript{105} The Commission began its work regarding the expulsion of “aliens” in 2004.\textsuperscript{106} Since then, Special Rapporteur Maurice Kamto prepared nine separate reports which culminated in “Draft Articles” being adopted by the Commission on June 6, 2014, followed by commentaries adopted on August 5, 2014.\textsuperscript{107} The Commission then recommended that the General Assembly “take note of the Draft Articles”; annex them to a resolution; disseminate them as widely as possible; and, ultimately, consider a convention based on them (ILC 2014). Although the Draft Articles received a rather unfriendly response from

\textsuperscript{100} See generally, von Sternberg (2014).

\textsuperscript{101} International Migrants Bill of Rights, developed at Georgetown Law Center. See IMBR Initiative (2013).

\textsuperscript{102} Article 13(4).

\textsuperscript{103} Article 13(5).

\textsuperscript{104} Of course, all discourses have definitional complexities. Even the apparently simple term “migrant” is the subject of considerable contestation. It was historically roughly defined by UNHCR as “any person who changes his or her country of usual residence.” See, e.g., IMBR (defining “migrant” simply as “a person who is outside of a State of which the migrant is a citizen or national, or, in the case of a stateless migrant, the migrant’s State of birth or habitual residence”). There are also a number of more capacious definitions that focus less on residence and permanence and more on the simple fact of international transit (UN DESA 1998).

\textsuperscript{105} UN Charter, Art. 13. See also ILC Statute, Article 1.

\textsuperscript{106} As noted above, this is the term of the article used by the Commission.

a number of nation-states, and were ultimately not acted upon by the General Assembly, they constitute an important step forward in the conceptualization of expulsion as a subject of international law and of the rights of those who face deportation.

The Draft Articles reflect much work by excellent international lawyers, some (though perhaps not enough) input from human rights experts, and serious engagement with the often repressive and reactionary contemporary agendas of governments (ibid.). They involve not only “the codification” but also “the progressive development of fundamental rules on the expulsion of aliens.” In some respects they are path breaking, although they leave many questions unanswered and much important work still to be done (Kanstroom 2016). Their current status is unclear. Nevertheless, as we consider the state of anti-deportation legal discourse, the Draft Articles must be a major focal point.

The Draft Articles contain 31 provisions. Some simply seek to restate (and thus to “codify”) existing and well-accepted aspects of international law. For example, Article 2 offers what would seem a basic, uncontroversial definition of the terms, “expulsion” and “alien”:

(a) “expulsion” means a formal act or conduct attributable to a state, by which an alien is compelled to leave the territory of that state; it does not include extradition to another state, surrender to an international criminal court or tribunal, or the non-admission of an alien to a state;

(b) “alien” means an individual who does not have the nationality of the state in whose territory that individual is present.

As I have noted elsewhere, however, even the most basic definitional aspects of a document such as this warrant careful scrutiny (ibid.). For example, it is far from clear what is actually meant by the phrase, “conduct attributable to a state.” Attributable by whom? In what context? Is the welter of coercive (indeed sometimes oppressive), but formally “voluntary” return mechanisms developed in the United States and Europe covered by this definition? Paragraph 3 of the General Commentary to the Draft Articles states:

the formulation “alien[s] subject to expulsion” . . . is sufficiently broad in meaning to cover, according to context, any alien facing any phase of the expulsion process. . . . [including] the implementation of the expulsion decision, whether that involves the voluntary departure of the alien concerned or the forcible implementation of the decision.

This important, but insufficiently comprehensive phrasing does not clearly capture a variety of informal, ostensibly voluntary “return” methods.

See generally Murphy (2014).
109 See also, the US response: https://www.state.gov/documents/organization/153456.pdf.
110 I will not engage herein with the controversial choice of the drafters of the Draft Articles to use the term “alien.” It is not a usage that I favor, however.
111 E.g., “voluntary departure” is often coerced by agents of Customs and Border Protection, and Immigration and Customs Enforcement (Kanstroom 2012).
112 ILC Draft Articles.
113 See generally Kanstroom (2012). Similarly, Article 10 (“Prohibition of Disguised Expulsion”) covers some prohibited practices; though, again, it is not clear about ostensibly legal, but formally “voluntary” mechanisms.
Other provisions of the Draft Articles aim to reconcile the rights of “aliens” in expulsion proceedings with such special protections as those of the Refugee Convention, the Convention Against Torture, the Convention on the Rights of the Child, etc. This is a critically important aspect of the project in that the drafters’ goal was clearly to expand protections, not to limit them. However, the phrasing of some provisions is ambiguous, thereby raising questions about the exact relationship envisioned between what one might term two forms of *lex specialis*. Article 3, in a rather baroque formulation, states that “[e]xpulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights.”

The problem, however, is understanding what is meant by “without prejudice.” As Gerald Neuman (2016) notes, the Draft Articles’ “without prejudice” clauses function in different ways, “sometimes as a savings clause for rules that give greater protection to the alien facing expulsion; sometimes as preserving powers of the state that might otherwise seem inconsistent with the norm set forth in the text; and sometimes by depriving the particular provision of any normative force at all.”

To the extent that the Draft Articles accurately codify international law, the phrase would seem to be unobjectionable but also unnecessary and implicitly redundant. Where the existing rules of international law differ from the Draft Articles, however (which may be especially the case where the Draft Articles aim for “progressive realization”), then the “without prejudice” formulation would seem to be regressive and contradictory to the thrust of the Draft Articles themselves. Even if one envisions a gap — i.e., an area where there is no clear rule of international law — then it is still unclear what is meant by “without prejudice.” In such situations, one would think that the Draft Articles should now occupy the field, so to speak.

Similarly, Article 6 states that the Draft Articles are “without prejudice to the rules of international law relating to refugees, as well as to any more favorable rules or practice on refugee protection.” It then lists some rules “in particular,” that are derived from the 1951 Convention and the 1967 Protocol. Article 7 is said to be “without prejudice” to the rule of international law relating to stateless persons. The difficult interpretive question is what, exactly, is meant by the phrase “without prejudice” (Neuman 2016). The commentaries to the Draft Articles explain that the formulation is “aimed at ensuring the continued application to refugees of the rules concerning their expulsion, as well as of any more favourable rules or practice on refugee protection” (emphasis added). But, again, neither “prejudice” nor the operative concept of favorability is defined.

114 The portion of Article 6 that lists “particular” rules states:

(a) a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order;
(b) a State shall not expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where the person’s life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.
The “Right to Remain Here” as an Evolving Component of Global Refugee Protection

On the more positive (progressive) side, the Draft Articles expressly aim for progressive development in:

- Article 23(2) (regarding non-refoulement for an “alien” who faces the death penalty);\(^{115}\)
- Article 26 (which extends important procedural rights to aliens who are unlawfully within the territory of the state seeking to expel them);
- Article 27 (which standardizes the “suspensive” effect of an appeal against an expulsion decision);\(^{116}\) and
- Article 29 (which recognizes a qualified\(^ {117}\) right of readmission after an “unlawful” expulsion.

In addition, as Gerald Neuman notes, other examples of progressive development may include Article 21(1), favoring voluntary departure, and Article 5(3), if understood as imposing a case-by-case reasonableness standard for all expulsion decisions (Neuman 2016).\(^ {118}\)

Their aim notwithstanding, it is not clear if all the Articles identified above as progressive actually go beyond existing law. A fundamental problem with the Draft Articles is their deep, structural ambiguity, if not confusion, about rights.\(^ {119}\) This is reflected in the very first sentence of the General Commentary, in which the “expulsion of aliens” is referred to as “a sovereign right of the State.” Article 3, similarly, is entitled “Right of expulsion.” It recites, “A State has the right to expel an alien from its territory.” To be sure, this is followed by very important qualifications relating to the force of these articles, international law, and human rights. Still, such “rights” phrasing — as applied to what would be better termed as state sovereign power or, perhaps, prerogative — is significant, even when modified by rights provisions. Note the similarity between this framing and that regarding the “right” of a state to grant asylum discussed above. In this context, it would seem better to recognize that the legitimacy of deportation and expulsion depends upon its compliance with both domestic and international law and basic human rights, including of course, refugee law where applicable.\(^ {120}\)

Consider an alternative approach which would begin with a view that expulsion is of fundamentally questionable legitimacy. Expulsion, with its attendant “formidable machinery,” is an awesome power of states (Meissner et al. 2013), perhaps legitimate in some of its

\(^{115}\) Though Gerald Neuman (2016) argues that these paragraphs “do not adequately capture the circumstances in which the right to life generates non-refoulement obligations.”

\(^{116}\) Article 27 states that “[a]n appeal . . . shall have a suspensive effect on the expulsions decision when there is a real risk of serious irreversible harm.” The insertion of three adjectives: “real, serious, and irreversible” indicates, I suppose, how much controversy swirled around this provision.

\(^{117}\) The Article 29 right of readmission is limited by the recognition that the state may deny readmission that “constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.”

\(^{118}\) It should also be noted that detention is inevitably a component of expulsion, with its own protective norms. For example, ICCPR Article 9 mandates that any “alien,” even if unlawfully present, has the right to notice of the reasons for an arrest, and the right to bring proceedings before a court to determine whether the detention is unlawful (Neuman 2016).

\(^{119}\) For a fuller discussion of this issue, see Kanstroom (2016).

\(^{120}\) See Council of Europe (2005).
manifestations, but illegitimate in many of its increasingly prevalent forms. As noted above, one might avoid some hazards of the “definitional turn” by focusing functionally on the mechanisms and consequences of expulsion. Despite their states’ rights orientation, however, the Draft Articles contain much that is useful to a critique of this sort.

But if we are serious about codifying the rights of those who face deportation (as I believe we must be), then we should ratify the proposition that those who face deportation are a definable legal class with specific, cognizable rights. The burden would then be on the deporting state to justify the rights infringement that takes place. Global deportation demands a framework that prioritizes protection of basic human rights. The Draft Articles are somewhat limited in this regard.121

IX. Do the Deported Have Rights Post-Deportation?

Whether deported individuals have post-deportation international human rights vis-à-vis the deporting nation-state is a difficult question, the answers to which are evolving.122 Indeed, a deported person may also have specific rights claims in the country to which she is deported (typically her country of nationality) based on discrimination against her as a “deportee.” Such claims may overlap, as is discussed more fully below. The content of such rights, and perhaps most saliently, which state has the responsibility to ensure the protection of these rights, are works in progress.123

Some might suggest that the very idea of rights claims against the deporting state is oxymoronic once a deportation has been legally completed (Kanstroom 2007b). Under US law, in particular, the deported have been held to be stripped of virtually all rights they may have had to challenge various aspects of their deportation. The US Board of Immigration Appeals, which has appellate jurisdiction over decisions made by immigration judges, has held that “physical removal of an alien from the United States is a transformative event that fundamentally alters an alien’s posture under the law.”124 This has meant that challenges to wrongful deportations and rights claims arising out of the individual’s prior presence and ties to the country were completely ignored. In situations like this, the suggestion that the deported are, as a class, subjects of international law with particular types of recognized rights claims, analogous to refugees, could be especially significant.125

121 Article 26, for example, protects the right to be “represented,” while deferring to the divergence of state practice regarding whether this is a right to appointed legal counsel. However, as the United States Supreme Court has recently intimated in Padilla v. Kentucky, certain forms of deportation warrant such a right as a matter of due process and fundamental fairness. In addition, another limitation appears in Article 5, where the phrase “for the sole purpose of” seems to make grants of a right to liberty too easy to evade. Commentary (3) seems to affirm the suspicion that undue deference was given to state practices and desires here. See also ILC Draft Articles, art. 11 (similarly limiting its protection to actions done “for the purpose of” confiscation of assets).
122 See Kanstroom and Chicco (2015).
123 See Returns Directive, FRONTEX Code of Conduct, etc.
124 Matter of Armendarez-Mendez, 24 I.&N. Dec. 646, 655-56 (B.I.A. 2008). This ruling has since been challenged and overturned by a number of US Courts of Appeals.
125 Cf. OHCHR 2006).
To state this objective is not to underestimate its prodigious challenges. Undoubtedly, the legitimate rights claims of refugees and other migrants have been difficult enough to develop and maintain. However, protecting the basic human rights of the deported demands both extraterritorial state responsibility (by the deporting state) and a need for better coordination between the legal regimes of the deporting state and the receiving state, to coordinate transfers of documents, earned benefits, property, medical records, etc., and to protect the deported from discrimination, persecution, and social stigma.

The Draft Articles do not consider either extraterritorial state responsibility or legal coordination extensively, though they do take some positive steps in these directions. Article 20, for example, provides that the expelling state “shall take appropriate measures to protect the property of an alien subject to expulsion.” Article 29 goes so far as to state a “right” to be admitted to the expelling state if the expulsion is found to have been “unlawful.” Of course, much will depend on what is meant by “unlawful”; this protection is limited to those who were “lawfully present,” a criterion that appears frequently in the ICCPR and elsewhere.

Clarifying the rights of the deported could, as noted, have a number of salutary effects. Most basically, it foregrounds the rights of individuals affected by expulsion. One model for doing this is the draft Declaration on the Rights of Expelled and Deported Persons developed through the Boston College Post-Deportation Human Rights Project (of which the author is a co-director). The Declaration is similar to the Draft Articles, but goes further, as it powerfully counters the prevalent “out of sight, out of mind” mentality that undergirds deportation systems, especially post-deportation. The Declaration thus clearly recognizes deported and expelled individuals as a cognizable legal class with distinctive, particular protection needs and rights. This instantiation of deportees as a legal class renders their rights claims more regular and more understandable as it also implies and enhances solidarity among those who have faced deportation in disparate settings.

The Declaration could also serve as a matrix for nation-states to develop mechanisms — jointly or individually — to provide greater regularity and greater rights protections for the deported.

126 An example is the International Convention for Protection of Rights of Migrant Workers and Their Families which, despite having been adopted twenty-five years ago, has failed to garner much meaningful support (OHCHR 1998).
127 But should this not also be a duty of the receiving state, and a duty of both to coordinate?
128 Article 29 of the Draft Articles states that:

An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save where his or her return constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.

129 For the full text of the draft Declaration, see http://www.bc.edu/content/dam/files/centers/humanrights/pdf/DRAFT%20Declaration%20on%20the%20Rights%20of%20Expelled%20and%20Deported%20Persons.pdf.
130 The Draft Articles do, of course, also embody such protections in important ways. See, e.g., ILC Draft Articles, arts. 13-20. However, when one pauses on Article 15, commentary (3), the value of reciprocal obligations becomes clear. It is significant to recognize as the commentary does, that “all categories of vulnerable persons that might merit special protection” cannot be listed. Therefore, it is important, as Article 15 does, to protect “other vulnerable persons.” But it might also be helpful to diverge from the passive voice here and to clarify which state or states must protect the expelled with due regard for their vulnerabilities.
The goal, of course, is neither to legitimize nor to facilitate deportations. The Declaration seeks to balance a variety of pragmatic considerations as it leaves a significant “margin of appreciation” for state action within its prescribed boundaries of rights protections.\(^\text{131}\)

The Declaration is designed to be relatively simple and accessible. It applies to all forms of deportation and to all deportees, regardless of prior legal status or lack thereof. Of course, it also applies to refugees and asylum seekers.

Many of the Declaration’s core protections focus on the rights of deported and expelled persons in the course of travel and reception in the country of removal or transit country. Part 3 of the Declaration, for example, includes a strict limitation on the use of restraints, special protections for vulnerable individuals, the right to bring or transfer assets and personal property, and the right to contact family members or others in the receiving state to notify them of their arrival. Article 11, which protects expelled and deported persons who require special attention, specifically mandates that “sending” (i.e., deporting) and receiving states should coordinate to provide adequate services to such individuals, or establish procedures to connect them to existing services. Such procedures may include information sharing, such as the transfer of medical records upon the informed consent of the individual.

The Declaration provides other unique protections. Article 7, for example, enunciates an important norm of nondiscrimination in the countries to which deportees are sent.\(^\text{132}\) Part 4 addresses compelling problems of adjustment and reintegration in the receiving country. Among other things, that part includes a right of individuals to have identification documents that do not identify them as deported or expelled individuals (Article 15), a right to be free from social stigma (Article 17), and the right to housing, healthcare, and work on equal footing as other citizens of the receiving country (Articles 18-20).

Part 5 of the Declaration covers obstacles faced by deported individuals in challenging wrongful removals. Its protections go beyond those stated in the Draft Articles. Article 21 of the Declaration, for example, states the right to continued participation in legal proceedings of all kinds — criminal or civil — not just those that relate to deportation. It specifically provides that states should facilitate travel and entry for the purposes of participating in legal proceedings. The right to appeal or challenge wrongful expulsions, including through collateral motions, and to return to the expelling state should they prevail on such challenges, is set forth in Article 22. The Declaration also affirms the right of deported individuals to return to the expelling state, and calls for limits and waivers of any imposed reentry bans (as do the Draft Articles). Finally, in an important challenge to states’ alleged “right” to exclude, Part 6 confirms the right to respect for family life, and provides, in a very progressive formulation, that states should allow avenues for family reunification and generously grant requests for visits through visas or parole.

\(^{131}\) The consensus in the drafting conferences was strongly in favor of the propriety and immediate need for this initiative. However, some participants, particularly those who identified themselves as “deportation abolitionists,” were concerned about increasing the legitimization of the practice of deportation by creating more law around it. Though this critique was always a major concern of ours, most conference participants concluded that current policies and practices worldwide indicate that massive deportation is likely to be a reality for some time to come and the legitimization risk did not outweigh the need for a strong, rights-based response.

\(^{132}\) See generally Kanstroom (2012). See also Dingeman-Cerda and Rumbaut (2015).
Conclusion

Though it might seem counterintuitive to think that emerging ideas about deportation protections could help refugees and asylum seekers, the emerging anti-deportation discourses should be systematically studied by those interested in preserving and improving the global refugee regime. This is so not only because asylum seekers themselves increasingly face the brunt of harsh deportation practices. It is imperative because the phenomena of refugee/asylum protections and deportation are inherently linked. Reform of the global refugee system without paying specific attention to the rise of deportation and its opposing discourses risks gaining benefits through the front door, so to speak, which may later be lost through the back door due to the long-term duration of many refugee crises, complexities of assimilation, and fear of crime and terrorism. Emerging deportation human rights discourses embody creative framing models that can aid constructive critique and reform of the existing refugee protection regime. Finally, these discourses offer important specific rights protections that could strengthen the refugee and asylum regime. This is especially true in regard to the extraterritorial scope of the deporting state’s obligations post-deportation.

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The “Right to Remain Here” as an Evolving Component of Global Refugee Protection


The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants

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**Executive Summary**

Wars, conflict, and persecution have forced more people to flee their homes and seek refuge and safety elsewhere than at any time since the end of World War II. As displaced people and other migrants increasingly move out of the conflict-ridden and less developed regions of their displacement and into relatively rich and stable regions of the world, the countries of destination are increasingly working to contain and even stem the migration flow before it reaches their shores. Perversely, countries that have developed generally rights-sensitive standards and procedures for assessing protection claims of asylum seekers within their jurisdictions have simultaneously established barriers that prevent migrants, including asylum seekers, from setting foot on their territories or otherwise triggering protection obligations. Consequently, those who would otherwise have been able to avail themselves of asylum procedures, social support, and decent reception conditions are often relegated to countries of first arrival.

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or transit that have comparatively less capacity to ensure protection of human rights in accordance with international standards.

This paper seeks to develop a working definition of the externalization of migration controls and how such externalization of the border implicates the human rights of migrants, and asylum seekers in particular. Although the majority of those migrants seeking legal protections stay in countries neighboring their own, hundreds of thousands continue their journeys in search of protection and stability in more distant states, including in the European Union, the United States, and Australia. In response to the significant increase in asylum seekers arriving at their borders, all three entities have significantly increased deterrence measures with the hopes of keeping new arrivals from entering. This paper will thus highlight a number of the most troubling externalization strategies used by the European Union, the United States, and Australia. Finally, because rights-threatening externalization law, policies, and practices implicate the international legal responsibility of the destination states pursuing them, the paper will conclude by presenting recommendations that could strengthen protection of human rights in the context of state actions seeking to manage migration.

I. Introduction

As displaced people and other migrants increasingly move out of the conflict-ridden and less-developed regions of their displacement and into relatively rich and stable regions of the world, the countries of destination are increasingly working to contain and even stem the migration flow before the tide of those migrating reaches their shores. One of the cruel ironies in recent years is that a number of countries that have developed rights-sensitive standards and procedures for assessing protection claims of asylum seekers within their jurisdictions have simultaneously established barriers that prevent asylum seekers from setting foot on their territories or otherwise triggering protection obligations. Consequently, asylum seekers who would otherwise have been able to avail themselves of asylum procedures, social support, and decent reception conditions are often consigned to countries of first arrival or transit that have comparatively less capacity to ensure rights and process claims in accordance with international standards.

Humans migrate for a host of reasons — to escape harm or death, to reunify with family members, or to search for new opportunities — and these factors can evolve en route.

2 In this essay, the term migrant is used broadly to include any person who is outside of their country of citizenship or, in the case of stateless migrants, their country of habitual residence. This term encompasses those who are displaced by conflict, natural disaster or other causes, and also includes those who qualify under relevant international, regional, or national definitions of refugee. In lieu of refugee, the term asylum seeker is used throughout to broadly describe those migrants who are seeking and merit humanitarian protections, whether under international, regional, or national law protecting refugees or other forms of legal protections based on risk, vulnerability, or legal status (and also to emphasize, as does refugee law generally, that migrants who are deserving of those protections as a matter of law have a right to them whether or not they have yet been formally recognized or declared to be a refugee).
Recent estimates place the total number of migrants worldwide at an all-time high and rising — with the latest estimates above 244 million (UNFPA 2002). The number of the forcibly displaced — refugees, asylum seekers, and internally displaced persons — are also at historical highs. The overwhelming majority of the approximately 63.5 million people “of concern” to the United Nations High Commissioner for Refugees (UNHCR) at the close of 2015 have remained close to their places of original displacement (more than 38 million of them remain internally displaced in their home countries; 86 percent of the world’s refugees, 13.9 million, are staying in the developing world) (UNHCR 2016c). But hundreds of thousands have moved or are seeking to move beyond nearby countries of first arrival and knocking on the doors — and sometimes pushing them open or climbing over and around them — of industrialized countries, principally member states of the European Union and the United States, as well as Australia, though its deterrent measures have very effectively kept new arrivals from entering in recent years.³

The world’s attention has recently been seized by the drama of asylum seekers and migrants on overcrowded boats and at newly-erected fences on the frontiers that divide the world’s “haves” from the “have-nots.” From London to Canberra, political leaders have suggested that people smugglers were responsible for enticing migrants to make their journey or, worse, that human traffickers were forcing or tricking them to board boats or take dangerous overland routes (Frelick 2015).⁴ Politicians argued that the “tide” could be “stemmed” by cracking down on smuggling and trafficking crime syndicates and increasing deterrence to dissuade people from migrating. Some gave voice to the worst fears — that terrorists might pose as refugees. Others suggested that many of those at the gates were seeking jobs rather than asylum and were not in need or deserving of any rights protections at all. Finally, particularly in Europe, many said that even refugees fleeing conflict and persecution could and should have found asylum in countries closer to home, and were moving onward not to seek protection but rather only in search of a better quality of life.

This essay acknowledges that the United States and most of the EU member states have generally been providing protection to the people on their territories with legitimate claims for international protection — once migrants gain access to territory and to asylum or status determination procedures. A worrisome parallel development, however, has been the development by those states of a toolbox for preventing migrants, including asylum seekers, from reaching their territories and triggering the states’ international obligations. Another, distinct problem is that migrants are removed from a state’s territory quickly to prevent access to asylum or status determination procedures.⁵

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³ See the discussion of Australia in section IV(B), below.
⁴ “Smuggling of migrants” is generally defined as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;” and, “[t]rafficking in persons” is generally defined as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation” (UNODC 2004).
⁵ Consideration of efforts by states to expeditiously remove or otherwise prevent access to asylum or status determination procedures for migrants within a state’s territory is outside the scope of this article.
Section II of this article will suggest a working definition of externalization of migration controls and describe some of the ways that this phenomenon works in practice. Section III will briefly discuss the human rights of migrants, and asylum seekers in particular, and how the externalization of migrant controls affects these rights in practice, including the specific issue of the international responsibility of destination states that pursue migration-control externalization. Section IV will highlight a number of the most troubling externalization strategies used by Australia, the European Union, and the United States. Section V will present some recommendations that could strengthen protection of human rights in the context of externalization of migration controls or other efforts to “manage” migration.

II. What is the Externalization of Migration Controls?

Externalization of migration controls describes extraterritorial state actions to prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims. These actions include unilateral, bilateral, and multilateral state engagement (see Gammeltoft-Hansen 2011; see also Crépeau 2013), as well as the enlistment of private actors. These can include direct interdiction and preventive policies, as well as more indirect actions, such as the provision of support for or assistance to security or migration management practices in and by third countries.

As migration policy has become an increasingly politicized issue, externalization is often deceptively framed as either or both a security imperative and a life-saving humanitarian endeavor rather than simply as a strategy of migration containment and control. Control of migration flows is cast as an effort to prevent “illegal” (or irregular) immigration or to protect migrants from the dangers of the journey. Extraterritorial actions to manage
migration flows are also increasingly linked to the ineffectiveness (and politicization) of national or regional migration policies. Over time, the phenomenon has expanded to commonly include the systematic enlistment of third countries in preventing migrants, including asylum seekers, from entering destination states. Third countries enlisted in the prevention of onward movement of migrants and asylum seekers are — at least implicitly — encouraged to prevent migrants and asylum seekers from entering their territories or to apprehend and return them (Haddad 2008, 199). Much of this public engagement takes place in the context of transnational crime-control efforts by states that is directed at seeking to counter human trafficking or people smuggling (and often conflates the two) (Plaut 2015). A prominent example is law enforcement or military assistance designed to stop the flow of illicit materials, such as weapons and drugs, which may have the additional effect of sealing borders (both for exit and entry), encouraging push-backs, increasing apprehensions, and/or reducing access to protection mechanisms in the context of apprehension and deportation practices.

Externalization occurs through formalized migration policies and visa regimes, through bilateral and multilateral policy initiatives between states, as well as through ad hoc policies and practices. Externalization policies and practices may explicitly seek to prevent the entry of migrants into a destination state or have only an indirect impact on migration. The rhetoric that provides the humanitarian rationale for externalization focuses not only on preventing migrants and asylum seekers from embarking on what is characterized as a dangerous journey, but is also framed as an exercise in capacity building for countries of origin, countries of first arrival, and transit countries (IFRC 2015). While it may be questionable whether such capacity-building actions seek to improve rights protections in countries of origin as a humanitarian end in itself, or rather to address the “root causes” of international migration as a means of containing irregular migration flows, the building

11 Haddad contends that border externalization encourages apprehension and return, rather than resettlement, as it assumes that most migrants can be deported (see also Crépeau 2013 ¶ 59, highlighting a trend in European migration policy as more focused on stopping irregular migrants than protecting migrants’ rights).

12 For example, the United States has recently given $112 million in technological assistance to Mexico for border security. This support is being allocated to three security lines north of Mexico’s border with Guatemala and Belize. The stated goal is to counter “human trafficking and drug running from the region.” Under the Mérida Initiative, Pillar III, the US Department of State (DOS) focuses support on Mexico’s efforts to establish a secure southern border, with the stated goal of permitting free flow of licit goods and people while deterring illicit flows. For FY 2016, DOS requested $39 million for Mexico under Mérida to address security threats from drug trafficking and violent crime. Additional funding comes from the US Department of Defense (DOD) counter-drug budget (see DOS 2012; see also Isaacson, Meyer, and Morales 2014).
of capacity for developing rule of law, respect for human rights, conflict resolution, good governance, and humane quality of life all represent positive aspects of externalization (see Ogata 1995; see also Haddad 2005, 202-02, 204). While recognizing that successfully addressing root causes should enable more people to choose to remain in their homes or in countries of first arrival, capacity-building policies and practices can have the additional effect, even if only indirectly, of advancing, strengthening, or rationalizing migration-control externalization.

Externalization policies are often also pursued with the stated goal of assisting third countries with migration control and management. Examples of these schemes include policies and practices that encourage both third countries and countries of origin to prevent would-be migrants from migrating through incentives for individuals to remain in place and also through physical or legal barriers (Plaut 2015); policies and practices encouraging migrant apprehensions (interdictions, interceptions, or “turn-backs” — including on the high seas) through logistical, financial, or political support, or directly in exchange for aid; the development of readmission and incentive structures between third countries and countries of origin (Hyndman and Mountz 2008, 253); financial and political support of migrant detention or interdiction practices by third countries or off-shore (ibid.); and partnerships to combat “illegal” (or irregular) migration or to build capacity of immigration or asylum systems in third countries (Haddad 2008, 196). Externalization policies can also include measures implemented entirely through requirements imposed on the private sector, such as carrier sanctions imposed on transportation firms, and that have the effect of preventing departure or transit of migrants to destination states. In the context of forced migration, externalization efforts may also extend to efforts aimed at diverting asylum seekers to third countries, such as to third-country processing centers or “protected areas” near countries of origin (Andrijasevic 2010, 266).

In conjunction with and often to justify the externalization of migration controls, states have specifically sought to reduce access to asylum. Many states have pursued a two-pronged strategy to reduce access to asylum. One way is to push, prod, and sometimes pay a country of first arrival or a transit state to seek to curb the migration flow through its own enforcement measures. The second line is to deem the transit or first arrival state a “safe third country” or “first country of asylum” that has or could have provided protection to a refugee, and to which the person can be returned after only a cursory admissibility determination.

UNHCR’s Executive Committee first tackled the question of which country is responsible for examining an asylum request in 1979. At that time, the Executive Committee issued a formal conclusion holding that (1) “the intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account” and (2) “asylum should not be refused solely on the ground that it could be sought from another State” (UNHCR Executive Committee 1979). But the same conclusion also said that if a person “before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum

13 Examples of European border externalization include an 8.5 billion euro program through which the European Union signs agreements with countries that agree to readmission of nationals who are illegally present on the territory of a member state (Hyndman and Mountz 2008, 266).
from that State” (ibid.). The Dublin Regulation in Europe\textsuperscript{14} (Frelick 2015) and the US-Canada Safe Third Country Agreement\textsuperscript{15} (Frelick 1996) and state practice have expanded the scope of this conclusion in the development of the principle of “safe third country” as a basis for determining the country within a set of countries with harmonized standards that would be responsible for examining an asylum claim, which included a basis for ruling inadmissible asylum claims in countries of destination (UNHCR Executive Committee 1999).

With the safe third country concept established in international law, what is at issue in the context of externalization of border control is not the principle per se, but whether the country of first arrival or transit is, in fact, safe. This requires a factual assessment of whether it provides effective protection, which is based on the following criteria:

- no risk of persecution within the meaning of the 1951 Convention or serious harm in the previous state;
- no risk of onward \textit{refoulement} from the previous state;
- compliance, in law and practice, of the previous state with relevant international refugee and human rights standards, including adequate standards of living, work rights, health care, and education;
- access to a right of legal stay;
- assistance of persons with specific needs; and
- timely access to a durable solution (UNHCR 2002).

In the rush to render asylum claims inadmissible on the basis of the safe third country concept, nominal adherence to these criteria has often been deemed sufficient even when there are evident gaps between formal acceptance of principles and their realization in practice. In effect, asserting that a person should be denied asylum because he or she could have sought an ineffective form of protection in a country of first arrival or transit operationalizes the externalization of migration control — and provides perhaps the starkest illustration of the serious threat that externalization poses to the protection of the rights of migrants, and of asylum seekers in particular.

\textbf{III. The Impact of Border Externalization on the Right of Migrants}

Border externalization policies and practices can directly affect the human rights of migrants — and the international obligations of states to protect them — in significant ways.

First, and perhaps most importantly, by directing migrant flows to third countries, externalization influences the nature and duration of state legal obligations, as well as \textit{which} states are charged under international law with the protection of the rights of

\textsuperscript{14} European Council Regulation No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national (Dublin Regulation).

migrants. For example, border externalization may attempt to (or effectively) limit formal legal obligations, including the right to seek and enjoy asylum, by preventing migrants from ever coming under the jurisdiction of destination states.\textsuperscript{16}

Such externalization policies and practices can then place significant and unequal burdens on third countries; often states with fewer resources are forced (in practice and by law) to seek to ensure the protection of migrants’ rights, including rights in the context of asylum.\textsuperscript{17}

When the rights of asylum seekers and migrants are violated in such third countries as a result of a destination state’s externalization efforts, this can raise complicated issues of state responsibility for both destination states and third countries. Simply put, it is a violation of international law for states to directly support the internationally wrongful acts of another state. States may not knowingly “aid or assist” another state in the commission of an internationally wrongful act if the underlying act would be internationally wrongful if committed by the former state (ILC 2001). As a result, destination states pursuing border externalization strategies may come to be responsible (as a matter of international law) for rights violations outside of their own territory, as at a minimum they are responsible when they exert control over the acts of third countries.\textsuperscript{18}

Second, externalization may actually trigger, directly or indirectly, one or more categories of rights violations. Regardless of their status or location, migrants have a range of fundamental rights that can be implicated by migration-control externalization practices and which protect migrants against abuse throughout the migration process.\textsuperscript{19} These include rights that are implicated during transit, including while on the high seas and over land, if and when detained as well as during the expulsion or deportation process.\textsuperscript{20}

In addition to this core set of rights, some migrants may be covered by specific bodies of law that provide a higher standard of protection than is available to other migrants. For example, child migrants are recognized to have a special status under international law, as are those fleeing rights abuses in their countries of citizenship or habitual residence, such as refugees and asylum seekers or stateless people.\textsuperscript{21} At times, migrants also encounter

\begin{itemize}
\item \textsuperscript{16} The right to seek and enjoy asylum is enshrined in the Universal Declaration of Human Rights and is affirmed both by refugee law and general human rights law (UDHR, supra, Art. 14). There are at least some circumstances in which state practice suggests a deliberate effort to limit rights protections available to migrants through the way in which border externalization efforts are pursued. For example, states may direct migration to third countries which are not parties to the 1951 Refugee Convention, and thus migrants benefit from fewer formal legal protections, particularly regarding refoulement (Hyndman and Mountz 2008, 266).
\item \textsuperscript{17} This can result in unfair “burden sharing” with only limited political or financial support (see Atger 2013, 7).
\item \textsuperscript{18} The increasing recognition of the extra-territorial responsibility of states to fulfill their human rights obligations, such as in Hirsi Jamaa and Others v. Italy, suggest that international law is likely to more broadly recognize breaches of international law and standards in the context of the externalization of migration controls. See Hirsi Jamaa and Others v. Italy, No. 27765/09 (ECtHR, February 23, 2012).
\item \textsuperscript{19} The rights of all international migrants are derived from many bodies of law, including general human rights law; human rights law protecting specific categories of people (e.g., children) and which thus protect specific categories of migrants; international labor law; international humanitarian law; and international refugee law, among others. For a restatement of rights and commentaries that source their origins to various international treaties and the regional conventions, see IMBR (2014).
\item \textsuperscript{20} See, e.g., UDHR, supra; ICCPR, supra; and ICESR, supra.
\item \textsuperscript{21} See the 1951 Refugee Convention, supra; and CRC, supra.
\end{itemize}
situations during transit that increase their vulnerability or trigger the attachment of additional rights, such as the rights of victims of trafficking or other crimes.22

The perilous journey undertaken by many migrants, including on the high seas, as well as clandestine efforts by some to cross increasingly militarized (and sometimes closed) borders, can expose them to violations of the right to life and the right to seek and enjoy asylum and can additionally implicate their rights as victims of crime and abuse (such as by traffickers) (see UNOHCHR 2014, 1-2). Externalization can also increase demand for both third-country resources for and interest in apprehension of migrants, and this, in turn, can increase the likelihood of apprehension and both the likelihood and the duration of detention. Yet, throughout this entire process, migrants maintain fundamental rights, including to liberty and security of person (including a presumption against detention on the basis of migration status) and, if deprived of liberty and otherwise, rights against torture and ill-treatment.23

In addition to being associated with increased enforcement practices (and detention of migrants), externalization can implicate asylum rights and prohibitions against refoulement. All persons have the right to leave any country, including their own; refugees and asylum seekers also have rights to seek and enjoy asylum and not to be punished for illegally entering a country to do so.24 Perhaps the most important obligation, that of non-refoulement, prohibits states from returning a refugee to territories where her or his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. The principle of non-refoulement also prohibits states from returning anyone to a state in which they would be exposed to the danger of torture or cruel, inhuman or degrading treatment or punishment.25 26 In some regions and circumstances, those fearing mistreatment are also protected under human rights law from return to a broader set of harms, including generalized violence or serious deprivation of a range of human rights (see, e.g., UNHCR 1984, part III[3]).27 These obligations require that states provide migrants access to screening and examination of any refugee or asylum claims, including in situations of mixed migratory flows (where not all migrants may ultimately be determined to merit or require international protection) (see UNHCR 2016b).28

22 Migrants may also not fall into any specific category of vulnerable group recognized by existing international law, but there is growing recognition of various categories of “survival migrants,” or those who are forced to leave their countries of origin as a result of impacts of climate change, environmental degradation, natural disaster or serious economic and social distress (see Betts 2010, 11; see also IMBR 2014 [recognizing, in Article 4, the rights of vulnerable migrants]).
23 See, e.g., ICCRR, supra Art. 7, 9; CAT, supra.
24 See UDHR, supra Art. 13; the 1951 Refugee Convention, supra Art. 31(1).
25 1951 Refugee Convention, supra Art. 33; ICCPR, supra Art. 7; CAT, supra Art. 3; UNHRC 1992.
26 The content of this right has been specifically tied to Article 7 of the ICCPR by the UN committee created by the treaty. Also note that the CAT does not have a nexus requirement; thus, the CAT applies to all migrants, even those who do not fear persecution on a ground recognized by refugee law (CAT, supra Art. 1).
27 Some migrants who leave their country for reasons that fall outside of refugee protection can still become refugees while abroad if circumstances in their country of origin change to create a well-founded fear of persecution (UNHCR 2007a, 5).
28 The right to seek and enjoy asylum and the refugee protection regime also provides the right to due process in the context of status determinations (a right which is also independently guaranteed under human rights law) and prohibits the use of detention as a deterrent to potential asylum seekers.
Enforcement pressures on third countries can increase the difficulty of crossing borders for asylum seekers and refugees as well as the ability to seek or access procedures for determining refugee status. Given that states are forbidden to practice “indirect” or “chain” refoulement — in which refugees are returned to a third territory where they face persecution, harm, or the serious threat of being returned to their home country or another territory to face persecution or torture — migration-control externalization can implicate the very cornerstone of the human rights regime.\(^{29}\)

### IV. Regional Case Studies

The United States, Australia, and the European Union are the primary destination states or regions that have engaged in deliberate externalization strategies aimed at preventing migrants and asylum seekers from irregularly reaching their shores.

#### A. The United States

US efforts to externalize migration controls go back at least to the Reagan administration.\(^{30}\) The 1981 Interdiction Agreement between the United States and Haiti authorized the US Coast Guard to interdict Haitian vessels on the high seas, detain the passengers, and return them to Haiti.\(^{31}\) Despite assurances in President Reagan’s executive order that the United States would respect the principle of non-refoulement, US officials brought fewer than one dozen of the 22,651 Haitians interdicted at sea between 1981 and 1990 to the United States to pursue asylum claims during the highly repressive Duvalier dictatorships (Taft-Morales and Sullivan 1993, 9).

A September 30, 1990 coup that overthrew Haiti’s first democratically elected president, Jean-Bertrand Aristide, caused the number of Haitians taking to boats to spike. US President George H.W. Bush attempted to continue the Reagan policy of shipboard screening, but ran into legal challenges alleging that the screening was inadequate.\(^{32}\) On May 23, 1992, he issued the Kennebunkport Order, which threw out Reagan’s nod to the principle of non-refoulement, and authorized summary returns of interdicted Haitians with no refugee screening whatsoever.\(^{33}\) In Sale v. Haitian Centers Council, the US Supreme Court countenanced the Kennebunkport Order policy of summary return of refugees interdicted on the high seas.\(^{34}\) Several international bodies have rejected the notion that the law of non-refoulement does not apply on the high seas (or extraterritorially).\(^{35}\) The UN High

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\(^{29}\) States’ non-refoulement obligations apply to their actions within and beyond their own territory (see UNHCR 2007b; von Sternberg 2014).


\(^{31}\) Interdiction Agreement Between the United States of America and Haiti, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559, 3559-60


Commissioner for Refugees called the Sale ruling “a setback to modern international refugee law” (UNHCR 1993).

As widespread human rights violations continued in Haiti and Haitians continued to seek protection in the United States, the Clinton administration briefly tried shipboard screening, but decided in July 1994 to detain interdicted Haitians temporarily at the US naval base in Guantánamo, Cuba rather than summarily return them to Haiti (Wasem 2011, 5). They were not screened for refugee status but held pending their return to Haiti (ibid., 4). It was clearly conveyed to the Haitians at Guantanamo that they would never be resettled in the United States (Gordon 1994).

President Clinton extended this externalization of migration control to Cuban boat and raft migrants as well. After a decades-long US policy of welcoming all rescued or irregularly-arriving Cubans to the United States and automatically granting them residency status, President Clinton, in August 1994, announced that “boat people” and rafters fleeing Cuba would, like the Haitians, be interdicted and taken to Guantánamo. This new US policy toward Cuban rafters was confirmed in a Joint Communique on Migration issued by the Cuban and US governments on September 9, 1994. The communique stated that Cubans “rescued at sea attempting to enter the United States will not be permitted to enter the United States, but instead will be taken to safe haven facilities outside the United States.” In addition, the communique stated that the Cuban government would “take effective measures in every way it possibly can to prevent unsafe departures using mainly persuasive methods” (DOS 1994).

President George W. Bush reverted to the policy of interdicting and summarily returning Haitian boat people, including possible refugees, to Haiti. When a wave of political violence in late February 2004 resulted in a second ouster of President Aristide, and Haitians once again took to boats, President George W. Bush announced, “I have made it abundantly clear to the Coast Guard that we will turn back any refugee that attempts to reach our shore” (Seper 2004).36

The Obama administration has continued high seas interdictions and cursory shipboard screening. Those found to have “credible fears” are brought to Guantánamo where they undergo a refugee status determination without the benefit of legal representation. The few who are recognized as refugees are held at Guantánamo pending third-country resettlement; they are not considered for resettlement to the United States.37

US externalization of migration controls has a long history on land as well. In 1989, an internal US Immigration and Naturalization Service (INS) memo called on the INS liaison in Mexico “to secure the assistance of Mexico and Central American countries to slow down the flow of illegal aliens into the United States” (Frelick 1991, 2). In June 1989, the INS newsletter, Commissioner’s Communique, reported on “cooperation with the Government of Mexico to stem the flow of Central Americans through that country, including the establishment of checkpoints along the transit corridors and the deportation...” (Frelick 2005).

36 Remarkably, neither the White House nor the State Department issued any correction to this use of the term “refugee” (Frelick 2005).
37 Information in this paragraph is derived from the Meeting on Interdiction in the Caribbean, US Department of State, on October 29, 2015, attended by Bill Frelick.
of intercepted Central Americans” (Jones and Roney 1989). While cooperation between US immigration officials and their Mexican counterparts has ebbed and flowed over the years, the idea of pressuring and supporting Mexico to control Central American migration across its remote 500-mile southern border with Guatemala has had a lasting appeal for US policymakers faced with the challenges of policing the nearly 2,000-mile US border with Mexico.

Through the Mérida Initiative, a cooperative bilateral security agreement between the United States and Mexico that dates from 2008, the US Congress has appropriated about $2.5 billion in assistance to Mexico, of which more than $1.3 billion in equipment and training has been delivered to Mexico, as of April 2015 (Seelke and Finklea 2015). One of the “four pillars” of US security assistance to Mexico through the Mérida Initiative is support to “create a 21st century border” (pillar 3). The goal is to “[f]acilitate legitimate commerce and movement of people while curtail[ing] the illicit flow of drugs, people, arms, and cash” (US Embassy-Mexico 2014). While Mérida Initiative funding involves far more than migration control, “curtailing the illicit flow of . . . people” has remained an important priority for the United States (ibid.), as evidenced by events in the summer of 2014, when extreme gang violence and poverty in the Central American countries of Honduras, Guatemala, and El Salvador caused tens of thousands of people, many of them unaccompanied minors, to flee to the United States and Mexico.

President Obama committed his administration to meeting the “surge” of migrants “with an aggressive, unified, and coordinated Federal response on both sides of the border” (White House 2014a). He told congressional leaders that he intended “surging law enforcement task forces in cooperation with our international partners, with a focus on stepped-up interdiction and prosecution” (ibid.). A week later, he asked Congress for an emergency supplemental appropriation of $3.7 billion “to comprehensively address this urgent humanitarian situation” (White House 2014b). The highest levels of US diplomacy were engaged to persuade Mexico and the three Central American source countries, El Salvador, Honduras, and Guatemala, to create “concrete ways that we can work together to stem the flow of migrants taking the dangerous trip to the United States” (White House 2015a).

In direct response to the summer 2014 surge in unaccompanied Central Americans arriving at the US border, the US Department of Homeland Security (DHS) launched Operation Coyote, which it said was “designed to stem the flow of illegal Central American migration.” The operation involved the deployment of DHS investigators to Mexico and Central America “to share criminal intelligence with foreign partners and build capacity in human smuggling and human trafficking enforcement” (HRW 2016b, 52). By the end of May 2015, this effort had resulted in 1,037 criminal arrests in Mexico and the region.

38 In December 2008, Mexico and the United States signed the first Letter of Agreement for the Mérida Initiative, a bilateral security agreement centered on four “pillars”: (1) disrupting capacity of organized crime to operate, (2) institutionalizing capacity to sustain rule of law, (3) creating a twenty-first century border structure, and (4) building strong and resilient communities.

39 President Obama, Vice President Biden, and Secretary of State Kerry all met with highest level government officials in Mexico and Central America on this issue.


41 Ibid.
The Congressional Research Service (CRS) estimated that US Department of State (DOS) funding for equipment and training to support immigration enforcement on Mexico’s southern border would exceed $86.6 million prior to the enactment of the FY 2015 appropriation (Seelke and Finklea 2015, 16). Congress increased the president’s $115 million request for FY 2015 Mérida Initiative by another $79 million, and specified that it was to be used “for helping Mexico secure its southern border” and implement justice sector reforms (ibid., 7). Significant funding for Mexican Mérida Initiative programs continued in the Obama administration’s FY 2016 request. Additional funds also flowed to Mexico’s military from the US Department of Defense’s (DOD) counter-narcotics budget to bolster its capacity to control Mexico’s southern border.

The combination of funding and technical support, as well as diplomatic and other pressures from the United States, spurred the Mexican government to action. The same day as President Obama’s emergency supplemental budget request, July 8, 2014, Mexican President Enrique Peña Nieto announced the start of the Programa Frontera Sur (Southern Border Program). Although a detailed program was never presented publicly, the Mexican government established a new administrative body within the Ministry of Interior, the Office of Coordination for Comprehensive Migration Assistance at the Southern Border, to coordinate border control and migration management, and federal officials were designated to manage migration policy in the southern Mexican states of Campeche, Chiapas, Quintana Roo, and Tabasco (“Poder Ejecutivo” 2014, 1, 2; Monroy 2015). Moreover, in September 2014, the New York Times reported that “under pressure from the United States . . . Mexico in recent weeks has taken a rare step toward stemming the flow of migrants, sweeping [Central American migrants] off trains, setting up more roadway checkpoints and raiding hotels and flophouses where they congregate on their journey north” (Villegas and Archibald 2014).

Apprehensions of non-Mexican migrants along the southwestern border of the United States fell by 57 percent between October 2014 and April 2015 compared to the same months the previous year, from 162,700 to 70,400 (NYT Editorial Board 2015). As early as September 2014, when the number of Central Americans appearing at the US border decreased, DHS

42 The State Department’s FY 2016 budget request included $39 million for the Mexico Economic Support Fund to support the continued US-Mexico partnership under the Mérida Initiative “to address security threats stemming from drug trafficking and violent crime”; $81.5 million for Central American Regional Security Initiative (CARSI); $26 million for the Caribbean Basin Regional Security Initiative (CBSI); $80 million for International Narcotics Control and Law Enforcement (INL) Mexico funds for the purposes of “institutionalizing the rule of law, disrupting and dismantling criminal organizations, creating a 21st century border, including Mexico’s southern border, and building strong and resilient communities through the Mérida Initiative”; $225 million for INL for CARSI activities such as land border and maritime interdiction programs (and “support[ing] civil society through access to justice[ and] protection of human rights”); and $20 million for INL’s support to CBSI “to continue efforts to combat illicit trafficking and organized crime, increase port and border security, and strengthen the rule of law through training and technical assistance” (see DOS 2016, 90-109).

43 In FY 2011, DOD provided Mexico $50 million “to improve security along the Mexico-Guatemala-Belize border” out of $84.7 million in DOD counter-narcotics support funding to Mexico that year. DOD’s Mexico-Guatemala-Belize border initiative provides training to troops patrolling Mexico’s southern border, communications equipment, and support for development of Mexico’s surveillance capacity. DOD counter-narcotics funding for Mexico continued after FY 2011 with $83.5 million in FY 2012, $68.8 million in FY 2013, and $50.8 million in FY 2014 (see Seelke and Finklea 2015, 17, 24; Seelke and Finklea 2013, 29).
Secretary Jeh Johnson issued a press release showing the statistical drop and saying that the US government is “pleased that the Mexican government has itself taken a number of important steps to interdict the flow of illegal migrants from Central America bound for the United States” (Johnson 2014).

In parallel, apprehensions of Central American migrants in Mexico rose by 75 percent, from 53,078 to 92,889 (Secretaria de Gobernacion 2013, 117; Secretaria de Gobernacion 2014, 117; NYT Editorial Board 2015). Mexico’s National Immigration Institute (INM) reported a 79 percent increase in the number of Central Americans deported from Mexico in the first four months of 2015 (Stillman 2015).

The US government has characterized the efforts to stem the flow of Central American migrants to the US border as a success, and has given much of the credit for this success to Mexico for its enhanced enforcement efforts. As President Obama said at a joint White House press conference with Mexican President Peña Nieto on January 5, 2015:

I very much appreciate Mexico’s efforts in addressing the unaccompanied children who we saw spiking during the summer. In part because of strong efforts by Mexico, including at its southern border, we’ve seen those numbers reduced back to much more manageable levels.

(White House 2015b)

US externalization efforts extended to the Central American source countries as well. In June of 2014, Honduran law enforcement units which had received funding and training from the DOS Bureau of International Narcotics and Law Enforcement (INL) “launched an operation to intercept children and families attempting to cross the border from Honduras into Guatemala” (Jesuit Conference 2014, 2). Three such Honduran units apparently collaborated on two tactical operations, Operation Rescue Angel and Operation Coyote (ibid.). According to reports, all three units received equipment and special training from US Border Patrol, US Immigration and Customs Enforcement, or other US migration control and law enforcement entities (ibid.; “Honduras Amuralla” 2014; Carcamo 2014a; Carcamo 2014b).

B. Australia

Australia’s migration-control externalization policy, called the “Pacific Solution,” dates from August 2001 when the Australian navy began interdicting migrants on the high seas (Hathaway 2002; Magner 2004). That month, a Norwegian freighter, the Tampa, rescued migrants from an overcrowded vessel and sought to bring them to Australia’s Christmas Island, as the next “place of safety” — the proper place, according to international maritime law, to disembark people rescued from vessels in distress.44 After the Norwegian ship captain defied Australia’s order and entered its territorial waters, the Australian military blocked the Tampa off the coast of Christmas Island, prevented its passengers from disembarking, and transferred them to an Australian military vessel.

During the weeks-long stand-off at sea, the Australian Parliament passed legislation with the explicit objective of stemming the unauthorized maritime arrival of asylum seekers (HRW 2002, 12-13). Among other provisions, the legislation, which came into effect in late September 2001, excised Christmas Island and other outlying territories from Australian immigration law, thus prohibiting asylum seekers in these erstwhile Australian territories from lodging asylum claims in Australia (ibid.).

While there is evidence to suggest that Australian officials examined the US playbook in devising the Pacific Solution and in many respects “followed in the footsteps of the United States in its restrictive policies on asylum seekers who arrive by sea,” they also added some new variations (Magner 2004, 58). Australia’s new twist on externalization excised Australian territories, for immigration law purposes, by a stroke of the pen rather than through any extraterritorial actions, creating the sort of “rights free zone” that had proved so convenient for the United States at Guantánamo (HRW 2002, 63).

During September and early October 2001, Australia detained irregular maritime arrivals on Christmas Island or on board Australian naval ships and then transferred them to the Pacific-island country, Nauru, or to Papua New Guinea, where they were confined in camps. (ibid., 12-13). At the time, Nauru was not a party to the 1951 Refugee Convention and Papua New Guinea, though a party to the Convention, had attached numerous reservations to their accession and did not have in place adequate laws and structures to provide effective protection to refugees and asylum seekers (UNHCR 2010). Australian immigration officials conducted refugee status determinations in Nauru and Papua New Guinea but not for the purpose of granting asylum under Australian law, but rather — as the United States was doing at Guantánamo — to consider recognized refugees for discretionary resettlement; the asylum seekers in Nauru and Papua New Guinea had no recourse under any national law to challenge the refugee status determinations (HRW 2002, 62-65).

In late October 2001, Australia also began interdicting migrant boats and forcibly returned them to Indonesian waters. Indonesia was notified, but no specific reception arrangements were made and no agreement was in place guaranteeing the protection of the intercepted refugees from refoulement (ibid., 12-13).

Refugee processing was closed at Manus Island in 2004 and at Nauru in 2008. Nauru became a party to the Refugee Convention in 2011, but lacked the capacity to provide effective asylum procedures and refugee protection (UNHCR 2012b, 38).45

In July 2011 Australia announced an “arrangement” to transfer irregular maritime asylum seekers to Malaysia, but Australia’s High Court halted that plan, finding it to be procedurally invalid because of Malaysia’s poor refugee protections and the risk of refoulement (Phillips 2014).46 The High Court ruling ended the Malaysia deal, but the Parliament scrapped the provision of the Migration Act upon which the High Court had based its ruling, and switched its offshore processing scheme away from Malaysia, not a party to the Refugee

45 “[T]here are…no experienced refugee status determination decision makers in the Government of Nauru [and] no pool of persons identified to do the independent reviews on the tribunals envisaged by the recently enacted Refugee Convention Act of 2012.”
The Impact of Externalization of Migration Controls

Convention, and back to Nauru and Papua New Guinea, both nominally parties to the Convention.

In August 2012, the Offshore Processing and Other Measures Bill authorized the government to transfer irregular migrants arriving by sea to Nauru or to Manus Island, Papua New Guinea, where they would be held indefinitely while their refugee claims were processed (HRW 2012). The legislation targeted only those asylum seekers who arrived irregularly by boat (ibid.). Under the law, the claims of asylum seekers who arrived by air, even with improper documents, would continue to be processed while they remained in Australia (ibid). On July 19, 2013, Prime Minister Kevin Rudd announced that all irregular maritime asylum seekers would be sent to Manus and Nauru for processing and that none found to be refugees would be resettled to Australia (Parliament of Australia 2014).

In December 2014, the Australian Parliament passed legislation that removed most references to the Refugee Convention from Australia’s Migration Act of 1958, instead creating a “new, independent and self-contained statutory framework” to allow Australia to pursue its own interpretation of its obligations under the Convention (KCIRL 2014). Among other things, the legislation gave the minister of immigration and border protection extraordinary powers to detain people on the high seas and to transfer them to any country chosen by the minister, with very limited possibilities for judicial review (ibid). The new law added that “the designation of a country to be an offshore processing country need not be determined by reference to the international obligations or domestic law of that country” (ibid). Prime Minister Tony Abbott promoted his “stop the boats” policies as a model for other countries confronting the challenge of irregular migration, including European countries (see Norman 2015).

Australia has continued and expanded the Pacific Solution under the Abbott government (ASRC 2015). This expansion includes a regional plan by Australia, Indonesia, Sri Lanka, and Malaysia to deter migration by sharing intelligence and information about the identities of migrants, cooperating on naval patrols and border security, launching media campaigns to dissuade migration, and increasing the speed at which migrants are deported (The Coalition 2014). The Abbott and Turnbull governments’ part in this plan has been directed by the military-led Operation Sovereign Borders, which includes a joint agency task force aimed at preventing “people smuggling” (KCIRL 2015). Under Operation Sovereign Borders, migrants who are not returned to their “sending” country continue to be detained for offshore processing in substandard conditions (“Australia Asylum” 2016; Ostrand 2014).

The stated guiding principle of Australia’s Pacific Solution has been the “no advantage” test, to ensure that “no benefit is gained through circumventing regular migration arrangements.” As a consequence of this approach, Australia has refused the option of resettlement in Australia to any refugees from Nauru or Papua New Guinea. Its search for

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third countries willing to resettle refugees from its outsourcing centers led it to conclude a deal with Cambodia in 2014 to accept refugees from Nauru. The resettlement agreement, coupled with $40 million in development aid, ignored concerns about safety and the lack of capacity of the Cambodian government (HRW 2015). The first group of four refugees arrived in Phnom Penh in June 2015 at a cost to Australia of another $15 million, but by March 2016 three of the original four had chosen to go back to their home countries rather than remain in Cambodia (Hasham 2016). With two additional refugees resettled from Nauru, there were only three such refugees still in Cambodia, as of March 2016 (ibid).

In April 2016, the Supreme Court of Papua New Guinea ruled that detention of asylum seekers and refugees on Manus Island violated Papua New Guinea’s constitution. The Papua New Guinea prime minister then called on the Australian government to find alternative arrangements for its detainees on Manus Island and to relocate refugees not wanting to stay there (HRW 2016d).

**C. The European Union**

In 2003, British Prime Minister Tony Blair’s cabinet and Home Office circulated a policy paper called “A New Vision for Refugees,” which proposed that the European Union establish Regional Protection Areas (RPAs) near refugee-producing countries, which would have the purpose both to contain refugees in countries of first arrival and to serve as places to which asylum seekers that had arrived in Europe could be deported (Noll 2015). As proposed, returned asylum seekers as well as refugees arriving from their home countries would be processed in Transit Processing Centers (TPCs) for possible resettlement in the European Union (ibid). Finding insufficient support for the proposal, the United Kingdom withdrew it prior to the June 2003 European Council meeting in Thessaloniki, and it was never formally considered (HRW 2006, 5). But the New Vision has persisted through the years and echoes loudly in the 2016 EU-Turkey Action Plan for stemming the irregular flow of migrants and asylum seekers into the European Union.

In September 2005, the European Commission proposed Regional Protection Programmes (RPPs), a variation on the New Vision’s RPA. RPPs purportedly would strengthen protection capacity in the regions close to refugee flows (European Commission 2005). Human Rights Watch noted at the time that while “the RPPs’ goals of strengthening the protection capacity and improving access to durable solutions in the target countries are laudable, [t]he RPPs concept raises concerns . . . that the EU will use the existence of such programs as a pretext to declare the target countries ‘safe third countries.’ The EU could then return asylum seekers and migrants who transited through these countries even though effective protection could not be guaranteed” (HRW 2006, 4).

During the next 10 years, the European Union continued its efforts to put externalization into practice through cooperation with key migration transit countries. In Ukraine, at the time an important transit country for migrants and asylum seekers, the European Union and its member states bordering Ukraine provided resources, signed readmission agreements to facilitate summary returns, and conditioned closer ties on Kiev’s cooperation with migration-control efforts that led to asylum seekers being warehoused in the country (HRW 2010). In Libya, EU member state Italy led the way in encouraging the Gaddafi government
to prevent migrants from departing its shores by boat for Italy and Malta and to accept the summary return of those who did depart, despite the abuses against migrants and asylum seekers and lack of effective protection in that country (HRW 2009).

The European Union has also pursued a series of EU-wide readmission agreements with third countries to facilitate not only the return of rejected asylum seekers and other migrants who are nationals of those countries but in the case of transit countries, the nationals of other countries, a move designed in part to overcome the practical difficulties of deporting rejected asylum seekers to some countries (Rais 2016).

The “safe third country” concept was codified in Europe in the Asylum Procedures Directive (APD), one of the key elements of the EU’s Common European Asylum System, in 2005. After the APD passed, UNHCR said that it “may lead to breaches of international refugee law if no additional safeguards are introduced, and make it harder for refugees to have their asylum claims properly heard in Europe.” After the European Commission proposed a revised (but still problematic) version of the APD in 2009, the UN refugee agency in January 2012 said:

UNHCR continues to question the utility and consistency with international refugee law of the European safe third country concept. No minimum principles and guarantees appear to govern the procedure under Article 39 of the Amended Proposal. The implication is that access to territory and to an asylum procedure may be denied altogether to asylum seekers who may have protection needs. Such a denial could be at variance with international refugee law. (UNHCR 2012a)

The political impact of the refugee crisis in Europe in 2015, with the arrival of more than one-million people by sea, 84 percent of whom came from the world’s top 10 refugee-producing countries, gave fresh impetus to the European Union’s interest in externalization (UNHCR 2016e). The European Union first sought to shift responsibility towards the non-EU states on the Western Balkan migration route and then ultimately to Turkey, the main transit country for the 850,000 arrivals in Greece in 2015. At the same time, the European Union renewed its efforts to create migration partnerships with African countries, establishing an emergency trust fund for Africa in November 2015 with the explicit aim of reducing migration to Europe (European Commission 2015).

In March 2016, the European Union and its member states used inducements of future visa-free travel for Turkish nationals, a renewed path toward EU membership, and billions of euros in aid to seek Turkey’s assistance in preventing Syrian refugees from crossing into the European Union (European Commission 2016a). On March 18, 2016, the European Union and Turkey came to a formal agreement to return “all new irregular migrants crossing from Turkey into Greek islands” back to Turkey (ibid). The agreement states that such returns will take place “in full accordance with EU and international law.” The agreement
cites the APD, and suggests that asylum requests from Syrians, Iraqis, Afghans, and others arriving irregularly by boat from Turkey will be ruled inadmissible because Turkey will be identified as a “safe third country” or as a “first country of asylum” to which asylum seekers can be returned with less than full examination of their asylum claim (ibid.).

At this writing the EU-Turkey migration agreement is still in its infancy, but Turkey in any case falls short of the APD’s criteria for either “safe third country” or “country of first asylum.”

Importantly, any Syrian, Iraqi, or Afghan returned to Turkey would not be allowed to request refugee status there because Turkey excludes non-Europeans from qualifying for refugee status (Kirişci 2005). Syrians do have access to temporary protection in Turkey offering some access to assistance and more recently to the labor market, although in practice significant barriers remain (HRW 2016e). But Iraqis, Afghans, and other nationalities of asylum seekers are not even eligible for temporary protection. The APD also requires the safe third country to respect the principle of non-refoulement, the prohibition on the forced return of refugees. That principle not only forbids governments from deporting refugees to places where their lives or freedom would be threatened but also from rejecting asylum seekers at their borders who would face such threats. At the very time the EU was announcing its migration control deal, Turkey had closed its border to tens of thousands of Syrians fleeing a military offensive in the northern Syrian city of Aleppo (HRW 2016a).

As of this writing, the deal’s deterrent effect coupled with the closure of the Western Balkan migration route appears to be working; the number crossing the Aegean Sea has dropped dramatically (UNHCR 2016a). But if no Syrians reach Greece by boat and the war in Syria drags on, Turkey will be left with an ever-growing refugee population. And while the deal envisions voluntary resettlement of Syrians from Turkey to the European Union in exchange for the return of Syrians from Greece to Turkey, the fate of non-Syrians is far more uncertain.

Whatever the outcome of the EU-Turkey deal, it is clear that externalization is now the main plank of EU migration policy. This was emphasized in June 2016, when the European Commission announced a new Migration Partnership Framework (European Commission 2016b). While there are positive elements in the framework, including the possibility of greater resettlement and other legal routes for migration, the overall approach is consistent with the European Union’s efforts during the refugee crisis to deflect responsibility and legal obligations away from EU member states and onto transit and origin countries, including through the EU-Turkey deal. The short-term objectives of the framework are to “save lives in the Mediterranean Sea; increase the rate of returns to countries of origin and transit; and “enable migrants and refugees to stay close to home and to avoid taking dangerous journeys” (ibid.).

50 EU Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), articles 35 and 38.

51 The directive also says a “first country of asylum” is a country where the applicant has already been recognized as a refugee or “otherwise enjoys sufficient protection.” As Turkey does not recognize non-Europeans as refugees, the only remaining question is whether it provides de facto refugees sufficient protection. According to UNHCR, “[t]he wording ‘sufficient protection’ [in the APD] . . . does not represent an adequate safeguard when determining whether an asylum seeker may be returned to the first country of asylum.” EU Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Articles 35 and 38. As noted above, human rights law provides all migrants with legal protection against return to torture and other ill treatment independent of refugee law or status.
While much of the framework restates long-standing policy approaches, the emphasis on economic development as the main tool to tackle root causes of migration, the choice of potential partners including governments, like Sudan and Eritrea, with poor records when it comes to protecting human rights, and the effort to condition general EU aid explicitly on migration cooperation are worrying elements that will require close scrutiny in the months and years to come.

V. Recommendations for Promoting Government Migration Policies Protective of Human Rights

Laws, policies, and practices that externalize migration controls are rights-threatening, as discussed in Section III, when they have the intention or effect of blocking access to territory in ways that frustrate the right of any person to leave their country of nationality or any other country, or the right of anyone to seek and enjoy asylum outside their country. They are also rights-threatening when they have the effect (or the intention) of causing or making more likely violations of other human rights of migrants, including asylum seekers. There is ample scope for destination or transit countries to engage in capacity building and to assist with migration management, including as part of supporting security screening and law enforcement, in ways that are consistent with international human rights law and standards. Such laws, policies, and practices should be reformed to systematically and directly incorporate rights protections into migration management (including through increasing the protective capacity of authorities involved in migration control in third countries), as well as to condition destination- and transit-state funding, training, and other assistance to third countries on the implementation of a minimum set of human rights protections in law and in practice.

Rather than promoting the externalization of migration controls, states and other donors could also increase support to regional and international organizations that provide or promote the protection of migrants’ rights, including the rights of asylum seekers, in third countries and countries of origin. Such parallel resources could be directed to enhancing the capacity of all states along migration routes, including through robust training of immigration and border security officials in human rights and refugee protections. These could in particular include advocacy and training efforts to ensure that officials without a human rights or refugee protection mandate, but whose work triggers or follows apprehension and processing of migrants, such as border guards and law enforcement officials, understand and respect the rights of all of the migrants they encounter.

Finally, states and other donors could provide increased support to civil society actors whose work directly or indirectly supports protection of the basic needs and rights of migrants, refugees, and asylum seekers, including humanitarian protection. These efforts could be targeted to civil society actors well-positioned to advocate for migrants’ and asylum seekers’ rights. It is particularly important that international human rights organizations and civil society actors monitor the externalization of border control. There are several ways in which this can be done. To begin, civil society groups should educate each other on government practices in their regions. Civil society can seek and disseminate information about government practices and regional dynamics, including through civil society platforms and networks, and organize and engage with international and regional
human rights bodies that monitor states’ compliance with human rights laws. Civil society groups can also directly engage with law enforcement efforts and seek to ensure migrants’ and asylum seekers’ rights are not violated in the context of the prosecution of alleged criminals. In addition, civil society groups can engage in documentation and monitoring of compliance with international law and standards, and promote the incorporation of international human rights law into domestic law. They also can promote accountability for those migration-control externalization policies and practices that violate human rights by, among other things, bringing legal challenges to border externalization in domestic courts and international and regional human rights bodies whenever externalization policies contravene international or national law.

The following are specific policy recommendations targeted to states and corresponding to the regional case studies in section IV above:

**To the United States**

1. Stop the high seas interdiction, shipboard screening, and summary returns of irregular maritime migrants and asylum seekers in the Caribbean or elsewhere. Do not outsource screening and refugee processing to the US Naval Base at Guantánamo Bay, Cuba, but rather bring all individuals expressing a need for international protection to the territorial United States to have their claims assessed.
2. Redirect funding and support for Mexico’s Southern Border Program away from interception of Central American migrants and asylum seekers and to improving Mexico’s capacity to protect, receive, and process asylum seekers, including by improving its capacity to provide them social support while their claims for refugee status or other forms of protection are pending. Also, increase efforts to assist Mexico to integrate recognized refugees.
3. Condition any US funding of third countries engaged in immigration and border control on their demonstrated compliance with anti-corruption measures and national and international human rights standards.
4. Do not use US aid money to increase border militarization aimed at stopping migrants from leaving their home countries in search of international protection.

**To Australia**

1. End the policy of offshore detention and processing of asylum seekers in Nauru, Manus Island, or in any other sites that unable or unwilling to provide effective rights protections to asylum seekers.
2. Stop the policy of turning back migrants and asylum seekers arriving by boat to countries of origin or countries of transit, such as Indonesia, Sri Lanka, and Vietnam, after cursory screening.
3. Allow irregularly arriving maritime asylum seekers to have their claims for protection heard in Australia and provide asylum in Australia for those found to be deserving of international protection.
4. Offer the possibility of settlement in Australia to all refugees currently in Nauru and Manus Island.
To the European Union

1. Do not designate or otherwise treat Turkey or any other country as a safe third country or as a first country of asylum for the return of asylum seekers unless it meets the following principles:
   a. The country in law and practice provides for refugee status or a status that is equivalent to that required by the 1951 Refugee Convention or its 1967 Protocol to people of all nationalities deserving of international protection.
   b. The country provides a legal regime, such as a temporary protection regime, to ensure that migrants are not returned to a country experiencing armed conflict and indiscriminate violence where they face a risk of serious harm. The legal regime must also carry with it the possibility of refugee status, including for situations that become protracted.
   c. The country protects the labor rights of lawfully present refugees and the beneficiaries of complementary or temporary protection. In particular, the country must protect the right to work, such as by providing work authorization and access to the labor market.
   d. The country protects the rights to health and to education for recognized refugees as well as beneficiaries of complementary or temporary protection, and provides access to social services.
   e. The country protects the rights of liberty and security of recognized refugees as well as beneficiaries of complementary or temporary protection, and refrains from detaining asylum seekers, particularly children, on the grounds of illegal entry or stay.
   f. The country demonstrates respect for the principle of non-refoulement, including prohibiting any practice that could have the effect of returning an asylum seeker or refugee to places where they would face serious risk of violation of fundamental human rights, where their lives or freedom would be threatened, or where they would be at risk of persecution, torture, or cruel, inhuman or degrading treatment or punishment, including through interception, rejection at the frontier, or indirect refoulement.

2. Do not use the Turkish or Libyan or other third-country coastguards or border guards to prevent would-be asylum seekers from exercising their rights to leave any country or to seek asylum.

3. Do not make assistance through the EU-Africa Trust Fund, the Khartoum Process, or any other migration compact under the EU Partnership Framework conditional on African or other countries preventing individuals from leaving their countries of nationality or habitual residence, but rather help to build the capacity of those countries to respect and protect human rights and to address development needs.

4. Abrogate the unfair and unworkable Dublin Regulation system for determining EU member state responsibility for examining asylum claims based on the country of first arrival and in its place institute a mechanism for assigning responsibility for examining asylum claims to member states according to each state’s assessed capacity, while taking into consideration the dignity, autonomy, and wishes of asylum seekers and rights to family unity and reunification.
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The Impact of Externalization of Migration Controls


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The Impact of Externalization of Migration Controls


The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy

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Executive Summary

Asylum seekers and refugees continue to face serious obstacles in their efforts to access asylum. Some of these obstacles are inherent to irregular migration, including dangerous border crossings and the risk of exploitation. Yet, refugees also face state-made obstacles in the form of sophisticated migration control measures. As a result, refugees are routinely denied access to asylum as developed states close their borders in the hope of shifting the flow of asylum seekers to neighboring countries.

Restrictive migration control policies are today the primary, some might say only, response of the developed world to rising numbers of asylum seekers and refugees. This has produced a distorted refugee regime both in Europe and globally — a regime fundamentally based on the principle of deterrence rather than human rights protection. While the vast majority of European states still formally laud the international legal framework to protect refugees, most of these countries simultaneously do everything in their power to exclude those fleeing international protection and offer only a minimalist engagement to assist those countries hosting the largest number of refugees. By deterring or blocking onward movement for refugees, an even larger burden is placed upon these host countries. Today, 86 percent of the world’s refugees reside in a low- or middle-income country, against 70 percent 20 years ago (Edwards 2016; UNHCR 2015, 15).

The humanitarian consequences of this approach are becoming increasingly clear. Last year more than 5,000 migrants and refugees were registered dead or missing in the Mediterranean (IOM 2016). A record number, this makes the Mediterranean account for more than two-thirds of all registered migrant fatalities worldwide (IOM 2016). Many more asylum seekers are subjected to various forms of violence and abuse during the migratory process as a result of their inherently vulnerable and clandestine position. As the industry facilitating irregular migration grows, unfortunately so too do attempts to exploit migrants and refugees by smugglers, criminal...
networks, governments, or members of local communities (Gammeltoft-Hansen and Nyberg Sørensen 2013).

The “deterrence paradigm” can be understood as a particular instantiation of the global refugee protection regime. It shows how deterrence policies have come to dominate responses to asylum seekers arriving in developed states, and how such policies have continued to develop in response to changes in migration patterns as well as legal impositions. The dominance of the deterrence paradigm also explains the continued reliance on deterrence as a response to the most recent “crisis,” despite continued calls from scholars and civil society for a more protection-oriented and sustainable response.

The paper argues that the current “crisis,” more than a crisis in terms of refugee numbers and global protection capacity, should be seen a crisis in terms of the institutionalized responses so far pursued by states. Deterrence policies are being increasingly challenged, both by developments in international law and by less wealthy states left to shoulder the vast majority of the world’s refugees. At the same time, recent events suggest that deterrence policies may not remain an effective tool to prevent secondary movement of refugees in the face of rising global protection needs, while deterrence involves increasing direct and indirect costs for the states involved.

The present situation may thus be characterized as, or at least approaching, a period of paradigm crisis, and we may be seeing the beginning of the end for deterrence as a dominant policy paradigm in regard to global refugee policy. In its place, a range of more or less developed alternative policy frameworks are currently competing, though so far none of them appear to have gained sufficient traction to initiate an actual paradigm shift in terms of global refugee policy. Nonetheless, recognizing this as a case of possible paradigm change may help guide and structure this process. In particular, any successful new policy approach would have to address the fundamental challenges facing the old paradigm.

The paper proceeds in four parts. Firstly, it traces the rise of the deterrence paradigm following the end of the Cold War and the demise of ideologically driven refugee protection on the part of states in the Global North. The past 30 years have seen the introduction and dynamic development of manifold deterrence policies to stymie the irregular arrival of asylum seekers and migrants. This array of measures is explored in the second part of the paper through a typology of five current practices that today make up “normal policymaking” within the deterrence regime. Third, the paper argues that the current paradigm is under threat, facing challenges to its legality from within refugee and human rights law; to its sustainability due to the increasing unhappiness of refugee-hosting states with current levels of “burden-sharing”; and to its effectiveness as direct and indirect costs of maintaining the regime mount. Finally, the paper puts forward three core principles that can lay the groundwork in the event of a paradigm
shift: respect for international refugee law; meaningful burden-sharing; and a broader notion of refugee protection that encompasses livelihoods and increased preparedness in anticipation of future refugee flows.

I. The Rise of the Deterrence Paradigm

The cornerstone of the current refugee regime, the 1951 Convention Relating to the Status of Refugees (the “1951 Refugee Convention”), emerged in the aftermath of WWII. It established a legal regime that, despite its obvious shortcomings, extended a core set of individual rights for political refugees. During the Cold War, international refugee law came to play a crucial role in legitimizing the politics of the West (Gibney and Hansen 2003; Chimni 1998). In the 1950s and 1960s refugee flows were primarily conceived as an East to West movement and granting asylum to defectors consequently entailed scoring ideological points. This Euro-centric approach was gradually abandoned, however, paving the way for regional instruments and the 1967 Protocol Relating to the Status of Refugees (the “1967 Protocol”) lifting the geographical limitation of the 1951 Refugee Convention. Subsequent developments in legal interpretation have further helped expand the reach and scope of the Convention, while broader notions of subsidiary protection have developed as a matter of general international human rights law (McAdam 2007).

The last three decades, however, have seen an increased politicization of asylum across both traditional and new asylum countries. In the 1970s, the welcoming labor immigration schemes of several European countries were abandoned, thereby cutting off a regular form of migration. The proxy wars of the 1980s further created large-scale displacement across several regions in the Global South (UNHCR 1995b). Following the end of the Cold War, receiving refugees no longer served an ideological agenda. At the same time, globalization has made both knowledge of faraway destinations and transcontinental transportation more readily available. And rather than conforming to the traditional image of the singular bona fide asylum seeker, refugees are increasingly caught up in mixed flows of irregular migrants, often facilitated by human smugglers specialized in avoiding traditional forms of border control (Gibney and Hansen 2003; Castles and Miller 2003; Barnett 2002; Zolberg 2001).

In response, developed states have introduced a range of policies to deter or prevent migrants and refugees from arriving at their territory or accessing their asylum systems (Hathaway 1992, 40-41). From the 1980s onwards, states started introducing legal measures to retroactively exclude refugees who have already arrived at the territory from the “procedural door” (Vedsted-Hansen 1999b). The introduction of time limits for submitting asylum

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1 The drafters of the Convention shied away from establishing a positive right to seek and be granted asylum in line with Article 14 of the Universal Declaration of Human Rights adopted just three years earlier, in favor of a more limited, negative duty of non-refoulement. Further, the drafters did not set out a positive burden-sharing mechanism, instead calling for international cooperation in recital 4 of the Convention’s preamble.

2 Despite political contestation and lack of strong supervisory institutions, interpretation of the 1951 Refugee Convention has remained surprisingly dynamic both in terms of its scope ratione personae (e.g., in regard to persons fleeing gender-related persecution, persecution because of their sexual orientation, or persecution from non-state actors) and ratione loci (notably in regard to the geographical reach of the non-refoulement principle enshrined in Article 33) (Goodwin-Gill 2014; Gammeltoft-Hansen 2014a).
applications falls into this category; so do the use of various accelerated procedures based on “first country of arrival,” “safe country of origin,” “safe third country,” and “manifestly unfounded” concepts (Hurwitz 2009; Gil-Bazo 2006; van Selm 2001). Other measures have been aimed at physically preventing refugees from accessing the territory of the asylum state. In the 1990s the United States interdicted more than 65,000 Haitian refugees in international waters, returning them with no assessment of claims for political asylum (Miranda 1995). Through the introduction of carrier sanctions, private airline companies around the world have similarly been forced to reject boarding to thousands of asylum seekers, who are unlikely to obtain a visa (UNHCR 1991; UNHCR 1995a). The last two decades have further seen deterrence policies extended to cooperation with transit and origin states. The Bali Process co-chaired by Australia and Indonesia (Kneebone 2014), the European Union’s Global Approach to Migration and Mobility (European Commission 2011), and the American-led Merida Initiative (Seelke and Finklea 2015) all embed cooperation on border control in broader foreign policy arrangements regarding transnational crime, development assistance, trade privileges, labor immigration quotas, and visa facilitation.

The basic proposition of this article is that this historic development and the wide range of deterrence measures implemented today should be collectively understood as a dominant paradigm for international refugee policy. A policy paradigm may be defined as a set of shared beliefs, taxonomies, and tools within a community of policymakers that determine how they perceive, analyze and respond to a given policy problem. In this case, the community of policymakers is centered around traditional asylum states in the Global North, though a wider circle of states have gradually adopted similar policies. The underlying belief of the deterrence paradigm is that developed states can successfully insulate themselves from taking on a substantive and proportional responsibility in regard to refugee protection by speculating on the way that migration control is designed vis-a-vis international refugee and human rights law (Gammeltoft-Hansen and Hathaway 2015). It allows wealthy states to have their cake and eat it too: maintaining a formal commitment to international refugee law, while at the same time largely being spared the associated burdens (Gammeltoft-Hansen and Hathaway 2015).

Several scholars have lamented the current state of affairs, pointing out the obvious incongruence between deterrence policies and the original aspirations of the modern refugee regime. As noted by Louis Henkin, who served as the United States representative

3 The Merida Initiative is a multi-year agreement between the United States and Mexico to combat drug smuggling, transnational crime, and illegal immigration (Seelke and Finklea 2015).
4 The concept of paradigm in this context is principally derived from Thomas Kuhn (Kuhn and Hacking 2012) and subsequent work translating his work into the field of public policy (Hall 1993; Hogan and Howlett, eds. 2015).
5 Or, in Peter Hall’s words, “a framework of ideas and standards that specifies not only the goals of policy and the kind of instruments that can be used to attain them, but also the very nature of the problems they are meant to be addressing” (1993).
6 For examples see Section II. Transit and origin states may, for obvious reasons, not necessarily share the beliefs and policy ambition of sponsoring states, but nonetheless decide to engage in cooperative deterrence mechanisms due to the financial or other benefits or negative conditionalities involved (Lavenex 2006; Geddes 2009). At the same time, entering into such arrangements often lead transit states to adopt deterrence policies of their own in order to avoid becoming the cul-de-sac for asylum flows (Byrne, Noll, and Vedsted-Hansen 2002).
7 See further, Koh (1994).
The End of the Deterrence Paradigm?

during the drafting of the 1951 Refugee Convention, in regard to the Haitian interdiction program: “It is incredible that states that had agreed not to force any human being back into the hands of his/her oppressors intended to leave themselves — and each other — free to reach out beyond the territory to seize a refugee and to return him/her to the country from which he sought to escape” (Henkin 1993, 1). Yet, for a long time the deterrence paradigm has served as a crude but effective solution to the growing schism between the liberal values and self-protective stance of the developed world in regard to refugee protection.

While there is no doubt that deterrence policies challenge core principles of international refugee and human rights law, the deterrence paradigm is not premised on a rejection of international law as such (Gammeltoft-Hansen 2014b). While deterrence policies may be borne out of a sense of frustration with the limits that international law place upon states in their pursuit of more effective immigration control, few states have so far directly challenged international refugee law or taken steps to withdraw from the 1951 Refugee Convention or other core human rights instruments protecting refugees. Various factors, both domestic and international, may explain why states have remained reluctant to withdraw or reform international refugee law (Gammeltoft-Hansen and Hathaway 2015). Fundamentally, the logic of deterrence is premised on a concurrent commitment of less developed states towards refugee protection, where the vast majority of the world’s refugees currently reside. International refugee law serves as an important tool to ensure the continued commitment of those states, and it is difficult to imagine any of the world’s top refugee hosting countries agreeing to a new legal instrument that does not address this gross disparity in terms of global burden-sharing. In other words, although developed states are increasingly concerned about the commitment that international refugee law is placing upon them, receding from or renegotiating the current legal framework is hardly in these states’ best interest.

Within the deterrence paradigm, international refugee law has thus so far remained a set of shared rules directly or indirectly guiding action (Kuhn and Hacking 2012, 43). Yet, the tension between these normative commitments and differing political interests, leads states to develop policies that work at the fringes or in the interstices of international law in order to recoup sovereign maneuverability. Deterrence policies may in that sense be seen as examples of “creative legal thinking” (Gammeltoft-Hansen 2014a), as states seek to exploit interpretative uncertainties, competing legal regimes or new modes of governance in order to limit, shift, or circumvent legal obligations otherwise owed.

II. “Normal Policymaking” in the Deterrence Paradigm

A key benefit of understanding deterrence as a policy paradigm is that it allows us to understand how different kinds of policy developments are enacted and relate to each other. Despite several challenges to the effectiveness and viability of specific deterrence

8 For an overview, see Gammeltoft-Hansen (2011).
9 As Hathaway bluntly concludes, “the legal duty to protect refugees is understood to be neither in the national interest of most states, nor a fairly apportioned collective responsibility” (2005, 1000).
10 Though, more recently, both the Australian and the Danish prime ministers have openly suggested that the Convention ought to be renegotiated.
measures,\textsuperscript{11} policymaking in this area has so far continued without any perceived need to revise the fundamental beliefs and \textit{modus operandi} of the deterrence paradigm. Rather, deterrence policies may be seen to dynamically develop in response to external impositions.

There are at least three external factors driving policymaking in the deterrence paradigm. Firstly, certain forms of deterrence have been rendered ineffective by \textit{changes in migratory patterns and technologies}. Just as the original set of deterrence policies were developed in response to the “jet age asylum seeker,” the sophistication of those who help facilitate irregular migration has prompted new policy developments. Human smuggling is today a billion-dollar industry with the capacity to produce high-quality forged documents, bribe immigration officials, develop new smuggling methods, or quickly adapt migration routes (Gammeltoft-Hansen and Nyberg Sorensen, eds. 2013). This, in turn, has prompted not only developments in border control technology and strategies, but also an increased criminalization and targeting of human smugglers as part of deterrence policies (Mitsilegas 2014; Legomsky 2007, 679; Stumpf 2006, 367).

A second driver has been \textit{developments in international refugee and human rights law}. Many of the “first generation” deterrence policies have, even if sometimes very belatedly, been successfully challenged, forcing states to abandon or substantially adjust their policies. Both national and regional case law has firmly established that states cannot delimit the geographical scope of obligations under international law at will by excising parts of their territory or designating so-called “international zones.”\textsuperscript{12} While measures to exclude access to asylum by use of “safe third countries” notions and time limits have hardly disappeared, judicial impositions have forced several states to moderate the implementation of such policies.\textsuperscript{13} In Europe, an important blow against the Dublin system was struck by the European Court of Human Rights in the \textit{MSS} case and the follow-up decision by the European Court of Justice rejecting government claims that member states lack the ability to assess other states’ compliance with fundamental rights and refugee protection.\textsuperscript{14}

Third, and finally, policy innovation has been partly driven by mutual inspiration in a dynamic that may be best understood as a form of \textit{policy transfer} (Ghezelbash 2014). A key example of the transplant of policies from one developed state to another is the sequential spread of offshore processing in third states. In the 1980s, the United States began processing asylum claims in Guantanamo Bay, an approach emulated by Australia under the Pacific Solution in 2001 and later Operation Sovereign Borders (Dastyari 2007). Today, of course, there is heated debate in Europe whether to adopt such a model, a debate that has risen to the surface at various times since the United Kingdom put forward its “New Vision for Refugees” proposal in 2003 (UK Home Office 2003).

This does not mean that deterrence policies are implemented uniformly across states. Both physical and legal geography may be seen to play a major role in determining which

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deterrence policies are favored where. For instance, the United States and Australia have long exploited their extensive maritime borders to enact interdiction on the high seas and detention on nearby islands that are either part of the sovereign state or the territory of other states (Legomsky 2006, 677; Dastyari 2015; Mountz 2011, 118-28; Magner 2004, 53; Billings 2013, 279). European states have also enacted maritime migration control, though less successfully, legally bound as they are by the European Convention on Human Rights and geographically bound by alternative overland migration routes (Frontex 2016). Within the European Union, geography also plays a significant role, with outlying states seemingly favoring intensified border management, and more developed welfare states often implementing indirect deterrence measures to push asylum flows toward neighboring countries. More generally, the last few years seem to have fueled a competition-like environment, especially among EU states, to introduce increasingly draconian measures, including novel types of deterrence adding to the traditional arsenal.

Deterrence states have so far responded to the recent surge in refugee numbers and the sharp increase in secondary movement by treating this as “normal policymaking,” requiring only incremental adjustments to existing policies, or policy innovations still adhering to the foundational beliefs of the existing paradigm. Many of the more recent policies thus move beyond or expand on existing policies, opening new and challenging legal questions, often not directly covered by international refugee law. Consequently, the present article deliberately takes a broader view of deterrence than most previous work in this area in an effort to demonstrate the internal logic of the paradigm (Hathaway 1992; Vedsted-Hansen 1999a; Gammeltoft-Hansen 2011). Under this broader view, current deterrence policies may be seen to fall into five main categories: 1) non-admission policies limiting access to asylum procedures, 2) non-arrival measures preventing access to the territory of asylum states through migration control, 3) offshore asylum processing and relocation of refugees to third countries, 4) criminalization of irregular migration and human smuggling, and 5) indirect deterrence measures intended to make the asylum country less attractive.

### A. Non-admission

A traditional but still prevalent form of deterrence encompasses legal measures to retroactively exclude refugees who have already arrived at the territory, e.g., expedited procedures based on “safe third country” or other concepts (Vedsted-Hansen 1999b). The common purpose of these policies is to restrict access to or cut short ordinary asylum procedures, targeting specific categories of refugees based on their nationality, claim, manner of entry, or arrival point. The introduction of such expedited procedures may be justified where states are faced with large number of irregular migrants who are unlikely to qualify for international protection, and where sufficient safeguards exist to allow individual asylum seekers the opportunity to rebut the presumption of safety, redirecting such cases into a full and comprehensive asylum procedure. Yet, several states apply these procedures in response to mass influx situations or for groups of asylum seekers where the underlying presumptions of safety are clearly not fulfilled. Hungary has thus declared all asylum claims from persons crossing the border from Serbia — the transit route for 99 percent of refugees

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15 Hirsi Jamaa and Others v. Italy, no. 27765/09, ECHR 2012.
16 What Kuhn refers to as first order and second order change (Kuhn and Hacking 2012; Hall 1993, 280).
into Hungary — inadmissible, notwithstanding the concern of human rights organizations (Reuters 2015; UNHCR 2012c; Hungarian Helsinki Committee 2011). Asylum seekers crossing the US-Mexico border are dealt with under the “expedited removal” procedure, during which persons are detained and removed unless they pass a “credible fear” test. The threshold for this initial and summary interview was reportedly raised in 2014 and only a small fraction of Central American asylum claims appear to be examined on the merits (HRW 2014; Campoy 2014). South Africa, which has consistently received the highest number of asylum applications in Africa, has refused refugee status because asylum seekers have passed through a safe country en route (Hathaway 2014; UNHCR 2015, 29). All of these policies give rise to the risk of direct and indirect *refoulement* in the absence of access to an asylum procedure meeting international standards (UNHCR 2011).

The recently concluded arrangement between the European Union and Turkey is a further example of non-admission. Asylum seekers arriving in Greece are returned without examination of their claims of refugee status on the basis that Turkey is a safe third country. In exchange, the European Union has agreed to speed up accession talks, accelerate the implementation of the visa liberalization, provide a total of 3 billion euros to assist Turkey in providing refugee protection for Syrian refugees, and provide resettlement spaces equal to the number of refugees returned.17

### B. Non-arrival

Measures preventing refugees from reaching the territory of asylum states are another, and increasingly preferred, form of deterrence. Several other states have followed the American lead to implement various forms of maritime interdiction. In the Asia Pacific, Thailand, Malaysia, and Indonesia recently pushed back boats carrying Rohingya and Bangladeshi migrants and asylum seekers in the Bay of Bengal and the Andaman Sea (HRW 2015; Tisdall 2015), before agreeing to provide temporary protection to Rohingya asylum seekers. Australia has turned back 28 boats to Sri Lanka, Indonesia, and Vietnam since 2013 (Minister for Immigration and Border Protection 2016).

In Europe, migration control on the high seas has been carried out both by individual member states and as part of joint maritime operations coordinated by the EU border agency, Frontex. Whereas recent EU guidelines affirm the applicability of the *non-refoulement* principle to persons intercepted on the high sea,18 member states’ practices have varied. Italian authorities thus intercepted and directly returned at least 850 persons in 2009, despite the identification of asylum seekers and *bona fide* refugees among those returned (L’Unita 2010; UNHCR 2009).

From the still widespread use of carrier sanctions, private companies and corporations today perform a wider set of roles in regard to migration control. The use of private actors for the purposes of border controls, surveillance technology, and immigration detention

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and transportation is a key feature of states’ deterrence policies (Gammeltoft-Hansen 2015; Bloom 2015). Sweden, for example, in 2016 extended carrier sanctions to train and ferry companies operating inside the Schengen area as a means to restrict the otherwise free movement of refugees towards the country.\textsuperscript{19}

Perhaps the most significant trend has been the growth of bilateral and regional agreements to prevent onwards movement for migrants and refugees.\textsuperscript{20} In the Asia Pacific, Australia has established formal or informal bilateral agreements with regional states, including Sri Lanka, Malaysia, and Indonesia. These arrangements include joint patrols, disruption of people smuggling operations, and funding of immigration detention networks (Tan 2016). The above-mentioned Bali Process agenda has often been dominated by migration control, framing refugees within a “security/border control paradigm” (Kneebone 2016). In North America, the United States funds a range of migration control activities in Mexico, extending to patrol boats and migration management databases. Mexico is thus a buffer state for Guatemalan and Honduran asylum seekers attempting to reach the United States (FitzGerald, forthcoming). In the European context, the now-defunct Italy-Libya Treaty of Friendship, Partnership, and Cooperation is perhaps the most well-known case of bilateral cooperation in this area. A range of other bilateral agreements are currently in place, however, including between Spain and a range of North African states, such as Morocco, Senegal, and Mauritania (FRA 2012). Many of these arrangements involve partner countries with lacking or clearly insufficient asylum systems.\textsuperscript{21}

\textbf{C. Offshore Asylum Processing and Protection Elsewhere}

A third form of deterrence involves asylum processing or refugee protection in third states. Recent proposals in developed states have called for the establishment of offshore asylum camps, recalling the US processing of asylum seekers in Guantanamo Bay in the 1980s. Australia resumed offshore processing of asylum claims cooperation with Nauru and Papua New Guinea in 2012, reviving a key plank of the Pacific Solution first introduced in 2001 (Billings 2013; Grattan 2012). Approximately 1500 asylum seekers are currently in Australian-funded detention or accommodation in these two states (DIPB 2017). A range of human rights issues have arisen in offshore detention. The Committee against Torture has reported conditions of “overcrowding, inadequate health care and ill-treatment” causing “serious physical and mental pain and suffering (CAT 2014).” Australia has further entered into a refugee resettlement deal with Cambodia. In exchange for development assistance, Cambodia offers permanent resettlement to people found to be refugees on Nauru (DFAT

\textsuperscript{19} In addition to blocking onwards travel for refugees en route, such measures may be challenged as a matter of EU law.

\textsuperscript{20} For an in-depth examination of this development see Gammeltoft-Hansen and Hathaway (2015).

\textsuperscript{21} Although Turkey has recently adopted domestic legislation providing for a national asylum system, reports point to continued shortcomings in terms of both asylum procedures and key rights related to refugee protection (Amnesty International 2016). As a matter of international law, Turkey further maintains a geographical limitation to the 1967 Protocol, and is not obliged to apply the 1951 Refugee Convention to non-European refugees. Recent EU plans to re-establish migration control cooperation with North African countries raise even more significant issues. In 2012, the European Court of Human Rights thus held that Italy had violated the non-refoulement principle as well as the prohibition on collective expulsion by returning asylum seekers to Libya, despite its clear track record of abuse, detention, and forced return of refugees in \textit{Hirsi Jamaa and Others v. Italy}, no. 27765/09, ECHR 2012.
Such offshore asylum processing and resettlement set disturbing precedents for the mistreatment of asylum seekers and refugees forcibly relocated away from the state where they sought protection.

D. Criminalization

The marked increase in mixed migration flows in recent years has brought intense focus on criminalizing both irregular migration and those facilitating the process (Mitsilegas 2014; Legomsky 2007, 679; Stumpf 2006, 367). The non-arrival policies outlined above leave the vast majority of refugees with no choice but to turn to migrant smugglers and irregular entry in order to access asylum states. As a result, migrant smuggling is today a multi-billion industry with ties to established and increasingly sophisticated criminal networks (Kyle and Koslowski, eds. 2001; Gammeltoft-Hansen and Nyberg Sorensen, eds. 2013; Castles and Miller 2009). States may have legitimate reasons to combat such criminal activity and are legally entitled to do so pursuant to the Protocol against the Smuggling of Migrants by Land, Sea and Air, which promotes cooperation among states parties to prevent and combat smuggling. Yet, the Protocol equally underscores that the non-refoulement principle and other refugee rights must be respected as part of such efforts. Moreover, with no legal migration alternatives available to refugees, such measures may themselves limit access to asylum.

In the Asia Pacific, the Bali Process aims to deter and combat migrant smuggling and trafficking networks, with minimal focus on complementary access to asylum (Mann 2013; Kneebone 2014). Indeed, in 2015, states in the region initially justified denying access to asylum to 8,000 migrants with the argument that it would further fuel migrant smuggling. Getting third countries to criminalize irregular departure has similarly been a key priority for the European Union. In Morocco, Algeria, Tunisia, Libya, Egypt, and Turkey, leaving the country irregularly is punished with a financial fine and/or imprisonment (FRA 2013). Criminalization may further extend to the prosecution of private vessels who rescue migrants in distress at sea (Mangano 2011). Last, but not least, efforts to combat migrant smuggling have prompted a growing militarization, utilizing, for example, naval forces, army equipment, or military techniques for the purpose of migration control (Jones and Johnson 2016). In 2015, the European Union thus launched a military operation to seize and dispose boats used for human smuggling in international waters off the Libyan Coast and, in 2016, a NATO operation was commenced in the Aegean Sea to deter migrant smuggling from Turkey to Greece.

There is an inescapable link between these policies and the rising number of migrant fatalities and other dangers faced by migrants and refugees forced to employ the services of smugglers. An intensification of efforts to combat migrant smuggling may push smugglers

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24 Australian Prime Minister Tony Abbott stated that turning around boats was “absolutely necessary if the scourge of people smuggling is to be beaten” (Medhora 2015).
25 The operation is provided for by Security Council Resolution 2240 (2015), 7532nd Meeting, October 9, 2015.
to use longer or more dangerous routes, or to depart during periods when weather conditions are less favorable in order to avoid controls (Gammeltoft-Hansen and Nyberg Sorensen, eds. 2013; Brian and Laczko, eds. 2014). Similarly, policies to impound maritime vessels may push smugglers to further overcrowd boats or use inflatable or unseaworthy vessels, with poor engines and navigation systems, equally increasing the risk to migrants’ lives. Criminalization and militarization are further likely to prompt more risk-averse responses from smugglers, who may choose to offload passengers before reaching shore or themselves abandon the vessels, leaving cargo ships sailing on automatic pilot for Europe with no crew on board (Deutsche Welle 2015; Frontex 2016). Finally, military operations engaging migrant smuggling vessels on the high seas entail a significant risk of collateral damage involving migrants and refugees.\(^{26}\)

**E. Indirect Deterrence Measures**

A particular trend these past years has been the expansion of indirect deterrence policies, designed to discourage asylum claims or divert them to other countries. These measures may include mandatory detention policies, limitations on family reunification, cuts to social benefits, granting more temporary or subsidiary forms of protection, with fewer rights attached than those afforded under the 1951 Refugee Convention. While such measures do not restrict access to asylum *per se*, they often negatively impact other rights under the Convention, including freedom of movement, non-discrimination, and access to employment, public education, and housing. And while many such policies do not violate the letter of international refugee law, they may fall foul of general human rights law. Still other indirect deterrence measures — such as information campaigns — are not unlawful at all.

Denmark is among the countries which have most openly justified more restrictive asylum policies by the desire to shift asylum flows away from the country. Through a series of successive measures, Denmark has thus managed to maintain a relatively low number of asylum seekers, especially compared to its two neighboring countries, Sweden and Germany. In 2015 a new, tertiary protection status, “temporary asylum,” was introduced for persons fleeing generalized violence and armed conflict.\(^{27}\) Under this category, residence permits are initially granted for one-year periods only, ensuring that cases are regularly reviewed to assess continued protection needs. Access to family reunification for those granted temporary asylum is further denied for the first three years of residence, unless special considerations apply.\(^ {28}\)

Social benefits for refugees have been cut by 50 percent and childcare support and pensions for refugees graduated based on the length of stay in Denmark.\(^ {29}\) Legislation has been adopted granting the police authority to search and seize funds and assets from asylum

\(^{26}\) An internal EU planning document explicitly warned that, “Non-compliant boarding operations against smugglers in the presence of migrants has a high risk of collateral damage including the loss of life” (Rettman 2015).

\(^{27}\) Amendment to the Danish Asylum and Immigration Statute, Law No. 153, February 18, 2015.

\(^{28}\) The moratorium on family reunification was originally one year, but was subsequently extended. Amendment to the Danish Asylum and Immigration Statute, Law No. 102, February 3, 2016.

\(^{29}\) Amendment to the Danish Asylum and Immigration Statute, Law No. 1000, August 30, 2015.
seekers in order to cover costs related to accommodation and other benefits.\textsuperscript{30} Fees will similarly be introduced in connection with applications for family reunification and permanent residence for refugees. The latter will further be subject to new requirements in regard to language and employment, and the waiting period for permanent residence extended to six years.

Many other European countries have introduced similar policies. For example, despite a long-term commitment to liberal asylum policy, Sweden has recently implemented restrictions in regard to family reunification as well as shorter residence permits for refugees. Germany has similarly replaced financial benefits to refugees with coupons to claim food and clothing items. Countries outside of Europe have adopted indirect deterrence measures as well. Australia, for instance, now issues only temporary protection visas to refugees who arrive by boat, a status that does not include the right to family reunification (Kaldor Centre 2015).\textsuperscript{31}

Delayed or protracted refugee status determination processes may further be used as a deterrent in some instances. Administrative backlogs can be an unfortunate but inevitable consequence of mass influx situations. In Europe, where there were almost 800,000 outstanding asylum applications in September 2015 (European Asylum Support Office 2015), backlogs of asylum claims currently mirror levels of the early 1990s (Gibney 1994). Yet, in some countries, applying caps on the processing of asylum applications or restricting access to submit them, appear to be part of a deliberate strategy to deter asylum applications. Austria thus introduced a cap of 80 asylum applications per day in 2016 (Bell 2016). Greece has similarly limited the ability to submit asylum applications in some periods (UNHCR 2012a). In the Pacific, there are undue delays to refugee status determinations in Australian-led detention centers in Nauru and Papua New Guinea, where first instance decisions take up to 18 months to hand down (UNHCR 2013a; UNHCR 2013b; CAT 2014; Refugee Council of Australia 2014; Karlsen 2015).

Mandatory detention of asylum seekers is a widespread practice intended to deter further arrivals. European states including Greece, Macedonia, Malta, and Hungary have recently stepped up systematic detention of asylum seekers (Global Detention Project 2015; AIDA 2015). Australia has long had a policy of mandatory detention of asylum seekers arriving by boat, and has actively encouraged Indonesia to import such a policy (Nethery, Rafferty-Brown, and Taylor 2013). Israel places irregular migrants for up to a year at the Holot detention center located in the desert, from which residents are unable to leave (UNHCR 2014b). While asylum seekers may legitimately be detained for identification or security reasons, wide-scale detention policies are not consistent with the prohibition against penalization of illegal entry or stay in Article 31 of the 1951 Refugee Convention. The deleterious effect of protracted detention — particularly for children — is well documented (Dudley et al. 2012; Robjant, Hassan, and Katona 2009; Australian Human Rights

\textsuperscript{30} The authorities may confiscate funds or assets estimated to have a worth above 10,000 krone (approximately 1,350 euros). According to the guidance note, personal assets with a particular sentimental value, such as wedding rings or religious artifacts, are exempted. Amendment to the Danish Asylum and Immigration Statute, Law No. 102, February 3, 2016.

\textsuperscript{31} Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.
The End of the Deterrence Paradigm?

Commission 2014; International Detention Coalition n.d.). More generally, there is no evidence that the threat of detention does in fact deter irregular migration (Edwards 2011, iii).

Last, but not least, several countries have initiated information campaigns aimed at both prospective asylum seekers and those facilitating irregular travel. Thus, Belgium and Norway have used Facebook to dissuade Iraqi asylum seekers (Pop 2015; The Local 2015), while Denmark has taken out advertisements in newspapers in the Middle East warning prospective asylum seekers about its restrictive policies. Meanwhile, throughout its own region, Australia has advertised that asylum seekers coming by boat will never be settled there (Parliament of Australia 2013).

III. “Paradigm Crisis” and the End of Deterrence?

Although deterrence policies continue to flourish and take on new forms, there are signs indicating that “normal policymaking” will not suffice for much longer. Not only has the deterrence paradigm been attacked for its negative humanitarian impact, but it has come under pressure from several other sides, to the point that its legal foundations, political stability, and likelihood of long-term effectiveness are all in doubt.

A. The Legal Challenge

The first challenge relates to the legal challenges that have and are likely to be brought against the current range of deterrence policies. As mentioned above, the majority of current deterrence policies are based on the premise that developed states can somehow insulate themselves against responsibility by shifting migration control or the responsibility for refugee protection to third states. Yet, this idea that states are allowed to do outside their territory or through others exactly what they have committed themselves to prohibit at home as a matter of international human rights and refugee law, is becoming increasingly difficult to uphold. Just as the history of deterrence policies provides several examples of successful legal challenges to overreaching by states, current developments in both human rights and refugee law are increasingly undercutting attempts by developed states to insulate themselves from responsibility by shifting it onto others.

The evolving jurisprudence on extraterritorial jurisdiction is an important area that has helped rein in a number of “offshore” deterrence policies (Gammeltoft-Hansen and Vedsted-Hansen, eds. 2016). In Hirsi v. Italy, the Grand Chamber of the European Court of Human Rights unanimously struck down the legality of Italy’s cooperation scheme with Libya, arguing that pushbacks of refugees on the high seas violated Article 3 of the

32 In 2014, UNHCR launched Beyond Detention, a five-year strategy to end the detention of asylum seekers and refugees with a particular focus on ending detention of children (UNHCR 2014a). UNHCR’s detention guidelines outline the legitimate use of detention in the context of asylum, as well as providing alternatives to detention (UNHCR 2012b).

33 The text of the ad was subsequently criticized by the Danish Parliamentary Ombudsman for being misleading, suggesting that the new restrictions apply to all types of refugees.
European Convention on Human Rights. The Court equally suggested that international refugee law, notably the principle of non-refoulement, has to be observed when carrying out operations on the high seas. In Australia, a series of High Court decisions have challenged Australia’s policies in terms of access to judicial review for persons applying for asylum in the offshore zone, the relocation of refugees to politically declared “safe third countries,” and the ability indefinitely to detain persons considered a security risk and deny them access to asylum procedures.

Recent developments in general human rights law have recognized the extraterritorial application of human rights treaties, especially at the European level. Thus, in Al Skeini, the European Court of Human Rights held that human rights law applies in any situation where a state “exercises control and authority over an individual.” Further, in Issa and Others v Turkey, the Strasbourg court found that responsibility is engaged “where persons on the territory of another state . . . are found to be under the former state’s authority and control through its agents operating . . . lawfully or unlawfully.” Within scholarship, increasing attention to the establishment of shared responsibility for cooperation-based deterrence polices is, so to speak, piercing the corporate veil of internationalized migration control arrangements (Gammeltoft-Hansen and Hathaway 2015; Nollkaemper and Jacobs 2012; UNGA 2001). Such developments in shared state responsibility — be it independent, joint, or derivative — open up the possibility of holding two or more states responsible for the violations of primary obligations that occur in the course of deterrence policies.

Still further developments in human rights law present a challenge to a number of indirect deterrence measures. Most recently, the European Court of Human Rights in Biao v. Denmark held that a refusal to grant family reunion amounted to indirect discrimination, thereby striking a significant blow to Denmark’s notoriously restrictive policies towards immigrants in this area. In the Pacific context, Papua New Guinea’s Supreme Court has invalidated detention of asylum seekers and refugees under a bilateral agreement with Australia on the basis of the right to liberty set out in Papua New Guinea’s constitution.

34 Judgments of the European Court of Human Rights are binding on the states concerned. The Committee of Ministers of the Council of Europe is responsible for monitoring the execution of judgments.
35 Hirsi Jamaa and Others v. Italy, no. 27765/09, ECHR 2012.
37 Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship [2011] HCA 32. In this case, the Court adopted a specific interpretation of the Refugee Convention to declare Australia’s refugee swap agreement with Malaysia invalid. According to the “effective protection” approach, states are obliged to ensure that already accrued rights under the Convention can be guaranteed following transfer to a third country, something previously rejected by courts in both Australia and the United Kingdom, arguing that such transfers are merely subject to respect for the non-refoulement principle. In response to the judgement, the Australian government subsequently announced its intention to amend the Migration Act in order to “restore the understanding of the third country transfer provisions of the Migration Act that existed prior to the High Court’s decision on 31 August 2011” (Minister for Immigration and Border Protection 2011).
39 Al Skeini and Others v. the United Kingdom, no. 55721/07, ECHR 2011..
40 No. 31821/96, ECHR 2004.
41 In relation to derivative responsibility and the law of complicity, see Jackson (2015), Lanovoy (2015), and Aust 2013.
42 Biao v. Denmark, no. 38590/10, ECHR 2016.
43 Namah v Pato (Minister for Foreign Affairs and Immigrations) and ors [2016] PJSC 13.
A number of recent deterrence policies may finally be seen to endanger refugee-protective interpretations in regard to already established areas of international law. The recently concluded arrangement between the European Union and Turkey provides one such example. That agreement is premised on the definition of Turkey as a “safe third country” as a matter of both EU and international refugee law.\(^4^4\) As a form of politics, the EU-Turkey deal represents not only a classic case of placing the cart before the horse — i.e., politically declaring Turkey safe and then subsequently trying to pay to make it so as a matter of fact — but also once again placing Greece in the precarious position of having to take the legal-political risk of this strategy on its own, whilst allowing other Member States to wait the outcome of the legal test.

Given the number of reports suggesting violations of both the non-refoulement principle and fundamental shortcomings in the implementation of other refugee rights, legal challenges seem unavoidable. In this case domestic judiciaries have moved more swiftly than many expected. The Greek asylum appeals committee on Lesbos has thus ruled Turkey unsafe in a case concerning nine Syrian asylum seekers. Following the decisions, however, the Greek government changed the composition of the appeals committee in order to ensure the continued viability of the EU-Turkey deal. Meanwhile, another case has been submitted to the European Court of Justice that will be asked to assess Greece’s application of the EU Asylum Procedures Directive vis-à-vis Turkey.

Of course, as mentioned above, current and future legal challenges are a part of the policymaking landscape of the deterrence paradigm. In many cases, states simply adapt their policies and legal challenges may thus indirectly help drive policy innovations and more varied forms of measures. Nevertheless, the long list of successful legal challenges to deterrence demonstrates that there are limits on western states in this area and it is highly likely we will see similar challenges to the most recent suite of deterrence measures via national and regional courts.

**B. The Systemic Challenge**

The second challenge is political. Looking at the developments over recent years, it is hard to imagine the current refugee protection regime can survive much longer without some more meaningful displays of international solidarity. While the global number of refugees fluctuates from year to year and is currently at a historic high, deterrence policies in themselves are a zero-sum game that at best serve to push refugees from one state to another. The costs of this competition-style environment in Europe is increasingly being felt, not just by the refugees, but also by member states faced with even more unpredictable arrival patterns and various negative externalities from the reintroduction of, for example, border controls (Bohmer et al. 2016; European Parliament Directorate-General for Internal Policies 2016, 9).\(^4^5\)


\(^{45}\) According to the Bertelsmann Foundation, the EU-24 would see accumulated GDP losses of 471 billion euros by 2025 if the Schengen Agreement was suspended. The European Parliament Directorate-General for Internal Policies reports that the permanent suspension of the Schengen Agreement, calculated over a ten-year period, would amount to 230 billion euros. See also Soros (2016).
Moreover, as noted at the outset, the deterrence paradigm has placed an additional and inordinate burden upon major refugee-hosting countries like Turkey, Lebanon, and Jordan. While the refugee regime is, at least in principle, based on some level of burden-sharing between states, the deterrence paradigm seeks to quell, to the greatest extent possible, spontaneous arrivals of asylum seekers at the borders of states in the Global North. As a result, there exists the real risk that states hosting the bulk of the world’s refugees will choose to turn their back on the regime, absent the availability of humanitarian assistance and the release of pressure from refugees bottlenecked in states of transit. The perception that different rules apply to the European Union and other wealthier states that can simply isolate themselves from taking on a comparable commitment is deeply counterproductive and only risks prompting more of the world’s major refugee-hosting states, most recently Kenya (Kibicho 2016), to pursue self-interested and restrictive policies. Moreover, the success of arrangements such as the EU-Turkey deal ultimately depends on the continued willingness of these countries to continue to host most of the world’s refugees without any substantial form of burden-sharing.

In that sense, the current refugee protection crisis represents a classical collective action problem. There can be little doubt that not only the world’s refugees but also states would greatly benefit from a more open and coordinated response. Yet, no states will be willing to unilaterally expand access to asylum if this would entail unrealistic financial or political expectations, if there is no international solidarity, or if other states do not follow suit.

C. The Ineffectiveness Challenge

The third, and potentially most powerful, challenge to the deterrence paradigm relates to the continued effectiveness of the current policies. As is well documented, refugees remain resourceful despite the plight they are forced to endure, and may exhibit extraordinary resilience in their efforts to find safety and protection. Migration control measures at the European Union’s external borders did not prevent the sharp increase in numbers of asylum seekers in European countries in 2015 and preceding years.46 Deterrence measures are moreover challenged by the growing amount of resources available to human smugglers and the constant innovation and adaption that this migration industry exhibits.

While specific deterrence measures may be successful in stemming a particular migration path in the short term, smuggling techniques and displacement of migration flows towards alternative routes often significantly, if not completely, undermine the effect over time. The recently concluded EU-Turkey deal may well be one such example. Politically hailed as a success in terms of lowering the numbers of asylum seekers along the so-called Balkan route, the number of refugees and migrants using the Central Mediterranean route via Egypt or Libya has dramatically increased during the same period. Available data suggests that those arriving via the Central Mediterranean route are mainly different nationalities than those previously pursuing the Balkan route, yet it sends a signal that alternative routes are available. For those currently blocked onward passage from Turkey, it may thus be a matter of time before we see a similar displacement effect, as long as the agreement does not provide the promised “alternative to putting their lives at risk” (European Council 2016).

46 The EU thus saw a 470% increase in arriving asylum-seekers by sea from 2014 to 2015, up from a 360% increase the year before (Fargues and di Bartolomeo 2015; IOM 2016).
The humanitarian consequence of these dynamics are further high — the Central Mediterranean represents a far riskier passage expressed through mounting death tolls. Current efforts to combat migrant smuggling is only likely to push smugglers to use longer or more dangerous routes, or to depart during periods when weather conditions are less favorable in order to avoid controls (Gammeltoft-Hansen and Nyberg Sorensen, eds. 2013; Brian and Laczko, eds. 2014). Policies to impound maritime vessels may push smugglers to further overcrowd boats or use inflatable or unseaworthy vessels, with poor engines and navigation systems, equally increasing the risk to migrants’ lives. Similarly, recent reports suggest that current military operations not only result in more risk-adverse behavior by smugglers, but also entail a significant risk of collateral damage involving migrants and refugees.

A final indication of the growing ineffectiveness of deterrence policies is that direct and indirect costs related to deterrence are mounting. In the Asia Pacific, Australia’s detention of asylum seekers both onshore and offshore cost 2.17 billion dollars in 2014-15 alone (Refugee Council of Australia 2015). Third states have further become much more adept at negotiating agreements on migration control and readmission. In the European context, Libya negotiated a payment of 5 billion euros by Italy in compensation for colonial damages when negotiating the 2007 deal with Italy to stop and readmit boat migrants crossing the Mediterranean. In connection with the recent EU-Turkey agreement, the European Union promised not only to provide 3 billion euros for refugee assistance, but also controversial political concessions in regard to accession negotiations and visa liberalization. Similarly, the response of various EU member states in reintroducing border controls in the Schengen area are likely to incur significant financial risk in relation to commuting workers, tourism, and trade in goods and services. A recent study projects that should Schengen be entirely abandoned, the European Union would experience a drop in GDP of between 100 and 230 billion euros over 10 years (European Parliament Directorate-General for Internal Policies 2016). Policies to limit access to family reunification may similarly risk negatively impacting the ability to attract labor migration in needed sectors, or even deter nationals from returning to the domestic labor market after a period abroad. A significant number of Danes have thus relocated to countries such as Sweden due to restrictions in obtaining family reunification in Denmark. In addition, there may be non-pecuniary costs associated with the deterrence paradigm. Loss of international reputation, political capital, and diplomatic influence are all possible side effects of an approach that prioritizes deterrence over humanitarianism. Of course, such things are inherently difficult to measure, making any assessment highly speculative.

In sum, it is at least questionable whether European deterrence policies continue to remain effective in light of the current situation and increasing pressure currently experienced. As a counterfactual, Australian deterrence policies have so far proved ruthlessly effective

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47 In 2015, 1,015,078 people arrived in Europe by sea and 3,770 died en route. By July 2016, 237,173 had arrived, while 2,896 had perished.
48 An internal EU planning document explicitly warned that, “Non-compliant boarding operations against smugglers in the presence of migrants has a high risk of collateral damage including the loss of life” (Rettman 2015).
49 Trattato di amicizia, partenariato e cooperazione tra il governo della Repubblica italiana e la Grande Giamahiria Araba Libica Popolare socialista, August 30, 2008, ratified by Italy in law on February 6, 2009, according to Gazzetta Ufficiale Repubblica Italiana, February 18, 2009.
in “stopping the boats.” Through the use of a combination of pushbacks and offshore processing, the number of asylum seekers reaching Australia dropped from 20,587 in 2013 to zero in 2015. However, the Australian government appears to have no “exit plan” for refugees waiting for a durable solution in other Pacific states, and its success may hence be short lived as capacity in cooperating states is limited. Moreover, it remains difficult to imagine the Australian model being brought to scale in the current European context or in situations of mass influx. And even if deterrence measures may shift the burden of protection to less developed states, there is no evidence that it dissuades asylum claims or reduces the need for international protection globally.

Of course, several of these three sets of challenges are hardly new, and one may object that so far such “anomalies” have been handled entirely through incremental or innovative adjustments to deterrence policies. Yet, as various challenges accumulate, patchwork solutions gradually become harder to sustain. Taken together, the above challenges suggest that the deterrence paradigm is not sustainable in the long term, or even perhaps in the medium term. And the detrimental results of deterrence are becoming increasingly clear as access to refugee protection is systematically blocked, as refugees are forced to risk their lives in order to reach safety, as a transnational criminal industry of human smuggling flourishes, and as the protection capacity of developing states is pushed to the brink. While developed states may continue to return to the well of deterrence policies in the near future, the current situation in Europe demonstrates a need for more fundamental rethinking.

**IV. Conclusions and Recommendations: Three Tenets of a More Sustainable Regime**

As this article has sought to demonstrate, the present refugee crisis represents not a crisis of numbers, but of policy. While the global number of refugees is currently at a historic high, the world’s 21.3 million refugees still constitute less than 0.3 percent of the world’s population. And though financial contributions fall substantially short of estimated needs, UNHCR’s record budget for 2016 is substantially lower than the amount US consumers spend each year on Halloween decorations, costumes and candy.50 In other words, there is little to suggest that the current “crisis” in terms of refugee numbers and global protection capacity is an insurmountable challenge.

Yet, while the evidence that the current paradigm is failing is mounting, we have still to reach agreement on a politically acceptable alternative. In ensuing years, various policy visions will compete to become accepted as the replacement paradigm. In situations such as this, in which one era is closing and another beginning, it is typically difficult for both practitioners and scholars to maintain a comprehensive understanding of what is going on, including the extent to which their own work constructively feeds into the process of paradigm change (Kuhn and Hacking 2012).

In terms of what will end up prevailing, this is still an open question. But to be successful, any new policy paradigm must as a minimum successfully address the core problems left unaddressed by the existing paradigm. Taking heed of the above challenges, those in search

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50 The UNHCR budget for 2016, as approved by the Executive Committee, was 6.5 billion dollars (UNHCR 2016b).
of a new policy paradigm for global refugee protection may thus want to start by addressing the following three issues.

**A. Continued Respect for International Refugee Law**

If we accept that the deterrence paradigm is a particular instantiation of the current refugee regime, we also need to carefully distinguish between the existing political framing of the current regime and its underlying normative structures. This makes the recent arguments by policymakers, calling for a revision or complete abandonment of the 1951 Refugee Convention, difficult to sustain. Not only was the 1951 Refugee Convention designed very much with the kind of large-scale refugee situation we are facing today in mind, one would be hard pressed to find another human rights instrument that is so inherently, some might argue overly, sensitive to states’ political concerns. Refugee law leaves states largely free in terms of how to organize their domestic asylum procedures, explicitly excludes those underserving of protection, and allows states to apply exceptions if they have well-founded security and public order concerns. Furthermore, the drafters were attentive to the issue of not overburdening states facing mass influx, and to this end the Convention applies a novel approach where rights are granted incrementally instead of all at once, and in many cases only guaranteed relative to how the particular state grants rights to its own citizens. Over the last half century the 1951 Refugee Convention has thus proven itself a flexible and robust instrument, laying down a rights framework, which ought to remain at the core of any political reform process.

**B. Meaningful Responsibility- and Burden-sharing**

Within the parameters of the current legal regime however, it is possible to imagine a range of far-reaching reforms to both the institutional and political framework for organizing international refugee protection. A key element in this process must be to address the current misdistribution of both refugee responsibility and protection capacity. A stronger commitment to international solidarity should build both on the sharing of responsibility in regard to refugees, e.g., through resettlement, humanitarian visas, or global and regional distribution mechanisms, or on the sharing of resources, such as humanitarian assistance, expert staff, know-how, and money.

A number of scholars and refugee advocates have called for a general distribution model, with quotas based on each country’s population size, GDP, unemployment rates, etc. While such a model undoubtedly achieves a form of fairness among states, we believe it is unlikely to work even in the more limited European context. The first objection is political. The existing ad hoc redistribution scheme within the European Union has hardly been a success, and few member states would willingly sign on to what they perceive to be a blank check in such a politically sensitive area. But more importantly, such a model further fails to take account of refugees’ individual wishes, capabilities, networks, and personal attachments. Based on existing data, any such model will in all likelihood lead to widespread secondary movement.
In contrast, a common but differentiated approach implies that while all states must contribute in a proportionate and meaningful manner, not all states need provide the same kind of commitment (Hathaway 2016, 93-99). Countries in the region of origin, or along the most common arrival routes to the European Union, cannot be expected to continue to host the vast majority of refugees. The only way to ensure the continued willingness of these states to open their borders is to institutionalize a significant and systematic commitment to responsibility-sharing through, for example, resettlement quotas and humanitarian visa programs. Moreover, major refugee hosting countries must be properly compensated, and not just with money for humanitarian aid, but through a systematic investment in their national economies, in order to boost trade opportunities and create more jobs to benefit both the refugees and local populations alike.\(^{51}\)

**C. A Broader Notion of Refugee Protection**

For far too long refugee protection in the major countries of first asylum has focused almost entirely on providing basic physical safety and humanitarian assistance without a meaningful commitment to refugee protection, much less durable solutions. Yet, the data from the Syrian crisis clearly shows us that other rights are equally important if refugees are to establish a life and not feel compelled to flee onwards. These other rights relate to refugees’ ability to establish a livelihood, to access basic infrastructures such as health care and the justice system, and to ensure a future for their children through education. It is high time we move beyond the current containment approach and start thinking more thoroughly about refugee protection: How can we create more and faster job and self-reliance opportunities? How can we ensure access to education in a way that refugees can benefit from whether or not they have to stay in the host country or eventually return home? And how do you ensure that refugees are not marginalized in the societies and justice systems of the host countries?

A second element paving the way for more effective policymaking vis-a-vis asylum seekers is for states, individually and collectively, to enhance their preparedness to receive refugees. Any serious change to the current refugee regime must move beyond exploitation of the contours of international refugee law, and the reactive approach of individual states awaiting the arrival of refugees on their territories. Planning for and cooperation in regard to refugee arrivals is essential. The current regime’s apparatus of cooperation-based migration control paradoxically shows that origin, transit, and asylum states are engaging as never before. Harnessing new forms of more protection-oriented cooperation, states may wish to draw on both historical examples, such as the Comprehensive Plan of Action for Indochinese refugees (Betts 2006), and more current initiatives, for example, the multi-stakeholder process in regard to refugee protection in the Northern Triangle of Central America organized by UNHCR (UNHCR 2016a).

\(^{51}\) For a proposal to this end, see Betts and Collier (2015, 84).
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The End of the Deterrence Paradigm?


The End of the Deterrence Paradigm?

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Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research

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Executive Summary

Current representations of large movements of migrants and asylum seekers have become part of the global consciousness. Media viewers are bombarded with images of people from the Global South riding atop of trains, holding on to dinghies, arriving at refugee camps, crawling beneath wire fences, or being rescued after being stranded in the ocean or the desert for days. Images of gruesome scenes of death in the Mediterranean or the Arizona or Sahara deserts reveal the inherent risks of irregular migration, as bodies are pulled out of the water or corpses are recovered, bagged, and disposed of, their identities remaining forever unknown. Together, these images communicate a powerful, unbearable feeling of despair and crisis.

Around the world, many of these tragedies are attributed to the actions of migrant smugglers, who are almost monolithically depicted as men from the Global South organized in webs of organized criminals whose transnational reach allows them to prey on migrants and asylum seekers’ vulnerabilities. Smugglers are described as callous, greedy, and violent. Reports on efforts to contain their influence and strength are also abundant in official narratives of border and migration control.

The risks inherent to clandestine journeys and the violence people face during these transits must not be denied. Many smugglers do take advantage of the naiveté and helplessness of migrants, refugees, and asylum seekers, stripping them of their valuables and abandoning them to their fate during their journeys. Yet, as those working directly with migrants and asylum seekers in transit can attest, the relationships that emerge between smugglers and those who rely on their services are much more complex, and quite often, significantly less heinous than what media and law enforcement suggest.

The visibility of contemporary, large migration movements has driven much research on migrants’ clandestine journeys and their human rights implications. However, the social contexts that shape said journeys and their facilitation have not been much explored by researchers (Achilli...
Critical Perspectives on Clandestine Migration Facilitation

2015). In other words, the efforts carried out by migrants, asylum seekers, and their families and friends to access safe passage have hardly been the target of scholarly analysis, and are often obscured by the more graphic narratives of victimization and crime. In short, knowledge on the ways migrants, asylum seekers, and their communities conceive, define, and mobilize mechanisms for irregular or clandestine migration is limited at best.

The dichotomist script of smugglers as predators and migrants and asylum seekers as victims that dominates narratives of clandestine migration has often obscured the perspectives of those who rely on smugglers for their mobility. This has not only silenced migrants and asylum seekers’ efforts to reach safety, but also the collective knowledge their communities use to secure their mobility amid increased border militarization and migration controls.

This paper provides an overview of contemporary, empirical scholarship on clandestine migration facilitation. It then argues that the processes leading to clandestine or irregular migration are not merely the domain of criminal groups. Rather, they also involve a series of complex mechanisms of protection crafted within migrant and refugee communities as attempts to reduce the vulnerabilities known to be inherent to clandestine journeys. Both criminal and less nefarious efforts are shaped by and in response to enforcement measures worldwide on the part of nation-states to control migration flows.

Devised within migrant and refugee communities, and mobilized formally and informally among their members, strategies to facilitate clandestine or irregular migration constitute a system of human security rooted in generations-long, historical notions of solidarity, tradition, reciprocity, and affect (Khosravi 2010). Yet amid concerns over national and border security, and the reemergence of nationalism, said strategies have become increasingly stigmatized, traveling clandestinely being perceived as an inherently — and uniquely — criminal activity. This contribution constitutes an attempt to critically rethink the framework present in everyday narratives of irregular migration facilitation. It is a call to incorporate into current protection dialogs the perceptions of those who rely on criminalized migration mechanisms to fulfill mobility goals, and in so doing, articulate and inform solutions towards promoting safe and dignifying journeys for all migrants and asylum seekers in transit.

The Facilitation of Clandestine Migration

While representations of recent migration flows into Europe and the United States have been characterized as unprecedented and crisis-like, historical evidence suggests migratory flows have been significant in other times in Western history. For example, Donato and Sisk (2015) demonstrated contemporary migration levels in the United States are in fact
considerably smaller than those taking place during the 1980s following the passage of the Immigration Reform and Control Act of 1986. The historical record also shows that clandestine or irregular migrations, far from being under the control of organized crime, have been carried out through far less nefarious mechanisms. Instead, they often reflect long-standing social relations and migration traditions (Lopez-Castro 1998; Spener 2009; Kandell and Massey 2002; Ayelew 2016). Moreover, the social relationships that are maintained and developed as a result of transnational migration facilitate ensuing transits, with people relying on friends and family members for the purpose of moving to other locations. These methods are significantly less violent or dark than what media and official accounts suggest.

Data attest that most people who eventually become undocumented or irregular migrants did in fact enter destination countries legally, relying on a vast system of licit and illicit practices. For example, the majority of newly undocumented immigrants in the United States in recent years have entered legally through air and land ports of entry (Pew 2013; Warren and Kerwin 2015). Legally issued documents to cross borders or enter a destination country are frequently borrowed, purchased, or rented among travel documents from friends, family members, and third parties (Kyle and Dale 2001; Abel 2012). Others may claim to be a national of a specific country, having “learned” to perform foreign identities that may allow them to “pass” for nationals or residents of a specific nation in order to be admitted into it or to avoid detection and removal (Stone-Cadena 2016; Brigden 2016). Marriage is also used with the purpose of being allowed admission or official authorization to reside in a country (Tsay 2004).

There is also a strong industry comprised by entrepreneurs who illicitly, but also legally — and often taking advantage of gaps in laws and regulations — provide services that may be conducive of, or facilitate, irregular or clandestine migration. Businesses like travel agencies, employment brokers, print shops, passport or visa forgers, language schools, or even individuals training those seeking to travel abroad in social or cultural etiquette are broadly defined as brokerage. The term, in conjunction with the recognition of migrants and asylum seekers as owning and mobilizing their agency, seeks to encompass how migration-related information and processes are “controlled, evaluated, and processed” (Alpes 2012, 90) by migrants, asylum seekers, and their families and friends in order to advance and complete their migratory journeys.

Combined, all of these efforts may lead to the migration of many seeking to reach a destination. Many other persons, however, unable to secure visas, passports, or the mechanisms required to travel, may opt for another kind of service, perhaps the most visible and popularized form of irregular migration: the services provided by migrant smugglers.

**Defining Migrant Smuggling**

Human smuggling is defined as the “procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not a national or permanent resident” (United Nations 2000). It is most often depicted as a violent, exploitative, and criminal act controlled by groups of men from the Global South. Conceived as organized into vast, complex networks of
transnational reach, and as operating in partnership with other criminal organizations like drug smugglers (Davila 2015), human traffickers (Shelly 2014), and even terrorists (Bensman 2016), migrant smugglers are described as posing an incredible threat to the security of the nation-state. They are described in media, policy, and academic circles as greedy, as driven by the purportedly immense profits derived from the human trade, and as banking on the desperation of naïve, desperate migrants and asylum seekers worldwide.

There is in fact an abundance of graphic and tragic representations of the experiences of migrants and asylum seekers in transit at the hands of smugglers which provides a particularly alarming portrayal of the dangers present in clandestine migration. While it is important to acknowledge the precariousness of smuggling transits, it is also fundamental to establish that globally, empirical research on smuggling and its organization is scant. Most data pertaining to smuggling activity comes from law enforcement or other official sources (Zhang 2007), which in turn rely on the most dramatic of failed clandestine journeys to further justify enforcement practices. In this context, it is not surprising that depictions of smuggling will most often reflect the experiences of migrants and asylum seekers who were the target of threats, scams, and violence before being rescued by authorities or NGOs.

The reliance on these representations despite and alongside the absence of empirically-collected data raise critical methodological and conceptual concerns. Who are the migrant smugglers? How are they organized? How do they perceive the work they perform, and how is it in turn seen by those who rely on their services? What are the motivations leading smugglers to engage in this activity? What do they think about the violence? And most importantly, are there ways to make smuggling-involved journeys safer for those who rely on them?

During the last decade, there has been an increase in the number of empirical engagements on smuggling facilitation. Researchers have posed critiques of the dominant characterization of smuggling as a violent and predatory, urging a closer look at its community dimensions. This body of scholarship argues that the facilitation of irregular migration involves a multiple and diverse range of interactions, many of which are far less tragic or sensationalistic than what politicized, mediated narratives suggest (Sanchez 2015; Majidi 2016). This still narrow body of scholarship has however articulated important critiques on the need to re-evaluate smuggling dynamics in order to more critically engage on its reliance by migrant and refugee communities, and on its role at facilitating mobility amid increasing border enforcement and controls.

Smugglers and Their Views

Hired around the world by those seeking to migrate and who are unable to secure the protection of visas, permits, or passports, smuggling facilitators have been throughout history key facilitators of migration flows (Gamio 1931; Andreas 2013; Khosravi 2010; Chu 2010; Chao-Romero 2010). Despite being often described as cunning, deceiving, and greedy, smugglers and their services maintain a systematic demand among those seeking to migrate in light of stepped-up migration and border enforcement measures.

Spener (2009) and Zhang (2008) have argued that the continued reliance on smuggling by
migrants and asylum seekers constitutes an indication of the practice’s success amid and in spite of the frequent reports of smuggling-related tragedies and of stories pertaining to the abuses faced by migrants and asylum seekers in transit. In fact, reliance on smuggling service can also be interpreted as evidence of how immigration enforcement and control along borders has given place to the continued reliance on alternative, underground if criminalized activities to overcome mobility restrictions, and to the professionalization of smuggling activities (Andreas 2009).

While the empirical gap on migrant smuggling is significant, a few generalizations on their activities and perceptions can be made on the grounds of studies involving direct contact with smugglers and their clients. The following sections describe some of the findings of this body of work.

**Smugglers and their backgrounds.** While the ethnographic evidence suggests smugglers do not present a unique or specific demographic profile, some general observations can be made. Most smugglers are migrants or asylum seekers themselves who provide services on behalf of friends, acquaintances, and family members relying on their past migration experiences (Stone-Cadena 2016; Maher 2016). Many tend to share the nationality or place of origin of their clientele (Zhang 2008). In terms of their immigration status, they are likely to be or have been irregular migrants at some point in their lives (Sanchez 2015), although the participation of authorized residents and citizens from countries where smuggling activities take place is also commonplace (Achilli 2015). Men as well as women of all ages participate in the provision of smuggling services; however, the majority of those arrested for smuggling and smuggling-related offenses are men (despite women also being key actors of smuggling facilitation) (Zhang, Chin, and Miller 2007; Sanchez 2016). The majority of facilitators tend to be members of highly marginalized communities — working class, low-income laborers, residing in or traveling through areas of high migration flows. In short, data indicate that smugglers are ordinary citizens from multiple backgrounds. At best, they appear to share a highly entrepreneurial drive, further identifying themselves as self-starters and as enjoying working independently (Zhang 2007; Achilli 2015).

**The social organization of migrant smuggling.** Migrant-smuggling groups tend to be constituted primarily by groups of friends and family members. Entry into the smuggling market mostly occurs in two ways: through interactions with friends and family members already involved in smuggling activity (Zhang 2008; Chin 1999), or when approached to participate in the smuggling process in the context of their own migratory journey (Achilli 2015), most often in exchange for a reduction of their smuggling fees (Sanchez 2015). Tasks are gendered. Women most often perform feminized tasks (cooking, cleaning, childcare), as well as financial transactions (like cashing checks and ensuring fee payments have been made or wired) (Sanchez 2016; Zhang, Chin and Miller 2007). Men are more frequently involved in guiding and driving groups, acting as lookouts, recruiters, and guards (Spener 2009).

Smuggling requires no specialized or technical training or investments (Zhang 2007), with facilitators relying on the skills or resources they already possess — the ability to drive,

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1 Researchers on the US-Mexico border and North Africa have also documented reports of minors participating in the smuggling market who receive monetary compensation or who pay off their transits by performing smuggling-related tasks (IOM 2016; Moreno and Avedano 2015).
owning a dwelling or a vehicle, speaking the local language, or having knowledge of local
or roads (Sanchez 2014). While border enforcement and militarization has made crossings
more challenging, smugglers consistently rely on their knowledge of their territories and
and on the strength of their connections, rather than on technological savvy or skill. Some
scholars have suggested that increased controls have led not just to higher smuggling prices
but also to smugglers’ reliance on more sophisticated technology and equipment (Andreas
2009). It is perhaps more accurate to point out that most smugglers and their clients rely
on basic cellphones and radios (McAuliffe 2016; Newell et al. 2016) for communication
purposes. The use of smart phones, and most recently, of social media by smugglers
to recruit and guide their clients has also been documented by some scholars (Petrillo
2016; McAuliffe 2016), although said usage should be interpreted as a reflection of the
affordability and availability of mobile technology, rather than as a marker of smugglers’
osophistication.

Data indicate that smuggling facilitators work independently, relying on their personal
resources and social contacts. They perform a single, highly specific task only (guiding a
group through the desert, cooking, recruiting, driving) (Zhang 2007; Campana 2016) which
is performed in coordination with other facilitators. Facilitators are not always known to
each other — they may live in different cities, states and even countries. This is also an
effective protection mechanism organic to smuggling operations: In the event one facilitator
is arrested, he or she cannot identify others involved (Zhang 2008). Simultaneously, it is
important to reiterate that significant portions of the communications among smuggling
facilitators take place through mobile technology (including cell phone-based applications)
and social media, further eliminating the need for face-to-face interactions. The tasks, when
performed effectively and in coordination, will lead clients to their final destination.

It is common to find smuggling facilitators who perform coordinating roles. They put
facilitators, clients, and community members in contact; help monitor specific journeys;
and settle the frequent financial disputes among smugglers and their customers, and among
smugglers themselves. Coordination, however, should not be interpreted as a synonym
for leadership. Occasionally individual smugglers may assume temporary oversight for
a particular journey or a specific group of clients, yet each facilitator is still individually
responsible of a specific task during the journey. Temporary oversight typically comes
to an end once clients have successfully completed a specific stage of their journeys or
reached their destination. While law enforcement and media often articulate smuggling
as organized in complex and hierarchical networks (Aronowitz, 2012), ethnographers
have identified that the ability to improvise and make decisions independently (Brigden
2016) are essential characteristics of successful smuggling journeys. In other words, most
smuggling groups are organized horizontally, and lack centralized, permanent leadership
and hierarchical mechanisms (Spener 2009, 147; Zhang and Chin 2002; Sanchez 2015)
as they depend on the ability, availability, and skill of individual facilitators. The absence
of central leadership does not suggest charismatic facilitators with leadership attributes
or inclinations do not exist, but rather than the execution and effectiveness of smuggling
activities are more dependent on the collaborations among individuals rather than on
leadership.

Clients’ perception of smuggling. Despite the infamous reputation smuggling facilitators
have in the media, being a smuggler is far from a frowned upon activity within migrant and refugee communities (Majidi 2016; Koser 2008). Access to or information on reliable, trusted facilitators becomes critical in anticipation of clandestine journeys, as friends and families of migrants and asylum seekers and the travelers themselves are vastly aware of the challenges inherent to their passages and seek to reduce them (Alpes 2012). Those seeking to travel often conduct extensive research on their potential smuggling options well in advance of their journeys. They consult and solicit references from other friends and relatives who have successfully traveled in the past, meet with smugglers in person or over the phone, and “shop around” until a suitable option is found. While smuggling activities are illicit and must remain hidden from the authorities, they cannot be entirely secret or private, as the business relies on referrals and on smugglers’ accessibility to their clients. In this sense, the smuggling market is, as other illicit practices, “more mundane, consensual and public than imagined” (Zaitch 2005, 201).

In turn, the ability of a smuggling group or an individual facilitator to conduct business most often depends on the quality of his or her referrals from past clients and smuggling collaborators (Martinez and Slack 2016; Zhang 2008). Reports on factors like reliability, punctuality, risk levels, cost, and quality of transportation are as important in the decision to travel with a specific smuggler as are the more subjective, affective issues like kinship proximity, levels of respect shown towards women and the elderly, quality of care via personal interactions, friendliness, honesty, cleanliness, and quality of room and board provided (Vogt 2016). Combined, these factors play a role in clients’ decisions to travel with a specific smuggling facilitator, and on the ability of facilitators to generate and secure business for themselves and others.

While clients do not necessarily perceive the work performed by smugglers as criminal, they do recognize their actions as illicit, and are fully aware of the legal implications that an arrest can have on their future and that of the smuggler, including incarceration, possible legal charges, and future inadmissibility (Alpes 2012; Chu 2010). But given the limited options available for transnational mobility, clients most often describe the work of the smuggler as compulsory, in some cases even altruistic. To some, smuggling constitutes a necessary evil amid the challenges posed by immigration and border enforcement.

**Smugglers’ self-perceptions and motives.** While the main motivation behind their participation in the facilitation of clandestine migration is securing financial or in-kind returns, smugglers provide varied rationales for their involvement, perhaps due to the very scrutiny they face. For smugglers who have a migrant or refugee background, helping others like themselves get access to protection appears to be a constant theme. They express an awareness of the challenges encountered by migrants and asylum seekers in transit having experienced them themselves (Achilli 2015). Smuggling services constitute therefore a way to support other migrants and asylum seekers in their paths toward mobility and security. To other facilitators, smuggling is a way to pay back a favor from the past, the times when other smugglers assisted them in the context of their own journeys. In the context of her research on smuggling along the US-Mexico border, a smuggler interviewed by Sanchez stated: “I am just paying the favor forward” (2015). She also identified cases of women who were invited to take on smuggling tasks during times of unemployment or illness so as to supplement their already low incomes in service and hospitality occupations.
Most smugglers justify their participation in strictly utilitarian terms: The returns are often minimal, but welcome. In addition to constituting an income-generating mechanism, some smugglers perceive the work they perform as building social capital investment for the future — a community-based form of insurance. They often see their participation as a future way to cash-in the favors provided to migrants, asylum seekers, and their families (Sanchez 2016). A small number of facilitators manage to build a client base and a positive reputation, which over time, and as a result of the notions and community practices of reciprocity ruling communities, can ensure the duration of an enterprise (Spener 2009). Most clients express gratitude for their smugglers’ services when their journeys had a positive outcome, or as a result of the attention and the care provided to those traveling with them (Hagan 2008).

**The economy of smuggling.** The smuggling market is often described as incredibly profitable, with its returns matching or even exceeding those of drug trafficking (Soo 2015). However, estimating the size of the migrant smuggling market in terms of its finances is a virtually impossible proposition. Smugglers do not keep official records of their transactions, they may charge different fees to different clients, many rely on informal forms of banking (Koser 2008; Majidi 2016), and some are paid in kind while others may charge no fees at all. In other words, costs and profits associated with clandestine travels vary considerably depending on locations, clients, and facilitators.

There are, however, a few generalizations that can be made regarding the smuggling economy. Smuggling fees are dependent on multiple variables, with distance to and from a desired destination being just one of them. They are also tied to the means of transportation used, routes, access to state and non-state actors that may expedite transits, and to documents that may facilitate them (Izcara-Palacios 2013). The age, gender, or health condition of the person who seeks to travel is also a matter of consideration for smugglers, who often must deal with the impact of transporting a sick or vulnerable migrant upon the rest of a group (Hagan 2008). Some facilitators provide specialized services for clients like children, pregnant women, and the elderly that reduce travel times and exposure to risks (Sanchez 2016), at a cost several times higher than those pertaining to a “regular” trek. Families and friends in both countries of origin and destination cover these additional fees with the intention of improving the chances of a successful and safe journey.

Given the cost of their services, smugglers often provide guarantees. For example, smuggling fees are deposited with a third party and only when the arrival of the migrant to his or her destination is confirmed are the funds released to the smuggler. Other smugglers offer a certain number of crossing attempts (Guevara-Gonzalez 2015) while others do not charge unless the client reaches his or her destination (Zhang 2008).

While there is an abundance of variables that help determine smuggling costs, a correlation between the cost of a journey and its level of risk does seem to exist. Migrants with access to sources of financial and social capital are more likely to travel through faster and safer mechanisms, exponentially reducing the levels of risk they face. The opposite applies to those unable to secure or access funds or connections, as their options to protection are minimal or not readily accessible (Martinez 2015). Unequal access to protection is also pervasive in smuggling. Low-income migrants with limited knowledge of migration processes (most often women and children traveling alone) are more likely to endure
violence, detention, extreme levels of environmental exposure, and death, compared to those who possess better knowledge (Pickering and Cochrane 2013). The most vulnerable migrants are more frequently the subject of scams, extortion, kidnapping, or forced disappearance (CNDH 2009; CNDH 2011). In brief, higher smuggling fees often imply reduced travel time and environmental exposure, travelling along safer routes, and limited risk of detection. These advantages, however, are not always available to the poorest of migrants and asylum seekers in transit.

Smuggling journeys are financed in a number of ways. The ethnographic record suggests that costs are covered by friends and family members of those who travel. Migrants, asylum seekers, and their families take loans, spend savings, sell personal property, or set up payment plans. A journey takes place only after the terms associated with the transit have been established and agreed upon by all parties. The existence of these agreements, however, is often not enough to guarantee that the terms will be respected, especially when the ultimate destination of the migrant is a distant or non-traditional country. Migrants report smugglers often charge additional fees, fail to deliver contracted services, or even disappear prior to any services being provided or completed, taking any fees that already have been paid with them (O’Leary 2009).

Most smugglers however are open to negotiating their fees, given the socio-economic circumstances faced by their clientele and their market pressures (Casillas 2010; Sanchez 2015; Maher 2016). Many migrants or asylum seekers and their families run out of resources to cover their fees, having then to devise arrangements with facilitators to pay off service by performing smuggling-related tasks themselves (Sanchez 2015) or working out payment plans (Koser 2008). While most smuggling facilitators favor negotiations, many threaten their clients, and many may engage in acts of extreme violence, like physical or sexual abuse, extortion, kidnapping, and torture in order to obtain their fees (CNDH 2011).

Lastly, despite the often exorbitant amounts that are quoted in connection with smuggling costs, research indicates that individual facilitators’ earnings vary considerably (Sanchez 2015; Zhang 2008). Once all the costs associated with a journey have been recovered, the remaining amount is split among those who participated in its facilitation. Compensation generally depends on the task performed, the number of clients, and the number of facilitators involved. On the US-Mexico border, compensation also varies greatly across genders. Tasks typically performed by women (cooking, cleaning, and cashing wire transfers) often involve lesser compensation than those executed by men (like driving and guiding groups through the desert) (Sanchez 2016). These limitations also mean that few people consider smuggling a full-time occupation. Most facilitators report holding regular jobs in the mainstream economy or support themselves by performing additional informal forms of labor (Zhang 2007; Sanchez 2015). In other words, smuggling constitutes in the majority of cases only a supplemental income-generating strategy, its structure only allowing for limited, seasonal, and occasional job opportunities. And since most facilitators’ earning abilities are already limited, this also translates into their smuggling earnings being almost immediately re-circulated into the local economy to cover basic needs like food, rent, or

Majidi (2016) has identified that in long-distance journeys, like those involving transit from Pakistan and Afghanistan into Europe, the initial net of protection provided by local smugglers becomes more tenuous as the distance from the place of origin increases.
Critical Perspectives on Clandestine Migration Facilitation

school supplies (Sanchez 2015).

**Smuggling, Violence, and Organized Crime**

Representations of the migrant smuggling market describe it as plagued by violence and risk. We must keep in mind, however, that violence does not occur in a vacuum. Most references to violence in human smuggling focus on the persona of the smuggler, leading audiences to forget the role of structural violence in dictating the forms of interpersonal violence that take place in the context of clandestine migrations.

Violence in smuggling should be understood in the context of the global migration enforcement system, which has been conducive of heightened states of precarity and risk among those who travel irregularly. However, it has been primarily narrowed to simplistic characterizations where smugglers appear as predators, organized in transnational networks of far reach whose spread is explained as the result of “globalization and population migration” that allow criminal organizations to grow “increasingly unattached to a specific territory” (Varese 2011:3-4).

The reports of physical violence, sexual assault, homicide, labor trafficking, extortion, and kidnapping occurring along the migrant and refugee trail must not be ignored. Yet renouncing them far from provides contextual or theoretical insights into their occurrence. Illegality alone is not sufficient to create high levels of violence in criminal markets (Reuter 2009), particularly in smuggling, where the service being sold is protection — even if limited or scant. Scholars have argued that engaging in violence against migrants and asylum seekers as a smuggling facilitator would be impractical and counterproductive, as the business depends on referrals from satisfied customers (Zhang 2007; Spener 2009). Furthermore, smugglers are not the only characters that engage in activities that negatively impact the safety of those in transit. Abuses by state actors (CNDH 2009), robbers (O’Leary 2009), and even the general public (Lazaridis 2015) have an impact on migrant and refugee well-being and security. Furthermore, physical violence is far from being the only cause behind migrant and refugee death. The work of Rubio Goldsmith et al. (2006), and that of Martinez et al. (2013) have established the correlation between migrant deaths and environmental exposure emerging from migrants opting for more remote and isolated routes in order to avoid detection at the hands of law enforcement.

Claims that smuggling is in the hands of transnational criminal networks must also be treated with caution. Globalization should not be simply translated as a synonym of the ability of an organization or group to become mobile or operate at a different location at will (Varese 2011, 4). Most smuggling operations are set up at the local level (Campana 2016; Zhang 2007; Chu 2010) or within migrant or asylum seeker communities (Majidi 2016; Sanchez 2015). While interactions and encounters with members of other criminal organizations do take place, they suggest, rather than the existence of transnational collaborations or partnerships among criminal groups, the presence of communications and exchanges among them, and the sharing of routes and most likely similar mechanisms for their operations, but not the domination or take-over of a specific group (Wolf 2012). Furthermore, we must also remember that the evidence shows smugglers work independently, connecting with multiple other facilitators and not for a single, specific group.
Lastly, research on criminal activity shows that violence takes specific forms in specific markets, and is not random in nature (Reuter 2009). While clandestine migration is inherently precarious, the forms of violence that are present in any market are also specific to its context. In fact, not all clandestine journeys will be violent or involve dire encounters with organized crime. Research indicates that the level of vulnerability and exposure that a person in transit will encounter is connected to the amount of social and financial capital that has been deployed in the context of his or her journey (Martinez 2015). Some migrants and asylum seekers in fact never come in contact with anyone other than facilitators along their journeys, while others (most often, the poorest and most vulnerable of migrants) will systematically be the targets of crime and abuse. The latter, in turn, is more the result of their very vulnerability and visibility, than that of the spread of global criminal networks.

There are other manifestations of violence that appear to be more systematically prevalent in the market. The most common kind is the one emerging from interpersonal conflict. Arguments among smuggling facilitators, and smuggling facilitators and their clients are rather common, especially over the payment of smuggling fees (Sanchez 2015). Many facilitators may opt to charge additional fees on top of previously agreed prices, and may even refuse to continue transporting migrants or asylum seekers to their destinations if such charges are not covered. Others may hold their clients until smuggling fees that were promised are covered. Migrants may also fail to abide by the terms of their journeys. While the relationship between the smuggler and the person in transit may seem to uniquely favor the former, migrants often threaten smugglers with providing poor reviews of their experience, which may in fact damage the smuggler’s reputation and make the possibility of conducting future business complicated. Most often, parties negotiate (Casillas 2010) to avoid the loss of capital or fees, or being detected by or reported to law enforcement authorities. Facilitators also reconcile their differences among each other in order to ensure continued business opportunities.

One of the activities that has generated considerable concern in clandestine migration is the incidence of kidnapping among migrants and asylum seekers in transit. The practice appears to be most prevalent in the Horn of Africa-North Africa markets and in the US-Mexico and Mexican contexts. On the US-Mexico border, kidnapping acts are most often described as carried out by crews who rob smugglers of the migrants they transport (Martinez 2015; Slack 2015; Sanchez 2015). These actors, known in the region as bajadores3 retain migrants until a ransom fee from their friends or families is secured. Migrants report being subjected to emotional abuse, intimidation, beatings, sexual abuse, and torture (CNDH 2011). An almost identical practice occurs among Eritrean and Sudanese asylum seekers, with families in the diaspora being contacted to cover large sums of money in order to avoid or stop the further victimization of a victim in transit and to secure his or her release (Ayalew 2016). Many times the perpetrators of these forms of violence are migrants themselves, who are unable to cover their ransom fees and, often under pressure from captors, engage in the commission of acts of victimization against other migrants (CNDH 2011; Izcara Palacios 2015). While reports of sexual violence against migrant women have occupied the attention of most researchers and policy makers, men are consistently the

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3 The term is the Spanish word for “unload.” In northern Mexican popular culture the term was typically used in drug trafficking in reference to the amateurish crews that would rob drug traffickers of their drug cargo during transit.
target of sexual intimidation, humiliation, and violence (CNDH 2011; Sanchez 2014). In some contexts, state actors have been identified as working alongside those engaging in the criminal exploitation of migrants and asylum seekers in transit. Mexico’s National Commission for Human Rights, for example, has repeatedly denounced the involvement of members of that country’s immigration enforcement corps, the National Institute for Migration, in practices that afflict the safety of migrants traveling through that country.

Discussion and Way Forward

Through the mobilization of graphic images and tragic stories of migrant victimization, migrant smuggling has been established as the main mechanism behind migrant and asylum seeker flows. As part of these narratives, the public is told that clandestine migration is under the control of transnational criminal organizations that exploit migrants and the displaced, prey on their desperation, exploit them financially, and victimize them physically, sexually, and emotionally.

There is no doubt that exploitative and violent practices exist in the migrant smuggling market, and that many smugglers do prey upon migrants and asylum seekers. Yet the conditions of vulnerability faced by those in transit are rooted first and foremost in their inability to fulfill the ever rigorous requirements imposed by the nation state to secure visas and passports. Critical scholarship on smuggling has therefore challenged the oversimplified narratives of irregular migration, especially those that seek to construct the practice in a manner that exempts the state from its role as generating the conditions that ultimately influence the decision of migrants and asylum seekers to travel with smugglers.

This contribution summarized current knowledge on the facilitation of smuggling activities derived from empirical and critical research on the facilitation of clandestine migration. It outlined how work within migrant and refugee communities indicates that smuggling processes are not only criminal in nature, but that they are often community-initiated, rooted in historical traditions of social obligation and reciprocity that ultimately and collectively seek to provide a system of protection for its members. As these mechanisms are not authorized by the state, they are set up to constitute a form of human security from below. The data also indicate that few smuggling facilitators are members of wealthy transnational criminal networks. They are instead community members, often migrant and asylum seekers themselves who employ their knowledge, skills, and social connections in the facilitation of smuggling in order to supplement their income. While the financial motivations behind smugglers’ participation in the market must be acknowledged, there is no indication that profits are destined or shipped to any global, centralized, transnational leader or organization. Rather, earnings stay within the working class, often marginalized communities where migrants, asylum seekers, and facilitators come together, and are in fact almost immediately recirculated to cover basic needs like rent or food.

In light of these findings, what are the consequences of ignoring the community dimensions of smuggling at a time of large movements of migrants and asylum seekers? Research points at the following implications connected with border enforcement and migration and smuggling criminalization practices:
The increased criminalization of smuggling has transformed what historically and culturally has constituted a community-based and -centered activity. The work of Izcara-Palacios in Mexico, for example, shows that reliable, experienced facilitators have been forced out of the market, concerned over the risk of detection and arrest and the imposition of fees by organized crime that impact their earnings, leading less experienced facilitators to enter the market, which increases migrant and refugee risks.

Anti-smuggling law enforcement operations hardly ever lead to the capture of smuggling leaders since as evidenced by the ethnographic record, hierarchical leadership is virtually non-existent in the facilitation of smuggling. Missbach and Sinanu (2011) identified that instead, the members of marginalized, working-class communities, as well as asylum seekers, migrants, and people of color are the ones who are more likely to be detained under smuggling charges, and that their detention and prosecution have no impact on deterring smuggling from occurring.

Anti-smuggling activities also have a serious economic impact upon migrants, asylum seekers, and their families. Enforcement has raised smuggling costs. Most often law enforcement confiscates any fees in possession of a facilitator as evidence of his or her criminal activity. Fees are not returned to migrants or asylum seekers even in the presence of evidence of violence or victimization. This has a grave impact on the finances of families who might have become indebted in the course of financing migrant and asylum seeker journeys, many of whom are forced to attempt their crossings again, or to disappear to avoid the implications of unpayable debts. The state’s actions, in turn, heighten the vulnerability of migrants and their families.

Concerns over detection by law enforcement force migrants and asylum seekers to opt for more hidden, remote, and dangerous routes to reach their destinations. At these locations, the likelihood of receiving help in the event of an emergency is slim, and the probability of becoming prey of other forms of crime increases, as the case of the interactions between drug and human smuggling in Mexico documented by Casillas indicate.

Migration criminalization efforts have increasingly expanded to include humanitarian attempts on the part of individuals, civil organizations, and NGOs to transport migrants and asylum seekers. Cases of activists being charged for providing humanitarian assistance to migrants and asylum seekers have been reported in Europe and have been at the center of federal litigation in the United States (Coutin 2012; van Liempt 2016).

In summary, smuggling journeys are built upon collective, accumulated, and also improvised forms of knowledge acquired, developed, and shared by those in transit and their communities. Enforcement controls, including anti-smuggling initiatives that rely on the mobilization of notions of organized crime and that focus on rescue efforts alone, will continue to have little to no deterrent impact on migrant and refugee flows.

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4 Mass graves and massacres along sections of the migrant trail in Mexico under the territorial influence of Mexican drug trafficking organizations suggest interactions that severely impact the security of migrants, primarily those from Central America, who are more likely to rely on this route (Casillas 2010).
The very practice of irregular migration — migrant smuggling included — continues to depend on the mobilization of knowledge among migrants and their communities. This does not suggest that the role of smugglers as agents of mobility is always altruistic or humane. Rather it highlights how mobility efforts have increasingly and often mistakenly become criminalized, in the process leading to the emergence of dynamics and practices that further the vulnerability of those in transit. Anti-smuggling activity punishes not the feared transnational networks or cartels so often claimed to be behind its facilitation, but marginalized people along the migrant trail. By empirically evidencing the socio-cultural dimensions of irregular or clandestine migration facilitation as a form of protection from below, this article seeks to re-energize the academic dialogue on the topic, calling for empirically-informed research that can lead to policy and practices that stop the actions of predatory smugglers and improve the safety of those on the move.

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Kidnapped, Trafficked, Detained?
The Implications of Non-state Actor Involvement in Immigration Detention

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Executive Summary

Global migration challenges are reinforcing long-standing trends that involve shifting immigration control measures beyond national borders and incorporating new actors into detention systems. Proposals to shape migration management policies — including discussions on developing a Global Compact for Migration — recognize the need to involve a range of actors to implement humane and effective strategies. However, when observed through the lens of immigration detention, some policy trends raise challenging questions, particularly those that lead to increasing roles for non-state actors in migration control. This article critically assesses a range of new actors who have become involved in the deprivation of liberty of migrants and asylum seekers, describes the various forces that appear to be driving their engagement, and makes a series of recommendations concerning the role of non-state actors and detention in global efforts to manage international migration. These recommendations include:

- ending the use the detention in international migration management schemes;
- limiting the involvement of private companies in immigration control measures;
- insisting that the International Organization for Migration (IOM) actively endorse the centrality of human rights in the Global Compact for Migration and amend its constitution so that it makes a clear commitment to international human rights standards; and
- encouraging nongovernmental organizations to carefully assess the services they provide when operating in detention situations to ensure that their work contributes to harm reduction.

1 Michael Flynn is the executive director of the Global Detention Project in Geneva, Switzerland. Some of the ideas addressed in this article also appear in Flynn’s “Detained Beyond the Sovereign: Conceptualising Non-state Actor Involvement in Immigration Detention,” in Intimate Economies of Immigration Detention, ed. Deirdre Conlon and Nancy Hiemstra (Routledge 2017), 15-31. The author would like to thank Mariette Grange and the editors at the Journal on Migration and Human Security for their suggestions and comments.

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I. Introduction

The border between Thailand and Malaysia has for many years been an important area of activity for human traffickers whose victims include refugees from Myanmar’s persecuted Rohingya community, as well as thousands of men, women, and children from other countries in the region who often start out as economic migrants only to end up in situations of forced labor and sex trafficking. The brutality faced by these victims gained international attention in 2015 with the discovery of mass graves in abandoned trafficker camps located on both sides of the border. Official reports describe how some people had been caged in barbed-wire pens and starved or died from disease as their traffickers awaited payment (AP 2015).

The US Department of State (2015) and human rights groups (HRW 2015) cite reports implicating corrupt Thai officials in these trafficking networks. A key factor that makes people vulnerable to trafficking is being labeled “illegal,” particularly the Rohingyas who for years were not recognized by Thailand and faced terrible abuses. In 2013, for example, after the Myanmar government refused to accept Rohingyas deported from Thailand, journalists uncovered a secret Thai Royal Police policy called “option two,” which aimed “to remove Rohingya refugees from Thailand’s immigration detention centers and deliver them to human traffickers” (Szep and Marshall 2013).

The fate of these trafficking victims in Southeast Asia, as well as in numerous other regions of the world, highlights a critical dilemma facing the international community as it seeks to develop a Global Compact for Safe, Orderly, and Regular Migration: as countries across the globe ramp up efforts to block or remove unwanted foreigners, unofficial actors are increasingly serving — either under contract or because of corruption and lawlessness — as the jailers or service providers for migrants and asylum seekers deprived of their liberty.

Collusion between Thai authorities and traffickers in “removing” Rohingya refugees is clearly a criminal activity, which one would be hard-pressed to qualify as immigration detention. However, such activities arguably exist on a sliding scale of deprivation of liberty involving non-state actors, whose involvement can transform licit forms of detention into illicit and deadly situations. At the other end of this sliding scale is the involvement of private security companies in operating detention centers as well as the important roles played by nongovernmental advocacy groups and international organizations in providing services to detainee populations and detention authorities.

Although it is often not explicitly recognized, immigration detention has become intimately entwined with global migration management schemes, even as these efforts incorporate a growing range of actors (Geiger and Pecoud 2010). Migration management is typically viewed as a state-centric activity but it is in fact “polycentric, involving a range of public and private actors” (Betts 2013, 59). This fact was explicitly recognized by the UN Secretary General in his call to develop the Global Compact for Migration. In his April 2016 report, In Safety and Dignity: Addressing Large Movements of Refugees and Migrants, the Secretary General wrote that the compact must take into account “the roles and responsibilities of countries of origin, transit and destination of migrants, international organizations, local authorities, private sector recruiters and employers, labor unions, civil society and migrant and diaspora groups.”
Nevertheless, the significance of the involvement of non-state actors in immigration detention remains under-evaluated. Most attention has focused on the increasing privatization of detention operations and the impact this has on policymaking (for instance, Arbogast 2016; Conlon and Hiemstra 2014; and Menz 2013). The numerous cases of mistreatment and failed accountability at privately operated immigration facilities in the United States, the United Kingdom, and at Australia’s notorious offshore processing facilities have made names like Serco, G4S, and the Geo Group synonymous with the expansion of ineffective and dehumanizing immigration detention regimes (Flynn 2017).

A key goal of this article is to demonstrate that privatization is only one part of a much larger phenomenon involving the incorporation of non-state actors into detention systems. Who are these other actors involved in the expansion of immigration detention? How does their involvement influence our understanding of detention? And what steps should the international community take in response? This article seeks to address these questions by critically assessing our understanding of non-state actor involvement in immigration detention and the consequences of their work. Improved clarity about the actors involved in detention can help us develop concrete recommendations for the international community and individual states as they work to make a more humane global migration management system.

The next section of this article attempts to define the limits of immigration detention in light of the involvement of non-state actors. The article then provides several case studies aimed at broadening our understanding of the range of new actors who have become involved in detention operations, followed by an assessment of how these cases require us to reformulate standard notions of detention and non-state actors. The paper concludes with a series of recommendations for the international community as it works to develop a global compact. These recommendations respond to the expanding use of detention in migration management efforts, private sector involvement in detention, and concerns related to the role of international organizations as well as that of nongovernmental organizations (NGOs).

II. Finding the Limits of Immigration Detention

This article proposes using the definition of immigration detention employed by the Global Detention Project (GDP), an interdisciplinary research center based in Geneva, Switzerland, as a baseline for its investigation: “The deprivation of liberty of noncitizens for reasons related to their immigration status.” By assessing the strengths and weaknesses of this definition with respect to the issue of non-state actor involvement in detention, we can see how the activities of non-state actors undermine standard notions of immigration detention and complicate accountability and responsibility.

As with other definitions of immigration detention, the GDP definition is state-centric. Citizenship and status imply the existence of a sovereign power that can bestow or deny them. Yet, as this article shows, deprivation of liberty often takes place at the fringe of state authority. How can we account for these fringe activities within the scope of our current concepts of immigration control and detention?

Alston argues that the term non-state actor was “intentionally adopted in order to reinforce the assumption that the state is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve” (Alston 2005, 3). Immigration detention is only possible as a distinct form of deprivation of liberty because of the existence of the Westphalian state system. This form of deprivation of liberty is circumscribed by the authority of official actors who are empowered to confine non-citizens because of specific legal provisions. This sovereign power often then engages with actors who are not formally a part of the state, contracting them — or interacting with them in an ad hoc or extra-legal manner — to undertake specific detention-related activities. To understand the roles and consequences of these actors, we must first identify the limits of the meaning of immigration detention.

A key feature of the GDP’s definition is that it does not differentiate between categories of “non-citizens,” in contrast to other recent efforts at conceptualizing immigration detention. For instance, in a March 2017 factsheet on immigration detention, the Council of Europe’s Committee for the Prevention of Torture maintained that “asylum seekers are not immigration detainees, although the persons concerned may become so should their asylum application be rejected and their leave to stay in the country rescinded” (European Committee for the Prevention of Torture 2017). However, in many countries there is little effort to separate asylum seekers from irregular migrants within detention regimes. “Reception centers” and shelters can sometimes resemble detention centers in all but name (Gallagher and Pearson 2010). Notable examples include “shelters” in various Arab Gulf states like Kuwait and Saudi Arabia that operate as de facto detention centers for women who have fled abusive employers (GDP 2015b). While there is a rationale for assessing differences in the legal frameworks that treat asylum seekers, trafficking victims, and undocumented migrants, when assessing immigration detention regimes it is arguably preferable to bring into the frame all detention situations involving people whose reason for being in custody is related to their noncitizen status.

A second important aspect of the GDP definition is that it is intended to imply deprivation of liberty in a confined space. Some scholars have sought to define detention broadly to include “restriction of movement or travel within a territory in which an alien finds him or herself” (Helton 1989). A useful correlate for understanding the GDP’s concept is the definition of deprivation of liberty provided in the Optional Protocol to the UN Torture Convention (OPCAT), which also acknowledges the complexity of immigration detention by including private actors. The protocol states that “deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.” Thus, at the heart of our definition is the notion of coercion. As Guild (2006) writes: “The common feature of places of detention... is their coercive nature.” Incorporating this concept can also help us clarify what we mean by “detention center.” Only facilities that physically prevent people from leaving should be considered detention centers.

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3 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4.2, Dec. 18, 2002, 2375 U.N.T.S. 237.
As already noted, unless they have committed unrelated breaches of the law, detained noncitizens have been taken into custody because of alleged complications stemming from their residency status (Cornelisse 2010, 8-22). This is critically important to keep in mind as we explore the variety of cases of nonstate actors in immigration detention systems. Although there are clear cut cases in which we see private-sector actors performing functions at the bidding of the state, there are also cases where the roles of nonstate actors undermine the underlying rationale of the detention itself, thereby raising questions about whether such situations amount to immigration-related detention or should be considered something altogether different.

III. Case Studies

1. Immigration Detention in Situations of Lawlessness: Libya

Libya has become a frontline in European efforts to stem migration from Africa. This has included training the Libyan Navy on search and rescue techniques and providing funding ostensibly to improve the conditions of detention centers where intercepted migrants and asylum seekers are sent. A recent UN investigation of these detention centers found appalling conditions and “a consistent and widespread pattern of guards beating, humiliating and extorting migrants, including by taking money for their release” (UNSMIL 2016). The report also found that “[a]fter interception, migrants are often beaten, robbed and taken to detention centers or private houses and farms, where they are subjected to forced labor, rape, and other sexual violence” (ibid.).

A 2017 report by the United Kingdom’s Independent Commission for Aid Impact (ICAI) warned that the country’s £10 million aid program in Libya, which includes funding for naval operations and detention center improvements, was at risk of violating the “do no harm” principle of UK aid programs. “While reducing the number of deaths at sea is vital, we are concerned that the program delivers migrants back to a system that leads to indiscriminate and indefinite detention and denies refugees their right to asylum” (ICAI 2017). In stark parallel to the situation in Thailand mentioned earlier, ICAI noted that “there are credible reports that some Libyan state and local officials are involved in people smuggling and trafficking, and in extortion of migrants in detention.”

Compounding matters is that there is a parallel system of detention centers that are operated by militias — many of whom are also implicated in smuggling or trafficking rings — in areas of the country that are not under government control as well as reports that groups allied “to the so-called Islamic State in Iraq and the Levant (ISIL) have been involved in the abduction and abuse of migrants in Libya” (UNSMIL 2016). In a recent article for the UN Children’s Fund (UNICEF), a journalist wrote of his experience trying to access militia-run detention centers. An official with the Interior Ministry told him, “In Tripoli there are 13 illegal detention centers, managed by the armed militia. We cannot even get close to their areas, because we risk our lives” (Mannocchi 2017).

Following the 2011 uprising in Libya and the subsequent armed conflict there, numerous parts of the country were taken over by armed groups or militias, who assumed many of the
functions of the previous local authorities. In some cases, immigration detention centers fell under the control of these militias, many of whom subsequently became involved in smuggling and trafficking (GDP 2015a). “In the security vacuum created by the absence of a strong central government,” reported The Guardian, “migrants have become easy prey for kidnappers and militias looking to raise money through ransoms, businessmen looking for slave labor and smugglers looking for passengers to exploit” (Kingsley 2016).

A 2014 briefing from Amnesty International reported on a visit to an immigration detention center near Gharyan, some 80 kilometers south of Tripoli: “The center is run by the 9th Brigade, a militia nominally under the control of the Ministry of Defense. The center has not yet been handed over to state authorities. Although outside of direct state control, Libyan security agencies cooperate with the 9th Brigade, meaning that refugees, asylum-seekers, and migrants continue to be brought to the facility on a regular basis” (Amnesty International 2014).

During Amnesty International’s visit there were approximately 1,250 migrants at the center, including 20 unaccompanied children who were detained alongside adults. There were detainees from Chad, Egypt, Eritrea, Niger, Somalia, and Sudan. The facility was comprised of metal hangars that were in “freezing conditions” and provided no access to the outside. In addition, the center did not have a functioning sewage system and lacked clean drinking water. Detainees claimed “that their shoes had been confiscated to prevent escapes and many reported ill-treatment, including beatings with metal bars or plastic tubes, being forced to roll over in dirty water while being kicked by the guards with their boots, and being intimidated by guards shooting at the ceiling inside the hangars” (ibid.).

2. International Organizations and Nongovernmental Groups: Lebanon

Until the 2016 opening of a new dedicated immigration detention center in Beirut (Monique Sokhan, pers. comm.), Lebanon’s sole immigration facility, called the General Security Detention Center in Adlieh, was located in a dilapidated subterranean car park under a highway (Flynn 2011). The detention center opened in 2000 and was meant to be temporary. Despite an official capacity of 250, it had an average daily population of 400 to 600 persons cramped in a series of collective cages (GDP 2014). With the start of the Syria crisis, overcrowding surged to a record 720 (Kullab 2013; Slemrod and Meguerditchian 2012).

The conditions at the detention center were so severe they spurred numerous calls for reform, both nationally and internationally. Among the initiatives aimed at improving Lebanon’s detention practices was one led by the International Centre for Migration Policy and Development (ICMPD), a Vienna-based international organization comprised of 15 member states from Europe that assists in the development of migration management programs. In 2009, it launched a two-year project titled Strengthening Reception and Detention Capacities in Lebanon (STREDECA). The project aimed to develop “Lebanon’s capacities to manage its mixed migration flows post interception and/or apprehension” (ICMPD n.d.a) Partners on STREDECA — which was funded by France, Switzerland, Italy, and the Netherlands — included Caritas Lebanon, the UN High Commissioner for Refugees, the International Organization for Migration, the International Centre for Migration, and the International Centre for Migration Policy Development.
for Refugees (UNHCR), and Lebanon’s General Security, the state security apparatus that oversees implementation of Lebanon’s detention policies and operates the country’s immigration detention center (GDP 2014).

According to ICMPD, the project “evaluated essential national infrastructure and enhanced national institutional capacities for the reception and detention of irregular migrants and asylum seekers in line with international human rights standards” (ICMPD n.d.b). A UNHCR official described the agency’s role as focusing “on the provision of expertise in training and evaluation of the legal/administrative framework” (Monique Sokhan, pers. comm.).

Several years after STREDECA was completed, there continued to be severe criticism of the conditions at the Adlieh detention center. Visitors described how detainees were held in a row of cells of some 20 to 30 square meters, separated along gender and nationality lines. Metal gates formed two sides of rectangular cells on each side of concrete pillars marking the former parking spaces. Women were especially tightly packed, with at least 50 women each in the quarters allocated for Bangladeshi and Ethiopian detainees, according to a journalist account in 2012 (Slemrod and Meguerditchian 2012). Water bottles, clothes, dirty blankets, and pillows were crammed into empty spaces in the metal webbing. There were mattresses on the floors, but in the most crowded cells people had to share mattresses (ibid.).

The facility included an office for Caritas, reminiscent to operations at French detention centers (centres de réception). Called the Caritas Lebanon Migrants Centre (CLMC), the office received repeated criticism from other civil society groups, who accused Caritas of abetting illegal detention. Caritas, however, countered these claims stating that it was the sole NGO proving assistance to detainees (GDP 2014).

The STREDECA project was part of a larger initiative that is still ongoing today called the Dialogue on Mediterranean Transit Migration (MTM), which ICMPD describes on its website as “an informal consultative platform between migration officials in countries of origin, transit, and destination along the migration routes in Africa, Europe, and the Middle East” (ICMPD n.d.a). It involves national governments from across the Mediterranean, Europol, the EU border control agency, UNHCR, the IOM, and the European Commission, among other entities. As one scholar writes, “The MTM is a textbook example of migration management. The composition of participants brings together states, representatives of different state institutions, as well as intergovernmental organizations with diverging interests” (Kasparek 2010, 134).

STREDECA is also a notable example of how detention has become an element of international migration management initiatives that involve a range of non-state actors. International intergovernmental organizations, particularly those without human rights mandates — like ICMPD and the IOM — are playing increasingly important roles. As Martin Geiger has noted, many “approaches to manage migration are out-sourced and entrusted to non-EU actors such as the IOM” (Van Efferink 2010). The IOM has helped manage offshore detention facilities for Australia including through indirect funding to refurbish detention centers in Indonesia, provided capacity-building initiatives for detention officials in numerous countries, and worked with the European Union to fund detention
operations in countries on the periphery of Europe (Georgi 2010). And yet, “Until recently, one was hard pressed to find any reference to the IOM’s programmatic involvement in immigration detention” (Grange 2013). A closely related issue is the IOM’s long-standing role in facilitating “voluntary returns.” Although the IOM maintains that it assists voluntary returns only, many observers “have expressed concern about the voluntariness of expulsions and the degree of coercion that the IOM is willing to accommodate,” especially in light of evidence indicating “that local offices reliant on raising funds from governments may not be as careful” as those operating at the top (Guild, Grant, and Groenendijk 2017).

The case of Caritas Lebanon, although unique in many ways, is also not without precedent. Many civil society groups and non-profit charities have operated detention facilities or provided specific forms of assistance inside centers. The Italian Red Cross for many years operated that country’s centri di identificazione ed espulsione (GDP 2012). France’s centres de rétention include offices for NGOs, who by law are mandated to provide judicial and social assistance to detainees (La Cimade n.d.). The children’s charity Barnardo’s operated a detention facility for families in the United Kingdom until it was replaced, in early 2017, by G4S (Allison and Hattenstone 2017).

3. Carrier Detention in Airport Transit Zones: South Korea

In September 2011, a US citizen travelling from Honolulu to Mumbai was detained while trying to make a connecting flight in Seoul, South Korea. In a lawsuit filed in Florida, the defendant claimed, inter alia, that he had been unlawfully detained by Korean Air Lines (KAL) in a holding area at Incheon International Airport, which was a contributing factor in injuries he suffered. The Indian government had ordered KAL to return the passenger to the United States because he did not have adequate immigration papers. The lawsuit sought compensation under the Montreal Convention, an international treaty that makes airlines liable for bodily injury caused by “accident” during international travel. Although the lawsuit was eventually dismissed and failed on appeal, the defendant’s detention at the hands of the airline company was not disputed.

According to various accounts, the Incheon airport is equipped with a secure “waiting room” that is operated by an “Airlines Operators Committee” comprised of various airlines and staffed by private security guards. Arriving passengers who are deemed inadmissible by Korean authorities are taken to this facility to await removal by one of the airlines. According to a South Korean lawyer who is an expert in immigration matters: “When people are not admitted to entry at the airport, they are taken to the waiting room until they are deported. . . . The facility remains locked and secured by private security guards employed by the Airline Operators Committee, most of whom do not speak English and are known for their mistreatment to detainees. Detainees are fed chicken burgers three times a day for their meals and their requests for medical service are often neglected” (Jong Chul Kim, pers. comm.).

Although the attorney said that the waiting room is ultimately under the “control of the immigration office of Korean government,” a US attorney representing the defendant in the

5 Formally, the Convention for the Unification of Certain Rules for International Carriage by Air.
Kidnapped, Trafficked, Detained?

case *Jacob v. Korean Air Lines* claimed that a Korean airlines manager told her firm that the facility was wholly operated by Korean Air Lines and Asiana. She added that people detained at the facility “have a single shower, no soap, no towels and no laundry facilities and they are being kept locked up by airlines who have no legal authority to hold them” (Lisa Cornell, pers. comm.).

The Incheon airport case is an example of the larger phenomenon of the outsourcing of immigration controls that has resulted from the application of “carrier sanctions,” in which private transport companies are held accountable and become the de facto custodial authorities for people they transport who are refused admission at their destinations (Rodenhäuser 2014). These sanctions can lead to the detention of passengers by these companies, as provided in many national immigration laws. For instance, the Malaysian Passport Act empowers immigration and police officers to “lawfully detain” persons unlawfully entering Malaysia on board vessels during the period that the vessel is within Malaysia. Another example can be found in Ireland’s Immigration Act 2004, Article 7 of which provides: “The master of any ship arriving at a port in the State may detain on board any non-national coming in the ship from a place outside the State until the non-national is examined or landed for examination under this section, and shall, on the request of an immigration officer, so detain any such non-national, whether seaman or passenger, whose application for a permission has been refused by an immigration officer, and any such non-national so detained shall be deemed to be in lawful custody.”

### IV. The Migration Control Industry and Non-state Actors

The three cases discussed above provide important insights into the evolution of immigration control measures today and the relation between immigration detention and non-state actors. This section of the article reflects on the impact these insights have on our understating of immigration detention, focusing on the relation between non-state actors and human rights, literature on the “migration industry,” and critical theory.

One widely noted work on the subject of non-state actors argues that this concept should encompass all entities engaged in transnational activities that are “largely or entirely autonomous from central government funding: emanating from civil society, or from the market economy, or from political impulses beyond state control and direction” (Josselin and Wallace 2001). While such a definition arguably includes all the types of entities covered in the case studies — private companies, NGOs, militias, and international organizations — it nevertheless poses a number of quandaries when seen in light of our case studies and other detention situations. For instance, many detention service providers are local companies or humanitarian groups that do not operate internationally.

Another key omission in this definition is that it fails to make clear what “level of governmental funding, support, or encouragement might disqualify a group as a non-state actor” (Alston 2005). This concern is particularly relevant with respect to international organizations. Although they are not bound by the central government funding of any single state, they operate to a certain extent as surrogates of their member states. The IOM and ICMPD pose particular quandaries because they do not have human rights-based mandates.

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6 Immigration Act 2004 (Act No. 1/2004) (Ir.).
This issue has taken on major relevance since 2016, when the IOM became an official related organization of the United Nations and was given a leading role in negotiations on the Global Compact for Migration. As Guild, Grant, and Groenendijk (2017) state, with the United Nations “placing IOM close to the driving seat of the negotiations, and stating it to be a ‘non-normative organiz[ation]’, the issue of the fidelity to the UN’s human rights standards must be addressed.”

Many scholars have attempted to detail the various ways in which states — often motivated by the effort to evade normative restrictions like non-refoulement of refugees — have sought to share the burden of immigration control policies and to employ non-state actors to assist in “remote control” (Zolberg 1999). Examples include imposing sanctions on transport companies that carry aliens and establishing cooperative agreements with neighboring states and sending countries, as well as the “devolution” of certain roles to private entities. These various forms of outsourcing, all of which we have been observed in our case studies, can be arranged on a field that runs along two intersecting axes: public-private and domestic-international (Lahav and Guiraudon 2000, 58). In the domestic sphere, we find some states delegating responsibility for apprehending migrants to local police forces (public) and increasingly using for-profit companies (private) to run detention centers. In the international sphere, states pressure airlines (private) to verify whether travelers have proper travel documentation and arrange with third countries (public) to manage migration movements (i.e., by establishing readmission agreements).

In this paper, we are concerned with those actors whose activities fall within the private-domestic and private-international axes. Nevertheless, even using a broad schematic like this we find complications. Is it accurate, for instance, to call the operations of international organizations as belonging to a “private” sphere of activities? And how are we to characterize detention activities that do not directly involve state authorities?

Scholarship on the “migration industry” provides concepts that can address these challenges. The migration industry literature focuses on for-profit actors who facilitate human mobility to make a profit. Hernández-León (2008, 154) characterizes this industry as “the ensemble of entrepreneurs who, motivated by the pursuit of financial gain, provide a variety of services facilitating human mobility across international borders.” Nyberg Sørensen and Gammeltoft-Hansen (2013) build on this concept to include actors involved in immigration control (“control providers,” like private prison companies) as well as private actors who are not profit-motivated, like NGOs involved in the “rescue industry.” They thus redefine the migration industry as “the array of non-state actors who provide services that facilitate, constrain, or assist international migration” (ibid., 6-7).

This characterization of the migration industry is a promising framework for assessing the roles of non-state actors in detention. It is not constrained by geographic scope (domestic or international); it does not focus narrowly on profit-driven enterprises; and it encompasses both the facilitation of migration as well as migration control, including interdiction, detention, and deportation. Also, returning to the case studies, all the actors identified in those cases arguably fit with this definition. Militias and rebel groups, international organizations, and private companies acting as custodial agents all fit within the scope of this formulation. However, this raises the question: Should the detention of immigrants and asylum seekers by each of these actors be considered “immigration detention”? 
The GDP’s definition of immigration detention can provide some clues: “The deprivation of liberty of non-citizens for reasons related to their immigration status.” As discussed previously, immigration detention thusly defined exists because of the state. If the state is not involved in the deprivation of liberty, it seems to follow that it must be some kind of illegal activity (i.e., kidnapping, false imprisonment, trafficking). Can a private individual or company hold an asylum seeker in immigration detention? What about an armed group that is operating outside any legal mandate or smugglers working with corrupt officials? Or a private company that uses its airplanes or ships to lock up passengers denied entry in the state? All of these actors can of course be involved in “facilitating, constraining, or assisting international migration,” but if they are not operating on behalf of the state with legally bound parameters and obligations when they confine someone, then we should arguably not consider their activities as amounting to immigration detention.

This leads to the next key point in our reflection: To not be arbitrary, immigration detention requires an element of lawfulness. It must be provided for in domestic law. Nevertheless, if such is the case, then some scholars would contend that immigration detention does not exist at all because it represents an inherent absence of legal rights. A popular contemporary discourse on immigration detention revolves around the paradigm of the “camp.” This discourse is informed by the work of Giorgio Agamben (1998) and his concepts “homo sacer” — which denotes depoliticized life as opposed to the political life of the citizen — and “zones of exception,” which are typified in his discourse using the term “camp.” Agamben argues that politics is constructed around notions of those who belong within the rights-conferring institutional arena of the state and those who do not. The latter become the object of state power through the absence of rights in “zones of exception.” Through this dichotomy, sovereignty is exercised by inclusive exclusion (Flynn, M. B. 2016).

Importantly, Agamben-inspired post-structuralist arguments often fail to specify actors who are involved in the creation of detention centers and who operate within this field, which leads them to posit a functionalist argument. Detention centers play a central logic in the underlying dialectic of the state — its power to extend freedoms, rights, and ultimately to define human life is premised by denying the same to others. This circular thinking is evident when post-structuralists like Rajaram and Grundy-Warr (2004, 26) argue that “the enclosure of certain human beings [is] not an anomaly of the logic of contemporary sovereignty, but a normal outcome of this logic.” A weakness in this analysis is that “disembodied notions of the state and sovereign power substitute the role and intentions of actors for changing laws used to classify sets of people as illegal, to construct systems of control, and to operate detention centers” (Flynn, M. B. 2016).

To summarize, immigration detention properly understood is a function of the state that exists because a set of actors adopt and/or implement relevant laws — and not as a result of a state of exception or absence of rights. Thus, our conceptual framing of non-state actors in immigration detention must have at a minimum the following two elements: actors and state authority. Building on Nyberg Sørensen and Gammeltoft-Hansen’s conceptualization of the migration industry, we could argue that non-state actors involved in immigration detention include the array of actors not formally part of any official state apparatus who, in agreement with the state, provide services that facilitate the state’s objective of depriving noncitizens of their liberty for reasons related to their immigration status.
How does this concept help us deconstruct the three case studies? The case of the Libyan militias poses challenges. The militias have stepped into the vacuum of authority created by internal armed conflict, acting as a de facto sovereign power. While they are not technically a state, militias act as a kind of surrogate because they carry out a function that had been mandated by the presumably temporarily absent official state authority. Arguably, in instances where militias exert effective control over a territory, we should consider their activities as immigration detention. However, cases of militias — or migrants traffickers in Thailand — colluding with authorities to “detain” and “remove” unwanted foreigners is less clear. In the case of Thai police’s “option two” discussed in the introduction, it is clear that there was an original state of immigration detention, but once authorities colluded with criminal networks to remove these people from the country, the deprivation of liberty turned into trafficking, kidnapping, and — in many cases — murder. However, both the Libya and Thai cases underscore a critically important point: the often close proximity between legal detention regimes and lawlessness.

The STREDECA case in Lebanon and similar migration management initiatives elsewhere involve an amalgam of entities — including local NGOs, international organizations, and national authorities — engaged in a detention-related project funded by foreign governments who want to halt the onward movement of migrants and asylum seekers. This type of externalization activity has been widely noted in academic works assessing the policies of recipient countries like Australia and the United States (Frelick, Kysel, and Podkul 2016; Flynn 2014). In the process these countries have enlisted a range of actors — not all of whom necessarily aim to make a profit — in immigration detention efforts. As noted previously, however, bringing in “non-normative” organizations like the IOM as lead managers of these kinds of projects raises important concerns about ensuring adherence to international human rights standards.

The case of the Incheon Airport also appears to meet the necessary criteria to be considered immigration-related detention even though it reveals important strains in the international protection regime and the custodial authority remains unclear. The case has some similarities to STREDECA in that it is a form of detention that seems aimed in part at preventing people from officially reaching or remaining inside the border. These detention activities have emerged as a result of a country’s laws and occur at the behest of state authorities, even if the custodial relationship between the detainees and the state appears to be tenuous, thereby calling into question whether this particular instance of deprivation of liberty is within the framework of our formal definition of immigration detention. Nevertheless, this particular manifestation of “carrier sanctions” calls to mind the work of political geographers like Mountz (2004, 341) who have demonstrated how states create “detached geographies of detention” inside their borders that limit asylum seekers’ ability to access relevant legal processes.

V. Conclusions and Recommendations
This article contends that the effort to build a truly humane, rights-based global migration management system requires taking a hard look at how detention has become intimately incorporated into such efforts, often with the involvement of non-state actors. A starting point
for this analysis has been to assess the expanding range of actors involved in immigration detention. To date, the major focus has been the growing involvement of private for-profit prison companies. However, as this article has demonstrated, many other actors have been pulled into immigration detention operations, ranging from international organizations and local NGOs to airline companies and militias. In some cases, the form of deprivation of liberty that has resulted from these myriad engagements turns out not to be immigration detention at all, but something else, like smuggling or kidnapping.

Shadowing — or overshadowing — our discussion has been the question of who is accountable when rights are violated in detention. As Gammeltoft-Hansen (2013, 144) writes, “By its very design the migration control industry brings about certain responsibility and accountability gaps, which risks further undermining human rights of migrants and refugees.” Countries must not be able to shield themselves from liability by shifting responsibilities to private companies or other non-state actors. At the same time, new actors involved in immigration control efforts must not be allowed to argue that they are merely acting on the orders of a country and thus not liable for abuses occurring under their watch (see, for instance, MRS and CMS 2015, 184-86).

A telling example is that of “carrier sanctions,” which were mentioned in the case of the detention room operated by private airlines at the airport in Seoul and which have been the subject of much attention (Rodenhäuser 2014; UK Refugee Council 2008). The effort to block asylum seekers from boarding planes or entering national territory has resulted in private companies serving as de facto arbiters of asylum as airlines are pressured to deny passage to certain people, which can lead to violations of non-refoulement. On the one hand, as scholars have noted, state responsibility in such cases can be interpreted narrowly so that the state is not held accountable for the rejection of asylum seekers on another state’s territory; however, it may be impossible to hold the airline accountable for a violation, particularly in extraterritorial cases (Rodenhäuser 2014; Reinisch 2005).

Many of the cases discussed here merit “shared accountability,” a legal concept that “recognizes that more than one entity may be responsible for the same wrongful act” (Majcher 2015). Numerous scholars have sought to apply this concept to human rights violations that involve a range of actors working alongside or at the behest of state authorities, including international organizations, private companies, as well as cases involving public-private partnerships (Clarke 2014).

However, states continue to try to insulate themselves by “creating the appearance that migration control is . . . private and thus external to the state itself” (Gammeltoft-Hansen 2013, 145). To break through this conundrum, it is important to insist on the ties between the actions of non-state actors and the state, to carefully circumscribe the activities of non-state actors in control schemes, and to clarify which activities can be termed immigration-related detention and thus give rise to specific rights and obligations. To this end, the article concludes with four recommendations, which are directed at the range of different actors involved in shaping the Global Compact for Migration:
RECOMMENDATION 1. Detention should not play a role in international efforts to address migration and refugee challenges.

In his final report as Special Representative of the Secretary-General on Migration (SRSG on Migration 2017), Peter Sutherland recognizes that an “emerging model” of response to transnational migration crises is that some states agree “to quietly deter and detain [migrants] in exchange for greater development and economic assistance” even though “Such policies undermine respect for human rights and place further strain on already fragile States, thereby running the risk of weakening the collective security of all States.” However, in his recommendations for developing the Global Compact, Sutherland limits his detention-related proposals to “Ending the detention of migrant children and their families for reasons of their migration status.” To be sure, this is a critically important agenda item. But more attention must be placed on the almost knee-jerk response by wealthy countries, often assisted by the IOM and other international organizations, in resorting to detention in their regional or “neighborhood” migration management strategies and schemes.

In many countries that are targeted for more migration management assistance — like Libya — there appears to be an inevitable connection between legal and illicit forms of detention and removal because of pervasive lawlessness and corruption. This reality is reflected in recent proposals by the UN Special Rapporteur on the Human Rights of Migrants (SRHRM 2017) when he writes that “States must move from a zero-tolerance attitude to one of harm reduction, thereby undercutting the criminal organizations responsible for migrant smuggling, addressing the security concerns of States and, ultimately, reducing human suffering and saving lives. If States want to regain control over their borders, migrants should be provided with regular, safe, affordable and accessible mobility channels.” Among his “human mobility goals,” the Special Rapporteur includes “End[ing] the use of detention as a border management and deterrence tool against migrants.”

As many scholars and advocates have long argued, detention is expensive and ultimately ineffective. Nevertheless, to the extent that countries have a clearly stated legal framework providing detention measures, they have a sovereign right to employ them if they can establish that detention is “necessary, reasonable in all the circumstances and proportionate to a legitimate purpose” (UNHCR 2012). However, effort should be made to exclude detention measures in multinational migration management initiatives, and the Global Compact would benefit from a clear statement on this point. Additionally, when people are apprehended for migration-related reasons, non-state actors should be excluded from serving custodial functions. Apprehended migrants and asylum seekers should always unambiguously be in the custody of a state, whether they are on that state’s national territory, in transit zones, aboard vessels, or on territories where the state exercises extra-territorial jurisdiction or responsibilities.

RECOMMENDATION 2. States and the international community should limit the involvement of private companies in immigration control measures and their roles in migration management schemes must be subject to the domestic laws and international obligations both in the states where they operate as well as those in which they are domiciled.
Private companies play an important role facilitating migration. However, a variety of concerns arise when they become involved in migration control and detention, including questions of accountability, transparency, and responsibility. As we see in the case of “carrier sanctions” and situations like the one at Seoul airport, states can try to shield themselves from responsibility or obligations by placing noncitizens in the hands of private actors. It is also important to note that every major multinational company that has operated detention centers has been the target of severe criticism or lawsuits for mismanaging them or mistreating detainees, making it hard to avoid the conclusion that private companies will inevitably seek to cut costs, leading to a decline in services. Immigration detention is intended to serve an administrative role to accomplish immigration goals. However, in deciding to privatize detention operations, one opens the door to the potential that the rationale for immigration detention is not to meet the limited aims of administrative detention, but to satisfy the profit motives of companies (Flynn 2017).

A growing chorus of voices at the international level has begun to address this problem, including within the scope of the UN Guiding Principles on Business and Human Rights and efforts to develop an international code of conduct for private security companies. The UN Working Group on the Use of Mercenaries, which in early 2017 held a day of discussion on “PMSCs in places of deprivation of liberty and their impact on human rights,” has called for a binding international agreement to regulate the use and activities of private military and security companies. A fundamental pillar of the UN Guiding Principles is the extraterritorial responsibility of states when it comes to private businesses: “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”

Not only should states limit the involvement of private companies in immigration control measures, states and their partners must ensure that private companies roles in migration management schemes are subject to the domestic laws and international obligations both in the states where they operate as well as those in which they are domiciled. To help ensure that the work of for-profit actors involved in migration management initiatives do not harm migrants and refugees, states and other partners jointly working to address migration and refugee challenges should only seek private sector partners who have expressed a policy commitment to respect human rights, for instance by agreeing to relevant codes of conduct.

RECOMMENDATION 3. The IOM should actively endorse the centrality of human rights in the Global Compact for Migration and amend its constitution so that it makes a clear commitment to international human rights standards.

This recommendation — a restating of proposals made by Guild, Grant, and Groenendijk (2017) in their timely paper “IOM and the UN: Unfinished Business” — emerges from our reflection in this paper on the growing role that the IOM and other non-human rights-based international intergovernmental organizations are playing in detention situations, as well as the IOM’s new status as an official related organization of the United Nations and its central role in negotiations on the Global Compact. Despite the IOM’s insistence that it is a “non-normative” organization, at recent meetings and consultations of the Global Compact it has made an effort to highlight its role in the “UN System.” This could be misleading, failing IOM’s clear recognition that it accepts to be guided by relevant UN human rights norms. As Guild, Grant, and Groenendijk (ibid.) ask, “Is it possible to define the term ‘non-
normative’ in a manner which is consistent with the human rights objective of the UN?” Although human rights are mentioned in various IOM planning and strategy documents, human rights are not mentioned in its constitution. The IOM should actively endorse the centrality of human rights and amend its constitution so that it makes a clear commitment to international human rights standards.

**RECOMMENDATION 4. NGOs should carefully assess the services they provide when operating in detention situations to ensure that their work contributes to harm reduction.**

In his April 2016 report, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, the UN Secretary General rightly calls for boosting the capacities of NGOs so they can “play a greater role in humanitarian responses” (UN Secretary-General 2016). However, the involvement of nonprofit groups in detention operations can lead to accountability questions like those that apply to for-profit companies. Some observers have also raised concerns that the involvement of nongovernmental groups in detention services risk providing the state with normative cover for its detention activities. There is a fine and not-very-obvious line that advocacy groups must navigate when they become involved in providing services to detainees that should properly be the responsibility of the state. In the case of Lebanon, for instance, Caritas provides services that Lebanon’s General Security might otherwise neglect. It is also important to recognize that the presence of NGOs in detention centers can help ensure that the rights of detainees are respected, especially in cases — like for instance at Australia’s offshore processing facilities — where independent monitoring and access by journalists or other observers are severely limited. Thus, it is critically important that states enable civil society to access and assist undocumented migrants, asylum seekers, and refugees in detention, with particular attention to vulnerable persons including children, pregnant women, and stateless persons. At the same time, NGOs that find themselves in these difficult situations should continually work to make sure that the harm-reducing services that they provide do not lead to more detention, or prevent states from being held fully accountable for the rights and well-being of detainees.

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“They Need to Give Us a Voice”: Lessons from Listening to Unaccompanied Central American and Mexican Children on Helping Children Like Themselves

Susan Schmidt
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Executive Summary

Children make up half of the world’s refugees, yet limited research documents the views of youth about migratory causes and recommendations. While there is wide recognition of migrant children’s right to free expression, few opportunities exist to productively exercise that right and provide input about their views. This article analyzes the responses of Central American and Mexican migrant children to one interview question regarding how to help youth like themselves, and identifies several implied “no-win” situations as potential reasons for the migration decisions of unaccompanied children. Furthermore, the children’s responses highlight the interconnected nature of economics, security, and education as migratory factors. Examination of children’s political speech revealed primarily negative references regarding their home country’s government, the president, and the police. The police were singled out more than any other public figures, with particular emphasis on police corruption and ineffectiveness. Additional analysis focused on children’s comments regarding migration needs and family.

Recommendations for future action include:

• recognizing entwined motivations and no-win situations that may lead children to leave their countries of origin;

1 Quote from a 17-year-old Salvadoran girl: “Sometimes adults view children as lesser and they think we can’t become anything or don’t have an opinion. They don’t ask for our view on things. They need to give us a voice.”

2 The author acknowledges the invaluable contribution of the children quoted in this article, who shared their experiences and views as part of the original United Nations High Commissioner for Refugees’ (UNHCR) study. The author would also like to thank UNHCR for granting access to the subset of interview data analyzed in this article, and for the specific assistance of Leslie Vélez and Nicole Boehner. The research and any errors reflect only the views and analysis of the author. Contributions from the following during the writing of this article are also greatly appreciated: Dr. Jessica Toft, University of St. Thomas; the editors and reviewers of the Journal on Migration and Human Security; and the participants in the Center for Migration Studies’ conference, “Rethinking the Global Refugee Protection System” in July 2016.

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promoting integrated approaches to home country economic, security, and education concerns for Central American and Mexican youth;

• acknowledging migrant children’s political interests and concerns;

• providing youth with meaningful opportunities to contribute their views and suggestions.

• incorporating migrant children’s input and concerns into spending plans for US aid appropriated for Central America; and

• emphasizing youth leadership development in efforts to address child migration.

Introduction

In 2015, children comprised 51 percent of the globe’s 21.3 million refugees (UNHCR 2016a). Using a broader definition, UNICEF estimates that 65 million children are “on the move” due to global hostilities, poverty, climate events, or the pull of opportunities abroad (2016). Yet limited research documents the views of youth regarding migratory causes and recommendations (GRYC 2016). This omission of youth perspectives ignores young people’s rights to have a say in matters affecting them. Furthermore, it risks misunderstanding and misrepresenting what young people think about their circumstances, and it overlooks young people as potential resources and leaders in seeking solutions to the problems that affect them and, by extension, their communities. This article considers the central research question, “What can we learn from the observations and recommendations of Central American and Mexican unaccompanied migrant children themselves?” by analyzing the responses of Central American and Mexican migrant children to a question regarding how to help youth like themselves, and then concludes with policy and programming recommendations.

The United States witnessed unprecedented levels of Central American unaccompanied child migration in 2014 (ORR 2015; USBP 2015), short-term decreases in 2015 (Rosenblum and Ball 2016), followed by a return to increased Central American apprehensions at the southern US Border that continue well above historical averages (USBP 2016; Burnett 2016). El Salvador and Honduras, with Guatemala close behind, trade positions at or near the top of lists of the world’s most violent countries or the nations containing the most homicidal cities (The Economist 2016; Watts 2015; Instituto Igarapé n.d.). Persistent gang violence in this region, along with the push of economic strain and the pull of US opportunity (Donato and Sisk 2015; Rosenblum 2015; UNHCR 2014), seem to ensure that these migration patterns will continue for some time. This relentless violence, combined with high levels of criminal impunity, lead to mistrust of law enforcement to address security issues (OSJI 2016; Eguizábal et al. 2015).

Adding to existing literature reporting the reasons Central American and Mexican children leave home (UNHCR 2014; UNHCR and ACNUR 2014), this article examines previously...
unreported children’s responses regarding how to help child migrants like themselves. In analyzing the children’s own statements, this article also elevates the voices of youth as an important component in responding to migration crises globally, concluding that youth views can add nuance to understanding migration motivators and that in order to adequately respond to child migration and ultimately prevent — or at least reduce — the need to migrate, national and international policy makers must understand and integrate youth perspectives into the development of effective solutions.

To that end, this article engages in secondary analysis of interview data with 404 unaccompanied Central American and Mexican teens, previously reported on in the publication, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (UNHCR 2014). This earlier report focused largely on data regarding children’s reasons for leaving their countries of origin, finding that at least 58 percent of the children interviewed were potentially in need of international protection from organized armed criminal actors or violence in the home (ibid.). Hickey-Moody (2016), discussing the Dewey-informed concept of “little public spheres” (58), asks “What if young people could be included in the public realm? What would they say and how would they say it?” (62). These 404 unaccompanied children from El Salvador, Guatemala, Honduras, and Mexico provide valuable insight into their assessment of the problems that lead to youth migration and potential responses. In an era of global migration crises, their views deserve our attention.

**Literature Review**

A review of the relevant literature indicates both a recognition of migrant children’s right to free expression, along with an acknowledgement of the limited practical opportunities to productively exercise that right and provide input about their views.

**Youth Voice**

Article 12 of the Convention on the Rights of the Child enshrines the right of children to express their views on matters affecting them, while Article 13 ensures their right to free expression.\(^4\) Together these articles establish the right of children to participate in circumstances in which they have an interest, while Article 3 clarifies that “the best interest of the child shall be a primary consideration”\(^5\) in all actions that concern children. Thus, children have the right to give their opinion and to have their best interests prioritized in decisions concerning them.

Yet a systematic review by UNHCR of its youth engagement activities concluded that youth remain invisible within UNHCR structures and beyond (UNHCR 2013), while the organization continues its commitment to full age, gender, and diversity inclusion (UNHCR 2011). In a recent effort to mitigate this inattention to the particular needs and input of youth, UNHCR and the Women’s Refugee Commission coordinated a series of 56 Global Refugee

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\(^5\) Id.
Youth Consultations in 22 countries, culminating in a final global consultation at UNHCR headquarters in June 2016 (Gaynor 2016; GRYC 2016). Such efforts represent nascent steps towards incorporating the views of refugee youth into migration policymaking.

A very limited academic literature focuses on the voices of Central American children themselves, using narrative research with small sample sizes (Berman 2000; Bjørø and Jensen 2015), anecdotal accounts (Georgopoulos 2005; Nazario 2014; Somers 2010), or grey literature reports (UNHCR 2014; UNHCR and ACNUR 2014; Rosenblum 2015). Anastario and coauthors contribute to such literature through secondary analysis of governmental interviews with deported youth in El Salvador, who indicated family reunification, economics, and insecurity as their primary reasons for migrating in 2013 and 2014 (Anastario et al. 2015). A separate study in El Salvador, which gathered data directly from active and at-risk gang-involved youth themselves, found that a low orientation towards the future, low levels of empathy, combined with educational problems and peer relations with other delinquent or gang-involved youth, presented significant risk factors for youth violence and misconduct (Olate, Salas-Wright and Vaughn 2012). While small in scope, these studies suggest multifactorial explanations for both youth who migrate, and for youth who become involved in the gangs that can cause other youth to migrate. Oversimplified descriptions misstate the inherent complexities for both young people who leave, and for young people who contribute to the dynamics causing others to leave.

**Children and Migration**

Children’s reasons for migration have been tied to their parents’ migration patterns, suggesting generational or cyclical trends (Donato and Sisk 2015), while also demonstrating children’s own agency within migration decisions (Khashu 2010; Somers 2010). Children’s approaches to migration differ from adult expectations, as they undertake less preparation and undervalue migration risks (Khashu 2010), thus reminding policymakers that relying solely upon adult logic and priorities to understand youth behavior potentially overlooks the ways that maturity, age, experience, education, and access to resources, lead adults to understand things differently than young people.

US policy decisions may also influence children’s migration. For example, a broad-based analysis of Mexican migration suggests that politically motivated militarization of the US-Mexico border inadvertently locked migrant laborers within the United States, so that family members had to migrate to the US to be reunited, thus initiating a “shift from sojourning to settlement” (Massey 2015, 286). Musalo and Lee (forthcoming) convincingly argue that US policy has focused too much on an enforcement-based response to assumed pull factors while ignoring the significant protection-oriented push factors. This article’s analysis of the children’s responses suggests that clear theoretical distinctions between push and pull factors may be difficult to recognize in reality due to the intertwined nature of migration dynamics. Simplistic explanations risk underestimating the multilayered migratory reasoning that leads children to leave their countries of origin. Understanding children’s own views adds necessary nuance to these complex dynamics.
Methods

Research Design
This article analyzes previously unpublished data based on responses to one interview question from a larger 2014 UNHCR study examining the root causes of unaccompanied child migration from El Salvador, Guatemala, Honduras, and Mexico. UNHCR secured US government cooperation to conduct 404 qualitative interviews with youth ages 12 to 17 held in US federal custody. Central American children were primarily interviewed in shelter care programs overseen by the Office of Refugee Resettlement (ORR) within the US Department of Health and Human Services (DHHS), and Mexican children were primarily interviewed in detention holding areas of US Border Patrol stations near the Texas-Mexico border. This dataset uniquely captures the perspectives of children for whom migration decisions and transit experiences were still quite recent. In 2014, UNHCR published the report, Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection, focusing on children’s reasons for migration.

Original Methodology
Potential participants were randomly selected from those children meeting the designated nationality and age population characteristics. The gender breakdown averaged 77 percent male and 23 percent female (intentionally mirroring the gender composition of unaccompanied children in ORR custody), with nationality variations ranging from a low of 4 percent female among Mexican youth interviewed, to a high of 35 percent female among Salvadoran youth interviewed.6

To mimic the institutional review board process existing within academic institutions, UNHCR shared its research methodology and instruments with 14 external child migration experts and subsequently integrated their recommendations. In addition, UNHCR’s headquarters-level offices for Child Protection, and for Policy Development and Evaluation Services, reviewed and commented on the research methodology and materials.

Potential participants received informed consent explanations in small groups and then individually, including the children’s rights to: participate voluntarily, terminate the interview, decline to answer questions, speak with an on-site clinician following the interview, and expect confidential treatment of their responses. Interviewers also explained the limits of confidentiality in the event that a child reported that someone was harming him or her, that the child wanted to harm himself or herself, or that the child wanted to harm another person. Further, children were informed of the potential risks of and benefits from participation. Interviews were semi-structured, using a mix of closed ended and open-ended questions in a standard format. Interviewers were able to ask clarifying questions, or to modify the order of questions based upon how children wanted to tell their story.

6 The extreme gender imbalance among Mexican children present in the Border Patrol stations and federally funded shelters warrants further exploration but is beyond the scope of this article.
**Secondary Analysis**

UNHCR granted this author access to several subsets of the *Children on the Run* interview data in order to consider the research question, “What can we learn from the observations and recommendations of Central American and Mexican unaccompanied migrant children for helping children like themselves?” Children’s responses to the following question were analyzed: “¿Tienes ideas de cómo podemos mejor ayudar a otros jóvenes que salieron de sus países?” [Do you have ideas about how we can better help other youth who leave their countries?]. In some interviews, this question also included the variant, “What would have to be different for you to have stayed?” to help children consider what would have helped them, in order to also think about what would help others. Responses include a combination of particular and general observations and recommendations.

UNHCR requested and was granted permission to review this article’s findings prior to publication, solely in order to ensure the data was used ethically and in a manner consistent with the consent forms signed by the children. For the analysis in this article, conducted independently of the UNHCR report, the Institutional Review Board of the University of St. Thomas (St. Paul, MN) reviewed and approved the research plan.

Data was provided as an Excel spreadsheet and included 404 children’s biographical data (gender, age, nationality) and responses to the question described above (access to the interviews in their entirety was not provided). Grounded theory data analysis involved an initial round of “elaborative coding” based on theoretical constructs familiar from the prior research (Saldaña 2009, 168), followed by axial coding to identify subthemes, and inter-related pattern coding focused on economics, security, and education, as well as politics, migration needs, and family references (Miles, Huberman, and Saldaña 2014). A random selection of coded data was reviewed by a colleague for inter-rater reliability, resulting in coding agreement and confidence in coded themes.

**Findings**

Children’s responses to this one question incorporated a mix of their own needs and generalizations about the needs of others. An initial review for themes revealed recurring references to: economics, security, politics, education, migration needs, and family, along with several idiosyncratic comments. These responses were categorized and counted by gender and nationality for comparison purposes (see Table 1). Comments regarding the interaction of economics, security, and education (or more specifically work, gangs, and school) were extracted as pattern codes and analyzed separately.

In the abstract, the three elements of economics, security, and education, may be conceived of as different spheres of experience, but the interview results reveal that in the reality of these children’s daily lives, they are inextricably linked. This is not uncommon. As Bhabha observes, “While human-rights instruments and discourse emphasize the importance of educational goals . . . most migrant adolescents aspire to employment opportunities as a precondition not a sequel to postprimary education. . . . These two issues are often intertwined in the life of adolescent migrants” (2014, 247-48).
Table 1. Primary Themes from Children’s Responses to the Question, “Do You Have Ideas about How We Can Better Help Other Youth That Leave Their Countries?”

<table>
<thead>
<tr>
<th>Primary Themes*</th>
<th>Economics (Work / Poverty)</th>
<th>Security (Gangs / Cartels)</th>
<th>Politics (Government / Police / Corruption) **</th>
<th>Education (School / Scholarships)</th>
<th>Migration Needs (In transit / In US)</th>
<th>Family</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total References</td>
<td>166</td>
<td>125</td>
<td>114</td>
<td>83</td>
<td>82</td>
<td>39</td>
</tr>
<tr>
<td>By Country:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• El Salvador</td>
<td>37</td>
<td>52</td>
<td>31</td>
<td>19</td>
<td>19</td>
<td>11</td>
</tr>
<tr>
<td>• Guatemala</td>
<td>51</td>
<td>18</td>
<td>21</td>
<td>27</td>
<td>22</td>
<td>6</td>
</tr>
<tr>
<td>• Honduras</td>
<td>46</td>
<td>37</td>
<td>26</td>
<td>21</td>
<td>20</td>
<td>17</td>
</tr>
<tr>
<td>• Mexico</td>
<td>32</td>
<td>18</td>
<td>36</td>
<td>16</td>
<td>21</td>
<td>5</td>
</tr>
</tbody>
</table>

By Gender (percentages as a portion of the total male or female population)

<table>
<thead>
<tr>
<th></th>
<th>Female (n=91)</th>
<th>Male (n=313)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>35 (38%)</td>
<td>131 (42%)</td>
</tr>
<tr>
<td></td>
<td>31 (34%)</td>
<td>94 (30%)</td>
</tr>
<tr>
<td></td>
<td>22 (24%)</td>
<td>92 (29%)</td>
</tr>
<tr>
<td></td>
<td>16 (18%)</td>
<td>67 (21%)</td>
</tr>
<tr>
<td></td>
<td>16 (18%)</td>
<td>66 (21%)</td>
</tr>
<tr>
<td></td>
<td>14 (15%)</td>
<td>25 (8 %)</td>
</tr>
</tbody>
</table>

*Children may have had responses in more than one category.

**Political comments are further broken down in Table 2.

The observations of migrant children analyzed in this article add a third issue — security — as a serious danger that appears to be intertwined with education and employment motives underlying migration choices for the Central American and Mexican migrant youth participating in this study. These three domains of education, security, and economics, were frequently mentioned together, revealing their interrelated nature. The following responses demonstrate instances in which children mentioned all three domains in the same response. For example:

- “They need better education. There aren’t jobs that pay enough for someone to go to school. Children don’t go to school, instead they get involved with gangs and start robbing.” (17-year-old Honduran male)

- “There you study, but there are no jobs. Because they can’t get jobs, they think it’s better to go to the street or the girls just start having children.” (17-year-old Salvadoran male)

- “I don’t know, if there were more police presence or more resources to create centers to help children to not get involved in gangs. Some kids say they don’t want to study any more, or they don’t want to work, they only work to earn money to buy cocaine or marijuana. Many young people, 17 years old, leave school so they can join the gangs. I think there should be some kind of center where they can go and get classes and have an option to not be involved in the gang.” (17-year-old Salvadoran female)

7 Students may have to pay for a combination of tuition, textbooks, uniforms, community contributions, and/or other fees, as well as transportation (Bentaouett 2006).
• There are people who don’t have money to enroll their children in school. And when children don’t go to school they end up in the cartels.” (17-year-old Mexican male)

• “Many young people would study if they had the opportunity to, but to do that their parents need to work. Many young people can’t keep studying because their parents don’t have work. The gangs — sometimes people that don’t like to work or can’t find work, most of them destroy their families and get used to being on the street.” (17-year-old Guatemalan male)

To grasp the warp and weft of these three intertwining elements, they were treated as pattern codes and mapped as separate visual displays arranged by nationality. Images of the Salvadoran and Guatemalan displays are included below to represent the most significant contrast in these visual displays.

Pattern coding revealed that children frequently mentioned economics, security, and education issues in relation to one another. For the children from El Salvador, the relational comments focused more on the connections between economics and security, and education and security (see Figure 1). Guatemalan children placed greater emphasis on the relationship between education and economics (see Figure 2). The comments from Honduran and Mexican children were more evenly distributed among all three domains.

**Implicit “No-Win” Situations**

When all of the children’s comments were considered as a composite, several implicit no-win situations became evident, particularly related to economics, security, and education. Whether employed or unemployed, school enrolled or unenrolled, young people face risks from gangs and crime. Similarly, education necessitates employment, yet employment requires education. How does a young person get ahead in this rigged situation?

The children’s comments below illustrate the no-win relationship between economics and security.

**Economics ↔ Security**

On the one hand, not working increases children’s risks of joining or being forcibly recruited into a gang (due to idle or unsupervised time). On the other hand, working or having resources increases the risk of being targeted by a gang for theft or extortion. For example:

• “Gangs are increasing because of the economy, because there aren’t enough jobs. Kids think it’s better to rob and steal because they don’t see any other way to make money.” (17-year-old Salvadoran female)

• “Anything you have, the gang members take from you. Sometimes gang members will wait for you outside banks, then attack you and rob you.” (16-year-old Salvadoran male)
Figure 1. El Salvador
Visual Display Mapping Salvadoran Children’s Comments Connecting Economics, Security, and Education

Legend
* = All 3 elements mentioned; placed on the side of the first 2 elements mentioned

* Italicics = Female

There should be some sort of activity for the children, that children will like to do, that will give them an alternative to being on the street and doing drugs. There kids that aren't in school all they think about is going to parties and being in gangs and doing drugs. [F-SV]

Some children do not study because they are forced into gangs. The police are not in the neighborhoods. The police are afraid of the gangs too. When they see them, they do not stop them. [M-SV]

* I don't know, if there were more police presence or more resources to create centers to help children to not get involved in gangs. Some kids say they don't want to study anymore, or they don't want to work, they only work to earn money to buy cocaine or marijuana. Many young people, 17 years old, leave school so they can join the gangs. I think there should be some kind of center where they can go and get classes and have an option to not be involved in the gang. [F-SV]

* There are parents that have so many kids they can't educate them all and they let them go out in the streets, and then they start to rob chickens and anything and then they become "pandilleros". For some people, it was easier to make money robbing than working. For others, because they can hurt anyone they want to. [F-SV]
Figure 2. Guatemala
Visual Display Mapping Guatemalan Children’s Comments Connecting Economics, Security, and Education

Legend
* = All 3 elements mentioned; placed on the side of the first 2 elements mentioned

[Italics] = Female

When you don't study, you start to get involved with gangs and everything. [M-GT]
Security ↔ Education

Another, no-win situation surfaced in the relationship between security and education. Not attending school increases the risk of children being recruited into a gang (due to idle or unsupervised time). However, attending school increases the risk of being targeted by a gang (for harassment or recruitment by gang-connected individuals within, near, or on the way to school). These children’s quotes further illustrate this predicament:

- “Children in Honduras don’t have the education they need. Sometimes they end up in gangs because they don’t study.” (14-year-old Honduran male)
- “There you have to pay a lot just to be enrolled in school. Some kids go to school and they get kidnapped. Just because they want to study and get ahead in life, they get kidnapped and they get ransomed. There is so much insecurity in Honduras.” (17-year-old Honduran male)

Education ↔ Economics

Finally, there is a correlation in their responses between education and economics. On the one hand, well-paid work is necessary in order to pay for education (e.g., school fees, uniforms, supplies), while an education is necessary in order to obtain well-paid work. Indeed, even some youth with an education are not able to find meaningful work because of a lack of jobs in the overall economy. These quotes reveal a sense of frustration:

- “They need better education. There aren’t jobs that pay enough for someone to go to school. Children don’t go to school, instead they get involved with gangs and start robbing.” (17-year-old Honduran male)
- “Jobs require experience, and how can you get experience if they don’t give you a job? There are gang members because there are children that haven’t been given an education.” (16-year-old Guatemalan male)
- “I tried to get a job after I graduated, but there are no jobs. You also have to continue your education and get specialized. You can’t do that if you don’t have money.” (17-year-old Honduran female)

These implied “no-win” scenarios reveal an underlying calculation that may be made by children and/or their families when making migration decisions. Because of the no-win analyses, children, and their families, may conclude that migration is the only choice the child has to get ahead, or, in many cases, merely to survive. Instead of decisions based on a child’s best interests, this may lead to decisions based on the least worst options.

This migratory calculus is evident, for example, in response to a separate interview question by a 17-year-old Honduran male: “My grandmother wanted me to leave. She told me: ‘If you don’t join, the gang will shoot you. If you do join, the rival gang will shoot you — or the cops will shoot you. But if you leave, no one will shoot you.’” (UNHCR 2014, 10). In this Honduran young man’s retelling — as in the “no-win” scenarios described above — migration was the only alternative to avoid being killed.

Recognizing the existence of “no-win” situations from which child migrants flee supports the observations of Musalo and Lee (forthcoming) that adopting solely a “pull” factor
They Need to Give Us a Voice

assessment (e.g., that US factors draw migrants) to explain recent increases in Central American migration is misguided. From a global policy perspective, recognizing such no-win scenarios raises questions about how both to respond humanely in the short term to those who lack viable options to migration, and to also work over the longer term toward creating safe and appealing alternatives to migration and promoting self-determination by giving youth reasons to stay in their home countries.

Political Speech

Children’s responses regarding public officials was coded as “political speech,” because of the references to those with public power. Given the differing contexts for children from four different countries, the recurring words “government,” “police,” “corrupt/ion,” and “president” (along with their variants) were counted and analyzed as a common means of examining these children’s references to those in positions of public power. Among these terms, references to government occurred most frequently overall (68 children), particularly from Mexican youth (25), followed by Guatemalan youth (15) and then Salvadoran and Honduran youth (14 references each). References to government were then coded for pessimistic comments, in which 41 children noted that the government cannot, will not, or does not help (including this 12-year-old boy: “In Mexico, they don’t help us, the government is corrupt”). Comments indicating some belief in the government’s potential to act in a positive way to help or protect children were coded as “possibility,” including statements of what the government could, should or needs to do (e.g., “The [Guatemalan] government needs to control the extortions, robberies, and murders.”)

A total of 38 children mentioned the police, with the most references from Salvadoran and Honduran children (15 and 13 respectively), followed by six references to police by Mexican children, and four by Guatemalan children. Police corruption was mentioned by 21 children, most often Hondurans, including this 15-year-old male: “They should have a law against corruption. There [in Honduras], a gang member goes to jail and is released the next day because the police are corrupt.”

Sixteen children emphasized police ineffectiveness, including a 17-year-old Salvadoran female who noted: “They kill there in broad daylight and the police do nothing.” In addition, eight children noted the need for more or better police, including this 17-year-old Honduran male: “If there were more police [in Honduras] everything would be calmer.” A 17-year-old Salvadoran male was among six youth who commented on the gangs being in control — “There are cities [in El Salvador] where the police are too afraid to go in because the gangs are the ones in control” — while three children described situations of police harming the innocent, such as this 15-year-old Mexican male: “The [Mexican] police will stop you and steal your money and beat you.”

Honduran and Mexican children mentioned corruption more than other children, with nine and eight references, respectively, compared to four references by Salvadoran children.

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8 This author limited coding of political speech to children’s references to public officials, sometimes referred to as “state actors.” The definition used in this article is narrower than that used by many legal scholars, which may also include references to both state actors and non-state actors as forms of political speech.
### Table 2. Children’s Use of Specific Political Terms in Response to the Question, “Do You Have Ideas about How We Can Better Help Other Youth That Leave Their Countries?”

**Political Speech: References to Politicians and the Public Sector**

(Percentages refer only to this subset of responses)

<table>
<thead>
<tr>
<th>Themes</th>
<th>“Government”*</th>
<th>“Police”</th>
<th>Word “Corrupt” Used in Relation to…</th>
<th>“President”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Mentions</td>
<td>68</td>
<td>38</td>
<td>23</td>
<td>18</td>
</tr>
<tr>
<td>Sub-Themes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pessimism: (41)</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>– “The [Salvadoran] government is very selfish, it doesn’t think about the young people.”</td>
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<tr>
<td>– “The government in Guatemala can’t do anything, they don’t help people.”</td>
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<tr>
<td>– “The [Honduran] authorities are involved with the gangs. They don’t protect the community, they protect the maras.”</td>
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<tr>
<td>– “In Mexico, they don’t help us, the government is corrupt.”</td>
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<tr>
<td>Possibility: (19)</td>
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<tr>
<td>– “The [Salvadoran] government can help, they can send officers to provide security to the houses and the neighborhoods.”</td>
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<tr>
<td>– “The [Guatemalan] government needs to control the extortions, robberies, and murders.”</td>
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<tr>
<td>– The [Honduran] government could help with school, for those who do not have the money.”</td>
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<tr>
<td>– “The [Mexican] government can help people to have food.”</td>
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<tr>
<td>Other: “I am not sure if the government can help” (4); reference to US government (3), unclear response (1)</td>
<td></td>
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<tr>
<td>Corrupt: (21)</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>– “The [Salvadoran] police are corrupt and they tell the gangs before there is a raid.”</td>
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<tr>
<td>– “[In Honduras] the police sell themselves. They’re corrupt. A criminal ends up in jail, and a few days later he is out because he buys off the police.”</td>
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<tr>
<td>– “In Mexico, you see a police officer, and he isn’t a police officer, he is a hit man.”</td>
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<tr>
<td>Ineffective: (16)</td>
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<tr>
<td>– “If you call the [Guatemalan] police, they don’t come until two days later.”</td>
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<tr>
<td>– “[In Honduras] a gang member goes to jail and is released the next day”</td>
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<tr>
<td>More/better PO needed: (8)</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>– “If there were more police [in Honduras] everything would be calmer.”</td>
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<td></td>
<td></td>
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<tr>
<td>– “Gangs in control: (6)</td>
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<td></td>
<td></td>
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<tr>
<td>– “There are cities [in El Salvador] where the police are too afraid to go in because the gangs are the ones in control.”</td>
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<tr>
<td>– “Ineffective: “The government always says he will end the crime, but it’s always the same—he does nothing.” Or should do more (9)</td>
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<tr>
<td>Change needed: (5) “I think we need to change the president. The presidents steal money and the people suffer.”</td>
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<tr>
<td>Other (4)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Region</th>
<th>“Government”*</th>
<th>“Police”</th>
<th>“President”</th>
</tr>
</thead>
<tbody>
<tr>
<td>El Salvador</td>
<td>14 (20.5%)</td>
<td>15 (39%)</td>
<td>4 (17%)</td>
</tr>
<tr>
<td>Guatemala</td>
<td>15 (22%)</td>
<td>4 (11%)</td>
<td>2 (9%)</td>
</tr>
<tr>
<td>Honduras</td>
<td>14 (20%)</td>
<td>13 (34%)</td>
<td>9 (39%)</td>
</tr>
<tr>
<td>Mexico</td>
<td>25 (37%)</td>
<td>6 (16%)</td>
<td>8 (35%)</td>
</tr>
</tbody>
</table>

*Government coding includes 49 explicit references to the term “government” as well as 16 other references to government, such as “the mayor,” “politicians,” “authorities,” or government authorities implicitly referred to as “El Salvador,” “Guatemala,” “Honduras,” or “Mexico.” Other implicit references to the US government were counted within the category of “migration needs” in Table 3 (e.g., “In the US, give them papers and work.”)

**Some children made multiple comments that fell under more than one subcategory.**
and two by Guatemalan children. In addition to police references, the term corruption was used in relation to the government or country in general 11 times.

Mexican youth referred to the president six times, while the other three nationalities each made four uses of the term president. The primary theme related to presidents was their ineffectiveness, including this comment by a 15-year-old Honduran male: “The President always says he will end the crime, but it’s always the same — he does nothing.” Another five children stated that the president needs to change or to be different, with this appraisal from a 16-year-old Guatemalan male: “We need a good president in Guatemala; the presidents there only help the rich.”

The political speech analyzed in response to this one question came more from males — 18 were female (18 percent) and 79 male, compared to 23 percent female for the entire sample — with an average age of 16.13, higher than the entire sample’s overall average age of 15.83.

**Migration Needs**

The 82 individual children whose ideas for helping other youth addressed migration needs largely focused on access to US territory and access to immigration benefits, as well as better treatment and protection. Within this overall group, 30 children made generalized requests to let migrants enter the United States; a 17-year-old Guatemalan female represented this response by saying, “Let them in, don’t deport them.” By contrast, five children demonstrated some migration ambivalence, such as this 17-year-old Honduran male: “It would be better to have work there and not have to come here.” Another 30 referenced a desire to expand migration benefits or protections, including this 16-year-old Guatemalan male: “Give work permission [in the US] so young people can work and help their families.” Fourteen children noted a need for better treatment towards migrants, particularly towards children, as noted by this 17-year-old male from Mexico: “In the US, I wish they could help more children with refuge.”

Finally, 11 children identified a need for more protection or help in transit, with some emphasizing the security needs en route, such as a 13-year-old Salvadoran female who commented: “They need more protection from the gangs in El Salvador and from the Zetas on the journey. They kidnapped two people in Mexico and had them hostage for 14 days.” Others emphasized the need for help with basic needs such as goods and clothing, in addition to asking that officials not apprehend them, as this 17-year-old Honduran male pled: “Tell the trains to go slowly…tell immigration to not grab them so that they can pass. Give them food, clothing — some people don’t even have clothing.”

**Family References**

Children’s recommendations regarding relatives included 39 references to family or family members, with recurring themes of family reunification, helping family, and maltreatment in the home. Seventeen children made comments about the need for family reunification generally, such as the request of this 13-year-old Honduran female:
Table 3. Children’s Statements Regarding Migration Needs in Response to the Question, “Do You Have Ideas about How We Can Better Help Other Youth That Leave Their Countries?”

<table>
<thead>
<tr>
<th>Summary of Children’s Statements Regarding Migration Needs **</th>
<th>Let Migrants Enter</th>
<th>Expand Migration Benefits</th>
<th>Better Treatment</th>
<th>Protection/Help in Transit</th>
<th>Migration Ambivalence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Responses</td>
<td>30</td>
<td>30</td>
<td>14</td>
<td>11</td>
<td>5</td>
</tr>
<tr>
<td>Examples</td>
<td>Including:</td>
<td>Including:</td>
<td>Including:</td>
<td>Protection:</td>
<td>Including:</td>
</tr>
<tr>
<td></td>
<td>“Let them in to look for a better future”</td>
<td>“Give “papers””</td>
<td>“You can protect children by making sure immigration doesn’t treat us badly…they treat us like animals”</td>
<td>“Children need protection against the cartels”</td>
<td>“Better to… not have to come here”</td>
</tr>
<tr>
<td></td>
<td>“Let us pass”</td>
<td>“Give “per-miso””</td>
<td>“Make more programs like this one [ORR shelter]”</td>
<td>“Get rid of the thieves on the route”</td>
<td>“The journey is hard”</td>
</tr>
<tr>
<td></td>
<td>“Let us stay and only deport those who create disorder”</td>
<td>“Give us legal work like any other person”</td>
<td>“Not to keep people here so long [in ORR shelter]”</td>
<td>“Tell the trains to go slowly…tell immigration to not grab them so that they can pass. Give them food, clothing some people don’t even have clothing”</td>
<td>“Explain… difficulties they can face on the journey”</td>
</tr>
<tr>
<td></td>
<td>“Give us the opportunity to study and work”</td>
<td>“They can also bring us to help [the US], we can do this.”</td>
<td>“Help us because we are minors, don’t mistreat us”</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>“Take down the walls…at the border”</td>
<td></td>
<td>“That all kids have the same rights as the kids here, without discrimination, corruption”</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>“Not put them in [immigration] jail”</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Some children made multiple comments that fell under more than one subcategory.

“Help them so they can be with their families. That is the most important.” Some children referred to their desire to be reunited with a specific individual, primarily parents, such as this 13-year-old Honduran female: “I would like to stay here with my mom [in the United States].”

In contrast to the 17 children who mentioned the need for family reunion, 11 spoke of *problems in the home*, such as the need for parental support or the need to be protected from abuse or neglect. A few children spoke of their own experiences of maltreatment in response to this particular question, such as this 16-year-old Honduran female: “I would stay [in Honduras] if my grandmother would accept me with my baby and if she will take care of me. . .” More often they spoke in generalized terms, only hinting at their own possible abuse or neglect, such as this 14-year-old Mexican male: “Children in Mexico, children like me, need help. They need parents who support them. I have seen other families where they have a mother and a father and the children are supported. Every time I see that I feel sad because there are children that don’t have that.”

Eleven children talked about the desire to help family members remaining in the home country, with responses like this 17-year-old Salvadoran female: “Give us the ability to work and to help our families.” Some children, like this 15-year-old male from Honduras,
expressed concerns about their families’ economic well-being and safety: “I would have stayed if I had been able to make money and invest it so that I could help my family. I don’t know how to protect them. There are lots of gangs.” Others were motivated by helping a specific family member in a specific way, such as the 14-year-old Guatemalan female who stated: “I would have stayed if I had had a better paying job that would really let me help my little sisters.” These children’s responses demonstrate the varied roles that family relationships play in migration decisions: Family can be a pull factor drawing youth to the United States for reunification purposes; family can be a push factor in order to economically maintain the same family that one leaves behind; family, or lack thereof, can be a push factor giving children a reason to leave, such as the 13-year-old Honduran girl who stated, “Help the kids that are on the street, that do not have family and they look for a better life.” For young people, the developmental need to love and be loved may outweigh any legal repercussions of migration.

### Table 4. Children’s References to Family in Response to the Question, “Do You Have Ideas about How We Can Better Help Other Youth That Leave Their Countries?”

<table>
<thead>
<tr>
<th>Problems in the Home</th>
<th>Desire to Help Family in Home Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family Reunion (in US or Home Country)</td>
<td>Sub-themes</td>
</tr>
<tr>
<td>TOTALS</td>
<td>17</td>
</tr>
<tr>
<td>Sub-themes</td>
<td></td>
</tr>
<tr>
<td>Family reunion: “I want all of my family to be together so we are not separated. This is what I hope for.”</td>
<td></td>
</tr>
<tr>
<td>Reunion with a specific relative: “I would like to stay here with my mom [in US].” “I would not have stayed for anything because my father isn’t there.”</td>
<td></td>
</tr>
<tr>
<td>Problems in the Home</td>
<td>Sub-themes</td>
</tr>
<tr>
<td>TOTALS</td>
<td>11</td>
</tr>
<tr>
<td>Sub-themes</td>
<td></td>
</tr>
<tr>
<td>Need for supportive caregivers: “The majority of children’s parents don’t care about them.”</td>
<td></td>
</tr>
<tr>
<td>Protection from abuse: “I would have stayed if my [abusive] uncle didn’t come to where I was living anymore.”</td>
<td></td>
</tr>
<tr>
<td>Neglect: “Help parents and families especially when the parents don’t take care of the families, for example if they drink alcohol.”</td>
<td></td>
</tr>
<tr>
<td>Desire to Help Family in Home Country</td>
<td>Sub-themes</td>
</tr>
<tr>
<td>TOTALS</td>
<td>11</td>
</tr>
<tr>
<td>Sub-themes</td>
<td></td>
</tr>
<tr>
<td>Economics, security: “I would have stayed if I had been able to make money and invest it so that I could help my family. I don’t know how to protect them. There are lots of gangs.”</td>
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</tr>
<tr>
<td>Relieve parents: “I think that my mind would have changed if I had had money to help my mom, dad, and my family so that my father wouldn’t have to work so hard just to feed the family.”</td>
<td></td>
</tr>
<tr>
<td>Help siblings: “I would have stayed if I had had a better paying job that would really let me help my little sisters”</td>
<td></td>
</tr>
</tbody>
</table>

### Discussion

This secondary analysis of Central American and Mexican migrant children’s interview responses documents the interconnected nature of economics, security, and education as migratory factors. In addition, certain “no-win” situations were implicit in the children’s responses, suggesting no-win situations as potential reasons for the migration decisions of unaccompanied children and their families. Examination of children’s political speech revealed that 97 children spoke in primarily negative terms of the government, the president,
the police, or corruption, revealing much greater pessimism than optimism regarding the potential for those in power to improve circumstances. The police were singled out more than any other public figures, with comments saying that the police were corrupt and ineffective, the country needed more or better police, the gangs were in control (rather than the police), and, in a few instances, the police harm the innocent.

Children’s comments regarding migration indicate that these child migrants request and recommend more access to the United States and to legal migration, while a few disclose some migration ambivalence. Some children recommend better treatment of migrant children, and greater protection and concrete help for children and other migrants in transit. Finally, children’s family references recognize their desires to be reunited with family, to be supported and protected in the home, and to help family members remaining in their home country.

These findings provide further support for UNHCR’s earlier analysis of this same sample of children regarding their reasons for leaving home, which included “family or opportunity,” “violence in society,” “abuse in the home,” “deprivation,” and other idiosyncratic reasons (UNHCR 2014, 7). To that previous research, this article adds nuance to our understanding of children’s perspectives regarding the inter-related nature of economic, security, and education issues, suggesting that these issues cannot be considered in isolation and that migrant children may have entwined motivations for migrating that defy simple categorization. Furthermore, this article contributes a more in-depth examination of data from one question, and begins to lay the groundwork for a theory of child migration based on “no-win” situations, suggesting that children and their families may choose migration when faced with dangerous or deficient options.

The practical implications of these findings include their application by refugee and asylum adjudicators in corroborating the conditions of violence, corruption, and deprivation (both economic and educational) experienced by young people in El Salvador, Guatemala, Honduras, and Mexico. Recognition of the interrelated nature of economics, security, and education for young people from these countries should encourage adjudicators to consider and inquire about related security issues when children mention economic or educational issues in isolation. For example, if child asylum seekers articulate educational reasons for coming to the United States, adjudicators (as well as legal service providers) should probe behind the reasons why children could not continue their education in the home country. Similarly, children interviewed for refugee or asylum status who indicate economic motivations for migration should be queried further regarding any specific reasons that the child or family could not economically support themselves.

These children’s expressed concerns regarding police and government corruption are buttressed by other reports that identify corruption in El Salvador, Honduras, Guatemala, and Mexico as ongoing problems contributing to a lack of citizen security and undermining public confidence in the political system (UNHCR 2016b, 2016c; DOS 2015a, 2015b, 2015c, 2015d; Olson and Zaino 2015, 42). Cruz (2015) specifically connects police performance with overall political perceptions: “The police play a fundamental role in any political regime. Whether an authoritarian regime or a liberal democracy, police actions are intertwined with regime performance as they showcase the state’s response to day-to-day issues” (252). One journalist quotes a Honduran police chief recognizing that up
to 20 percent of his own police force is “dirty,” while community leaders living in the same area increase this estimate of corrupt law enforcement officers to half of the local force (Nazario 2016). Apart from educators, police may be the government actors with whom youth most interact; hence, police treatment of young people has direct relevance to refugee and asylum claims.

Analyzing children’s political speech in response to this one question confirms the potential for youth to hold political views, whether burgeoning, sophisticated, or somewhere in-between. Adults at times presume political disinterest among young people, yet these children made comments suggesting political concern, and at times cynicism, regarding the corruption and perceived ineffectiveness of those in positions of power. The question posed to these children was not specifically political in nature, yet 97 children (24 percent of the total number interviewed) used terms indicating political speech (individual children may have used more than one of the terms counted in Table 2). Given this research, refugee and asylum adjudicators should recognize the ability of youth to hold political views, whether nascent or mature.

Serido and colleagues (2011) make a connection between youth voice and identity development, suggesting that giving youth “opportunities to put their voices into action” (56) can nurture the sense that they matter. The children’s comments analyzed for this article indicate that they have relevant views about what would improve their circumstances and their societies. More explicit examination of Central American and Mexican migrant youths’ sense of power within their home communities may reveal ways in which countries and communities of origin can empower youth by giving them a voice regarding their own futures. As stated by the 17-year-old Salvadoran girl cited in this article’s title, “Sometimes adults view children as lesser and they think we can’t become anything or don’t have an opinion. They don’t ask for our view on things. They need to give us a voice.”

Taken together, these children’s comments signal the need for holistic responses at national and international levels, in order to mitigate the “no-win” scenarios that appear to contribute to the migration of children. Such a holistic approach to addressing migration events fits with the ecological perspective in social work, which emphasizes the interdependence between people and their environments and the resulting reciprocal exchanges in which persons impact their environment at the same time that they are impacted by it (Gitterman and Germain 2008). As public and private actors work together to change the dynamics leading to migration, they must collaborate and recognize how their efforts impact the work of others and are impacted in return. In more concrete terms, efforts to create well-paying work must also consider educational requirements, internship and job training opportunities, and how such approaches can compete with, and be undermined by, the seduction and threats of gangs and cartels. Efforts to improve educational opportunities for young people must also practically consider the economic requirements for children and their families to afford school attendance, along with the ways that schools can simultaneously mitigate the lure of criminal activity, while unintentionally facilitating recruitment and harassment by gang-connected peers and adults. Efforts to address security issues, particularly in relation to gangs and cartels, must also address the economic, educational, and political environment that has made illicit activity attractive, unavoidable, or involuntary.
As international aid to this region increases, programmatic approaches should be coordinated and interconnected. Equally important, youth should be involved in the planning and implementation of these interventions, if there is to be hope of success. The Global Refugee Youth Consultations led by UNHCR and the Women’s Refugee Commission (and described in the introduction) demonstrate one possible model for such youth engagement, particularly if these gatherings can be translated into concrete action. Programs that implement the principles of positive youth development, and youth community organizing or mobilization, provide a grassroots approach to harnessing young people’s ideas around issues of importance to them in a manner that is sustainable and develops youth leadership capacity (WOLA 2008).

A segment of these children’s interview responses reveals a palpable frustration and pessimism, even resignation, about the corruption, selfishness, and maltreatment they identify in the adults with responsibility for their protection (police, politicians, and sometimes caregivers). This sample of child participants represents a specific segment of the population — those who decided to leave their countries of origin. To the extent that they represent the views of at least some of their peers who have not or cannot leave, they signal a concerning sense of mistrust, particularly towards those in power. Christens and Dolan (2011) argue that youth community organizing can benefit the development of youth leadership and capacity, can improve community development, and can strengthen interactions between youth and adults. Such positive outcomes depend upon listening to youth views, developing youth leadership in order to effect change, and sharing power with youth in authentic ways through intergenerational collaboration (ibid.).

In December 2015, President Barack Obama signed into law the Consolidated Appropriations Act designating up to $750 million in aid and economic development funds for Central America. The Act requires that certain pre-conditions be met regarding border security, corruption, and human rights, before 75 percent of the funds are released (Meyer 2016; White House 2016; Beltrán 2015). The results of the research described in this article provide some broad suggestions for how youth themselves might allocate these funds, particularly in addressing economic, security, and educational issues. Concrete recommendations include prioritizing well-paying jobs, increasing protection from gangs and cartels, and supporting high-quality, accessible education. Hanson (2016) identifies a “lack of coordination” (12) as a regional handicap in promoting collaboration between government entities working on different aspects of youth opportunity programming in the Northern Triangle of Central America. These children identify the need for their nations to address issues of economics, security, and education in a coordinated manner that recognizes the intersecting nature of these domains. The record level of US government funding committed in 2016 presents an opportunity to intentionally nurture and develop future ethical leaders who can help create conditions in which the next generation will be able to remain and contribute to their homeland.

**Recommendations**

In summary, concrete policy recommendations emerging from this research include the following:
1. Recognizing entwined motivations and no-win situations that may lead children to leave their countries of origin. Refugee and asylum adjudicators should recognize that migration motivators are interconnected, and that economic or educational motives do not preclude related security concerns. Furthermore, in-country policymakers and service providers should identify and seek solutions to perceived no-win situations.

2. Promoting integrated approaches to home country economic, security, and education concerns for Central American and Mexican youth. Refugee and asylum adjudicators should probe children’s economic and educational reasons for leaving home to explore the possibility of interrelated security reasons leading to migration. For example, if a child mentions a desire to work or attend school in the United States, adjudicators should also inquire about circumstances impeding these options in the child’s home country.

3. Acknowledging migrant children’s political interests and concerns. Refugee and asylum adjudicators should recognize the ability of children to hold political views, even if these views are nascent or immature from an adult’s perspective.

4. Providing youth with meaningful opportunities to contribute their views and suggestions. Adults working with migrant youth, in the United States, in transit, and in home countries, should proactively seek out means for youth to contribute their views and suggestions, as a means of empowering youth, and of better understanding youth perspectives that may differ from adults’ views.

5. Incorporating migrant children’s input and concerns into spending plans for US aid appropriated for Central America. US and international aid to Central America and Mexico should seek out practical collaborative ways to address the root causes of migration across economic, security, and educational spheres of practice. For example, law enforcement efforts focused on reducing gang and cartel violence should incorporate positive youth development approaches through skill-building and rehabilitative programming, such as partnering with education and training programs for at-risk youth.

6. Emphasizing youth leadership development in efforts to address child migration. International and domestic programmatic efforts to stem child migration should include youth leadership development, to nurture future ethical leaders who can create conditions in which the next generation will be able to remain and contribute to their families and homelands.

Future Research

As an interviewer and researcher on the original study, this author is familiar with the full breadth of the children’s responses. However, this article, which represents exclusively the author’s own opinions, analyzes responses to only one question out of the entirety of each child’s interview. Readers interested in a fuller picture of these children’s interview responses should refer to the earlier findings of the UNHCR Children on the Run report (2014).
The participants in this study represent only those children who left their countries of origin. Additional research could analyze the views of children who remain in their countries of origin to examine how their views differ from those who left. UNHCR found that 36 percent of the children in its study had one or both parents in the United States (2014, 63). A complementary study could focus on those children with relatives in the United States who nonetheless chose to remain in their home countries. What factors in their lives counter the push and pull of migration? What efforts or circumstances are successful in giving children the security, or opportunity, needed to remain rooted in their home communities?

Future research could more specifically engage unaccompanied children in their perceived roles in relation to politics, political speech, public policy most relevant to youth, how migration impacts family relationships, and youth views on power (e.g., how age, gender, and diversity impact their perceived ability to create change in their lives and communities).

Ultimately, the analysis in this article provides a platform for the voices of these youths to be heard by those with the power to act and create positive changes in Central America and Mexico. These youth are asking for a say in their future. Who is listening?

REFERENCES


They Need to Give Us a Voice


S281


Seeking a Rational Approach to a Regional Refugee Crisis: Lessons from the Summer 2014 “Surge” of Central American Women and Children at the US-Mexico Border

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Executive Summary²

In the early summer months of 2014, an increasing number of Central American children alone and with their parents began arriving at the US-Mexico border in search of safety and protection. The children and families by and large came from the Northern Triangle countries of El Salvador, Honduras, and Guatemala — three of the most dangerous countries in the world — to seek asylum and other humanitarian relief. Rampant violence and persecution within homes and communities, uncontrolled and unchecked by state authorities, compelled them to flee north for their lives.

On the scale of refugee crises worldwide, the numbers were not huge. For example, 24,481 and 38,833 unaccompanied children, respectively, were apprehended by US Border Patrol (USBP) in FY 2012 and FY 2013, while 68,631 children were apprehended in FY 2014 alone (USBP 2016a). In addition, apprehensions of “family units,” or parents (primarily mothers) with children, also increased, from 15,056 families in FY 2013 to 68,684 in FY 2014 (USBP 2016b).³ While these numbers may seem large and did represent a significant increase over prior years, they are nonetheless

¹ The authors thank Katrina Myers for her excellent research support.
² This article was drafted and sent into production prior to the November 2016 US presidential elections and the inauguration of President Donald J. Trump. As a result, the recent policy changes of the Trump administration are beyond the scope of this article. The authors continue to stand by their recommendations, rooted in the US government’s international and domestic legal obligations towards refugees, as the proper course for the present day.
³ US Border Patrol (USBP) defines a “family unit” as an individual apprehended with one or more family members (USBP 2016b). Thus, each family unit consists of two or more individuals. For example, USBP will count as one “family unit” a mother apprehended together with her two children.
dwarfed by refugee inflows elsewhere; for example, Turkey was host to 1.15 million Syrian refugees by year end 2014 (UNHCR 2015a), and to 2.5 million by year end 2015 (UNHCR 2016) — reflecting an influx of almost 1.5 million refugees in the course of a single year.

Nevertheless, small though they are in comparison, the numbers of Central American women and children seeking asylum at our southern border, concentrated in the summer months of 2014, did reflect a jump from prior years. These increases drew heightened media attention, and both news outlets and official US government statements termed the flow a “surge” and a “crisis” (e.g., Basu 2014; Foley 2014; Negroponte 2014). The sense of crisis was heightened by the lack of preparedness by the federal government, in particular, to process and provide proper custody arrangements for unaccompanied children as required by federal law. Images of children crowded shoulder to shoulder in US Customs and Border Protection holding cells generated a sense of urgency across the political spectrum (e.g., Fraser-Chanpong 2014; Tobias 2014).

Responses to this “surge,” and explanations for it, varied widely in policy, media, and government circles. Two competing narratives emerged, rooted in two very disparate views of the “crisis.” One argues that “push” factors in the home countries of El Salvador, Honduras, and Guatemala drove children and families to flee as bona fide asylum seekers; the other asserted that “pull” factors drew these individuals to the United States. For those adopting the “push” factor outlook, the crisis is a humanitarian one, reflecting human rights violations and deprivations in the region, and the protection needs of refugees (UNHCR 2015b; UNHCR 2014; Musalo et al. 2015). While acknowledging that reasons for migration may be mixed, this view recognizes the seriousness of regional refugee protection needs. For those focusing on “pull” factors, the crisis has its roots in border enforcement policies that were perceived as lax by potential migrants, and that thereby acted as an inducement to migration (Harding 2014; Navarette, Jr. 2014).

Each narrative, in turn, suggests a very different response to the influx of women and children at US borders. If “push” factors predominately drive migration, then protective policies in accordance with international and domestic legal obligations toward refugees must predominately inform US reaction. Even apart from the legal and moral rightness of this approach, any long-term goal of lowering the number of Central American migrants at the US-Mexico border, practically speaking, would have to address the root causes of violence in their home countries. On the other hand, if “pull” factors are granted greater causal weight, it would seem that stringent enforcement policies that make coming to the US less attractive and profitable would be a more effective deterrent. In that latter case, tactics imposing human costs on migrants, such as detention, speedy return, or other harsh or cursory treatment — while perhaps not morally justified — would at least make logical sense.
Immediately upon the summer influx of 2014, the Obama administration unequivocally adopted the “pull” factor narrative and enacted a spate of hostile deterrence-based policies as a result. In July 2014, President Obama asked Congress to appropriate $3.7 billion in emergency funds to address the influx of Central American women and children crossing the border (Cohen 2014). The majority of funding focused on heightened enforcement at the border — including funding for 6,300 new beds to detain families (LIRS and WRC 2014, 5). The budget also included, in yet another demonstration of a “pull”-factor-based deterrence approach, money for State Department officials to counter the supposed “misinformation” spreading in Central America regarding the possibility of obtaining legal status in the United States. The US government also funded and encouraged the governments of Mexico, Guatemala, and Honduras to turn around Central American asylum seekers before they ever could reach US border (Frelick, Kysel, and Podkul 2016).

Each of these policies, among other harsh practices, continues to the present day. But, by and large they have not had a deterrent effect. Although the numbers of unaccompanied children and mothers with children dropped in early 2015, the numbers began climbing again in late 2015 and remained high through 2016, exceeding in August and September 2015 the unaccompanied child and “family unit” apprehension figures for those same months in 2014 (USBP 2016a; USBP 2016b). Moreover, that temporary drop in early 2015 likely reflects US interdiction policies rather than any “deterrent” effect of harsh policies at or within US own borders, as the drop in numbers of Central American women and children arriving at the US border in the early months of 2015 corresponded largely with a spike in deportations by Mexico (WOLA 2015). In all events, in 2015, UNCHR found that the number of individuals from the Northern Triangle requesting asylum in Mexico, Costa Rica, Nicaragua, and Panama had increased 13-fold since 2008 (UNCHR 2015b).

Thus, the Obama administration’s harsh policies did not, in fact, deter Central American women and children from attempting to flee their countries. This, we argue, is because the “push” factor narrative is the correct one. The crisis we face is accordingly humanitarian in nature and regional in scope — and the migrant “surge” is undoubtedly a refugee flow. By refusing to acknowledge and address the reality of the violence and persecution in El Salvador, Honduras, and Guatemala, the US government has failed to lessen the refugee crisis in its own region. Nor do its actions comport with its domestic and international legal obligations towards refugees.

This article proceeds in four parts. In the first section, we examine and critique the administration’s “pull”-factor-based policies during and after the 2014 summer surge, in particular through the expansion of family detention, accelerated procedures, raids, and interdiction. In section two,
we look to the true “push” factors behind the migration surge — namely, societal violence, violence in the home, and poverty and exclusion in El Salvador, Honduras, and Guatemala. Our analysis here includes an overview of the United States’ responsibility for creating present conditions in these countries via decades of misguided foreign policy interventions. Our penultimate section explores the ways in which our current deterrence-based policies echo missteps of our past, particularly through constructive refoulement and the denial of protection to legitimate refugees. Finally, we conclude by offering recommendations to the US government for a more effective approach to the influx of Central American women and children at our border, one that addresses the real reasons for their flight and that furthers a sustainable solution consistent with US and international legal obligations and moral principles. Our overarching recommendation is that the US government immediately recognize the humanitarian crisis occurring in the Northern Triangle countries and the legitimate need of individuals from these countries for refugee protection. Flowing from that core recommendation are additional suggested measures, including the immediate cessation of hostile, deterrence-based policies such as raids, family detention, and interdiction; adherence to proper interpretations of asylum and refugee law; increased funding for long-term solutions to violence and poverty in these countries, and curtailment of funding for enforcement; and temporary measures to ensure that no refugees are returned to persecution in these countries.

I. The Obama Administration’s Adoption of a “Pull” Factor Narrative

In response to the migration surge of Central American women and children in summer 2014, the Obama administration immediately took a harsh stance and adopted a raft of punitive policies rooted in its “pull” factor narrative. Despite the fact that heightened numbers of asylum-seeking women and children continue to cross the US-Mexico border even in the face of these policies, the US continued its deterrence-based approach.

The most immediately visible and hotly contested policy response was the rapid and unprecedented expansion of family detention along the southern border. Capacity for detaining families together — primarily mothers with their children — in US immigration custody expanded from less than a hundred beds in early 2014 to thousands by the end of the same year. A range of other deterrence-based policies also ensued, including the use of accelerated immigration proceedings for families and unaccompanied children in immigration courts, the increasing use of expedited removal of families, and raids of Central American asylum seekers carried out in January and the summer of 2016. Moreover, the United States has encouraged and funded the constructive refoulement of asylum seekers south of its own border, primarily through military and police funding for Mexican and Central American authorities, who turn back asylum seekers before they can reach the United States (Frellick, Kysel, and Podkul 2016). In addition, as discussed in section III below, the Obama administration restrictively interpreted substantive asylum law in
a continuing attempt to limit refugee protections, particularly with regard to the claims commonly made by individuals from the Northern Triangle of Central America.

1. Family Detention

At the beginning of 2014, a single 94-bed facility in Berks County, Pennsylvania was the only family immigration detention center in the United States. A larger family facility with 512 beds in Texas, the Don T. Hutto facility (“Hutto”), had operated from 2006-2009, but it closed down following heightened media scrutiny, a human rights investigation, and litigation (LIRS and WRC 2014, 5). Media and human rights reports examining the Texas facility criticized, in particular, the negative developmental effects of detention on children, many of whom suffered from depression and weight loss (ABA 2015, 14). A lawsuit filed in 2007 highlighted inhumane conditions for families at Hutto and alleged that the facility violated the terms of a 1997 settlement agreement in Flores v. Reno. That agreement required that children in immigration custody be held in the least restrictive setting possible, with a strong presumption favoring release to a parent or family member. The settlement also required state licensing for all US Immigration and Customs Enforcement (ICE) detention centers holding children. Hutto, a converted medium security prison that formerly held adult male inmates, was not licensed to provide child care and was decidedly restrictive, with children and families treated like prisoners. Restrictions included minimal freedom of movement, limited access to outdoor space, and an initial offering of only one hour of education a day for children (ABA 2015, 14). In response to the lawsuit, ICE agreed to make a number of changes to the facility in late 2007. Following an internal assessment in early 2009 that highlighted the special needs of families (Schriro 2009), the US Department of Homeland Security (DHS) ultimately closed the facility in September 2009, converting it into a detention center for adult women only.

Thus, from 2009 to 2014, the only family detention center in operation was a small facility in Berks County, which held both mothers and fathers with children. In response to the summer 2014 “surge” of families arriving at the US-Mexico border to seek asylum, however, DHS hastily opened a new facility in the remote town of Artesia, New Mexico — a 3.5-hour drive away from the nearest legal service providers (ABA 2015, 20). The 700-bed facility was originally a law enforcement training barracks that DHS quickly repurposed to house mothers with their children (ABA 2015, 19). The facility opened in June 2014 and ran as a “deportation mill” (Burnett 2014); within its first few weeks of operation, over 200 mothers and children were removed to the Northern Triangle (Hylton 2015). The makeshift facility in Artesia garnered criticism on a range of issues, including inadequate healthcare, social services, and access to counsel. In summer 2014, the ACLU and other groups sued, alleging that the facility violated the due process and other rights of detained mothers and children.4 ICE closed the Artesia facility in December 2014, stating that it had been meant for temporary use. Following this closure, the M.S.P.C. lawsuit was voluntarily dismissed.5

The expansion of family detention did not end with the Artesia facility’s closing. Rather, by August 2014, the private prison company GEO Group — the second-largest in America

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— had already begun to operate a large, 532-bed family detention center in Karnes City, Texas (ABA 2015, 22). In December 2014, ICE and GEO Group urged regulators to permit an expansion of the site of the prison, which increased the capacity of the Karnes facility to 1,158 beds. Meanwhile, in Dilley, Texas, the Corrections Corporation of America (CCA) — the largest private prison company in America — began operations at the “South Texas Family Residential Center” in December 2014. The 2,400-bed facility in Dilley consists largely of connected trailer structures and has been compared to World War II Japanese internment camps (Takei 2015). Both facilities hold mothers with children; only Berks detains fathers and mothers with children.

Overall, from 2014 to the present day, in direct response to the influx of Central American families and children seeking asylum, the government rapidly expanded the capacity for family detention from less than 100 beds to over 3,500. The administration was explicit in its deterrence-based rationale for this unprecedented expansion of prison bed space. In testimony before the Senate Committee on Appropriations in June 2014, DHS Secretary Jeh Johnson asserted, “[T]here are adults who brought their children with them. Again, our message to this group is simple: We will send you back . . . Last week we opened a detention facility in Artesia, New Mexico for this purpose” (Johnson 2014). So strong were its deterrence-based motives, in fact, the administration adopted a strict “no-release” policy toward families in detention. Pursuant to this policy, DHS generally refused to exercise its own discretion to release families locked away in Dilley, Karnes, and Berks even after they established a likelihood of asylum eligibility. DHS additionally opposed release for these same families in bond hearings before immigration judges. A federal lawsuit, brought by the ACLU, University of Texas Law School’s Immigration Clinic, and the law firm Covington & Burling resulted in a preliminary injunction against the no-release policy. The court in that case, R.I.L.R. v. Johnson, reaffirmed the civil nature of immigration detention and the principle that blanket deterrence rationales — inherently punitive in nature — would likely violate long-standing constitutional principles on the permissible uses of civil detention.6

Following the issuance of the preliminary injunction, DHS backed down from its no-release policy and agreed to stop using blanket deterrence rationales in its own custody decisions as well as in bond hearings for asylum seeker families. However, DHS continues to detain large numbers of mothers with children in family detention centers. This failure to learn from the lessons of the past — and in particular, the negative impacts of its earlier operation of the Hutto facility — has drawn heavy criticism and ongoing litigation (ABA 2015). All three remaining family detention centers are the subject of lawsuits alleging violations of the 1997 Flores settlement, which governs treatment of children in immigration detention.7 Its core provisions impose a strong presumption favoring release, and require that children who cannot be released be held in the least restrictive setting possible. The Flores settlement additionally sets forth a preferential list of appropriate release options for children, with release to a parent or legal guardian the first among them, followed by release to an adult relative or licensed program.

As in the Hutto case, counsel for the plaintiffs asserted that holding children in the family detention centers violated the Flores agreement due to the failure to apply the presumption

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7 Flores v. Johnson, No. 85-4544 (July 24, 2015).
of release for children, the restrictive nature of the facilities, and the lack of state licensing as a child care facility for Dilley and Karnes. Notably, similar to the children housed in the Hutto facility, the children detained in the South Texas facilities have exhibited wide-ranging negative impacts including anxiety, weight loss, chronic illness, breakdown of family structure, and other harms from even short periods of detention (CARA 2015b; CARA 2015c).

On July 24, 2015, district court judge Dolly Gee ruled that the family detention facilities violated the terms of the *Flores* settlement by failing to promptly release children and holding them in restrictive and unlicensed facilities. Her ruling ordered the government to take a number of steps to comply with the *Flores* agreement, including prompt release of children along with their detained parent, in line with the agreement’s first preference for release of the parent. The order also barred the government from holding children in secure facilities where their movements are restricted, as well as in unlicensed facilities. The government appealed Judge Gee’s decision to the Ninth Circuit, where the case remains pending.

In the meantime, DHS took belated steps to seek child care licenses for its facilities, but unsurprisingly ran into difficulties in getting prison-like immigration detention centers licensed for the appropriate care of children. As with the Hutto facility, DHS failed to seek an appropriate license for provision of child care for either the Karnes or Dilley facility when they opened in 2014, and ran both facilities without a license for a year and a half. The Texas Department of Family and Protective Services (DFPS) eventually granted a license to Karnes via an ad hoc, emergency process in May 2016 (Preston 2016a). DHS pursued a license for Dilley as well, but in May 2016, a Texas state court issued a temporary injunction preventing DFPS from issuing a license to the facility. The suit for an injunction, brought by Grassroots Leadership and others, alleged that the Texas DFPS lacked statutory authority under Texas law to grant licenses to the for-profit detention facilities under an emergency process. In Pennsylvania, the Berks family detention center — the lone facility among the three that operated with an appropriate license in 2014 and 2015 — lost its license in early 2016 after a concerted advocacy effort for non-renewal. DHS appealed the non-renewal to the state of Pennsylvania and continues to operate the facility, without a license, while that appeal remains pending (Constable 2016).

Beginning in the summer of 2014, the Obama administration insisted on not only entrenchment, but also expansion of family detention despite sustained criticism and multiple legal challenges. This scaling-up — accomplished through contracts with private prison companies — reflects a concerted effort to normalize family detention as a permissible for-profit enterprise. But, as described above, the continuing operation of these centers faces numerous legal obstacles, as well as organized and vocal opposition by faith leaders, medical professionals, human rights groups, and scholars (e.g., ABA 2015; LIRS and WRC 2014; Takei 2015). The Obama administration failed to persuade even members of its own political party as to the legality and wisdom of this practice; over 200 members of Congress have urged the president to end family detention (US Senate 2015; US House 2015).

8 Id.

Indeed, DHS’s own Advisory Committee on Family Residential Centers recently released a comprehensive report calling for an immediate end to the widespread use of family detention (ACFRC 2016). The Committee, established on July 24, 2015 by DHS, is comprised of independent experts in education, detention reform and management, immigration and asylum law, social service provision, and physical and mental health. Chief among its recommendations was for DHS to limit the use of detention against families in almost all circumstances, with rare exceptions only for cases where individualized flight risk or danger cannot be mitigated by any conditions of release.

In one encouraging development, however, Secretary Johnson recently announced that DHS would review its use of private immigration detention centers, including those used for families (DHS 2016). His announcement followed the Department of Justice’s decision to phase out federal private prisons due to their lesser efficacy and diminished standards (DOJ 2016). The Secretary’s announcement provides a welcome opportunity for DHS to rethink its use of family detention, particularly in light of the recommendations of its own advisory committee.

2. Expedited Removal, Reinstatement of Removal, and Accelerated Proceedings

Concurrent and intertwined with the use of family detention, expedited removal of families has also increased dramatically since 2014. Most of the families who end up in the Dilley, Karnes, and Berks detention facilities do so while undergoing expedited removal, a fast-track proceeding established under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Both adults and families may be subject to expedited removal at DHS’s discretion if apprehended at a port of entry or within 100 miles of a US border within 14 days of entry.  

Prior to 2014, however, asylum seeker families were generally not subject to this curtailed process. Rather, families were typically placed into removal proceedings before an immigration judge, in front of whom they could seek asylum (ABA 2015, 27). In these “normal” removal proceedings, individuals have the opportunity to obtain the assistance of counsel, present evidence in support of their claims, and cross-examine witnesses against them, as well as to appeal negative decisions to the Board of Immigration Appeals (BIA) and seek review in the federal courts of appeals.

In contrast, expedited removal is a bare-bones, administrative process that permits few procedural protections, even to individuals raising asylum claims. Under this extremely curtailed process, DHS removes people as quickly as possible, without providing them the benefit of a hearing on the merits of their claims before an immigration judge. Those who

10 Author Musalo is a member of said committee.
11 8 U.S.C. § 1225(b)(1)(A); 8 CFR § 1003.19 (b)(2)(i). Unaccompanied children arriving alone, however, are not placed into expedited removal. Instead, special screening procedures apply for children from Mexico and Canada; children from all other countries are transferred to the custody of the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) within 72 hours of apprehension (8 U.S.C.A. § 1232(a)).
12 8 U.S.C. §§ 1229a(b), 1252(a)(1).
do not express a fear of return or an intention to apply for asylum immediately upon arrival are summarily returned to their home countries upon the simple issuance of an order by a DHS enforcement officer.

Individuals who do express a fear of persecution or intention to apply for asylum should be referred to an asylum officer for a curtailed screening known as a “credible fear interview” (CFI). The CFI assesses whether individuals have a “significant possibility” of establishing asylum eligibility; if they pass the CFI screening, they can then apply for asylum in the immigration courts. In practice, however, both the initial referral process and CFI itself are riddled with errors and offer minimal protections, particularly for detained individuals. Human rights groups and scholars have documented numerous cases in which individuals who should have been referred for a CFI were in fact simply removed, often after failing to be apprised of their rights and sometimes even after expressing a fear of persecution (HRF 2015; HRW 2014; Pistone and Hoeffner 2006; USCIRF 2005). For example, Human Rights First documented a case in which DHS deported an indigenous-language-speaking family who had fled gang persecution without ever receiving a CFI. The father had told DHS officials about his fear of return to the country, but the officers did not speak his language and did not bother to secure an interpreter. Instead, DHS simply deported the entire family without inquiring into whether or not they were afraid to return (HRF 2015, 11-12).

Even when individuals do obtain a CFI, the interview fails to provide the due process protections of a full hearing, and suffers from erroneous determinations as a result. Access to counsel during a CFI is restricted; regulations provide that attorneys “may be present at the interview and may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview” (emphasis added). As a result of this broad discretion, asylum officers often limit attorney participation to a minimum, refusing in some instances to even let the attorney correct interpretation errors or present argument at all. During the CFI, individuals do not have a right to review adverse evidence, present full evidence in support of their claims, or be told, except in cursory fashion, the basis of an officer’s decision. Many of those in family detention, particularly in the Karnes facility, undergo credible fear interviews over the phone, and thus never have an opportunity to establish rapport, build trust, and convey credibility to an asylum officer face-to-face (IACHR 2015, 69). Moreover, asylum officers have conducted CFIs of mothers in detention in the presence of their children, impeding the ability of mothers to testify fully and to reveal traumatizing details such as death threats and sexual assault because they do not want to talk about such events in front of their children (LIRS and WRC 2014). Inadequate interpretation remains an issue for CFI interviews as well (ABA 2015, 44). In the immediate aftermath of the surge, CFI passage rates dropped nation-wide from around 80 percent in early 2014 to only 62 percent for June-September 2014 (USCIS 2014). In the Artesia, New Mexico family detention facility, CFI passage rates at one point dipped as low as 38 percent. Although

15 8 C.F.R. § 208.30(d)(4).
16 M.S.P.C. v. Johnson, No. 14-01437 (Aug. 22, 2014). The M.S.P.C. litigation, discussed in section I, specifically challenged many of the deficiencies in the CFI process at Artesia, arguing inter alia, that expedited removal procedures in the facility violated due process. As mentioned, DHS closed the much-criticized Artesia facility in December 2015, and the ongoing litigation was voluntarily dismissed (M.S.P.C. v. Johnson, No. 14-01437 (Aug. 22, 2014)). However, ACLU continues to litigate challenges to expedited removal proceedings at the Berks facility, representing habeas petitioners who received a negative CFI
the CFI passage rates at present are higher both nationally and in the Dilley, Karnes, and Berks facilities — at or above 80 percent nationwide and in each of the three facilities — the nature of CFIs remains curtailed (USCIS 2016a; USCIS 2016b). This raises concerns that the smaller fraction of individuals who do not pass their CFIs may nonetheless present legitimate asylum claims.

Moreover, review for all negative CFI determinations is extremely limited. Individuals can seek review of the asylum officer’s CFI decision before an immigration judge, but this, too, differs vastly from the full evidentiary hearing a judge would normally conduct in immigration proceedings. Negative CFI reviews often take place via video conference or even telephone, and if the judge affirms the decision of the asylum officer, the individual has no right to appeal to BIA or to petition for review by the federal circuit courts. Nor can the individual cross-examine adverse witness or present full evidence. As in the CFI, the government limits the ability of attorneys to participate; a 1997 immigration court memorandum states that “there is no right to representation prior to or during the review,” and immigration judges have curtailed attorneys’ roles as a result (EOIR 1997, 10).

For families in which a parent has a prior removal order, the process poses even greater hurdles and fewer protections. Through a mechanism termed “reinstatement of removal,” also created by IIRIRA, DHS can simply reinstate the prior removal order with virtually no process at all. If an individual with a reinstated order expresses a fear of persecution or torture, the government refers them for a “reasonable fear interview” (RFI), a screening interview in which applicants have to meet a higher standard than in a CFI. Individuals who establish reasonable fear are placed into “withholding-only” proceedings in which they may seek only withholding of removal or Convention Against Torture (CAT) relief — and not asylum. Although withholding of removal and CAT prohibit return to torture or persecution, they provide far fewer protections and benefits than asylum. Unlike asylees, these individuals cannot bring their spouse and children abroad to live in the United States, do not qualify for most federal benefits, have no path to citizenship, and can have protective status stripped away more easily. In addition, the RFI process itself is riddled with the same due process errors that plague CFIs, such as inadequate interpretation and few procedural protections (LIRS and WRC 2014; ABA 2015).

In addition to formal expedited removal and reinstatement of removal under the Immigration and Nationality Act, the Obama administration also accelerated the proceedings of children and families seeking asylum in other ways, in particular by “fast-tracking” their cases in the immigration courts and before the asylum office. In July 2014, the administration announced that immigration court dockets would prioritize the cases of “recent border crossers” (DOJ 2014). These priority dockets — referred to colloquially as “rocket dockets” — hear cases of unaccompanied children as well as families who recently crossed the border, including many released from family detention. The Executive Office for Immigration Review (EOIR) reassigned immigration judges in courts throughout the country to these new expedited dockets, shifting them from their regular dockets.

decision. The habeas petitions filed on behalf of mothers and children at Berks allege that expedited removal processes in family detention violate due process and statutory rights (ACLU 2016).
17 IIRIRA § 241(a)(5).
The creation of these new priority dockets for children and families had a negative impact on these vulnerable populations, particularly on their ability to find and secure counsel to represent them in court. At first, immigration judges pursuant to the announced “fast-track” policy routinely granted only short continuances for respondents, departing from the prior practice of allowing longer continuances for pro se individuals to secure counsel (Srikantiah et al. 2014). Indeed, even the National Association of Immigration Judges (NAIJ) criticized the Administration’s decision to mandate that children’s cases leap ahead of other cases in the already-backlogged court system (Solis 2014). As the NAIJ noted, “We deal with cases that are often, in effect, death penalty cases. Immigration law enforcement must stand on its own and not be allowed to overshadow or to control the immigration judicial process” (ibid.). Within DHS, US Citizenship and Immigration Services (USCIS) also adjusted its scheduling to rush through child asylum cases over adult asylum cases, even for children without counsel (Langlois 2015).

These actions pose serious due process concerns. Among the most pernicious of the effects of expedited, curtailed, and accelerated procedures are barriers to counsel. The limited role and availability of counsel in CFI and RFI proceedings have led to serious errors in those decisions, as described above. In addition, numerous studies have underscored the importance of counsel in obtaining relief for children and survivors of trauma in formal immigration proceedings. Children with attorneys are five times more likely to obtain asylum or other humanitarian protection (TRAC 2015a). Adults with children with attorneys are fourteen times more likely to secure protection in these same proceedings (TRAC 2015b). At the same time, misinformation, lack of resources, and a lack of low-cost and free legal services impede the ability of many to find attorneys.

Notably, the Advisory Committee on Family Residential Centers recommended in its 2016 report that DHS cease placing asylum seeker families into expedited removal in light of many of the aforementioned concerns (ACFRC 2016). Instead, the Advisory Committee recommended that DHS return to its prior practice of simply issuing a Notice to Appear for regular immigration court proceedings and that it promptly release families.

### 3. Raids

In late December 2015, media reports began to circulate surrounding upcoming raids of Central American families and children planned by DHS (Markon and Nakamura 2015). DHS conducted home raids over the New Year’s weekend around the country and confirmed, on January 4, 2016, that it had apprehended 121 individuals, including 71 children and 50 adults, mostly mothers (Johnson 2016b; NILC 2016). In its official statement on the raids, DHS was explicit in its desire to use aggressive enforcement tactics as a way to send a message to others. Secretary Johnson’s opening words stated, “As I have said repeatedly, our borders are not open to illegal migration; if you come here illegally, we will send you back consistent with our laws and values” (Johnson 2016b). This statement fails to recognize the right of asylum seekers to seek protection from persecution under US and international law. Commenting on the raids later that spring, a senior DHS official reiterated, “We cannot send a message that once families with kids cross the border, they are here to stay. If many end up staying here indefinitely, the concern is that it will encourage further illegal immigration” (Constable 2016).
The invasive raids took place in the early morning hours, before dawn, with ICE agents storming the homes of mothers with children and waking up terrified families in the dark (Graybill and Cho 2016). According to a report on the raids in the Atlanta, Georgia region, DHS by and large failed to secure warrants to enter homes, in violation of longstanding constitutional principles, and also impeded the families’ access to counsel after picking them up (ibid.). ICE also used false information in some cases to gain access to homes (ibid.; NILC 2016).

DHS transferred families subject to the raids to the Dilley family detention facility for deportation processing. Although the government portrayed the families subject to raids as ineligible for asylum, interviews by attorneys revealed that many of the families did in fact have valid claims, but were often simply unable to present those claims due to an inability to secure counsel or to understand the immigration court proceedings (Foley 2016). Indeed, fewer than half of the individuals subject to the January raids, including young children, had secured attorneys in their asylum cases (Preston 2016b). Pro bono attorneys with the CARA Project at Dilley attempted to meet with all families picked up during raids, but facility officials blocked access to most families. In the end, volunteer attorneys managed to represent 12 families and successfully secured stays of removal by the BIA for all 12, or over 33 individuals (AIC 2016). The fact that the BIA granted these stays speaks to the meritorious nature of the immigrants’ underlying claims for protection — as courts considering a stay of removal must generally consider the likelihood of success on the merits of the underlying claim.19

The aggressive home raids traumatized mothers with their young children, caused widespread panic in immigrant communities, and drew a swift backlash of heavy criticism (Preston 2016b). More than 100 members of the House and Senate wrote President Obama to demand a cessation of raids (ibid.). The letter, however, had little effect. Three months later, on March 9, 2016, DHS Secretary Jeh Johnson revealed that ICE had been conducting home raids pursuant to “Operation Guardian Border” since January 2016. Johnson announced that this operation had led to raids resulting in the apprehension of 336 individuals, the majority of whom entered as unaccompanied children after January 1, 2014 but had since turned 18 years old (Johnson 2016a). Although ICE claimed it would not target churches, medical offices, or schools, 10th grader Kimberly Pineda Chavez was picked up on her way to school in Atlanta, Georgia, as were teenagers Yefri Sorto-Hernandez and Wildin David Guillen Acosta in North Carolina (Holpuch 2016; Lee 2016).

On May 12, 2016, Reuters reported yet another spate of raids planned for summer 2016 against hundreds of families and unaccompanied children (Edwards 2016). Within just two weeks, pro bono attorneys at the Dilley and Karnes facilities encountered 16 such families (CARA 2016). One mother and her 14-year-old daughter were deported during the night, even after their pro bono attorneys informed DHS officials of their intent to seek a stay of removal (ibid.).

The raids have sown terror in immigrant communities across the country. Teachers in the schools attended by Yefri and Wildin reported that numerous stellar immigrant students had begun missing school or even dropped out entirely over fear of being deported (Lee

2016). In one Maryland high school with a high percentage of Latino and Central American students, attendance dropped by half following the January raids (United We Dream 2016a). In response, the Durham school system passed a resolution calling on the administration to end the raids (Durham School Board 2016), as did the National Education Association and the American Federation of Teachers (AFT et al. 2016). In addition to children dropping out of school, health care providers reported a stark decline in immigrant patient care in affected communities (NILC 2016; Hiemstra 2016).

4. Interdiction, or Constructive Refoulement

The US government’s harsh, deterrent tactics against Central Americans also extended beyond its borders to Mexico and Central America, where it encouraged and funded strong enforcement measures to keep asylum seekers from reaching the US border. Following the 2014 surge, the United States worked with Mexico to increase efforts to interdict migrants along Mexico’s southern border, and funded additional programs in Honduras and Guatemala to prevent would-be migrants from journeying north.

Since 2007, the United States has provided assistance to Mexico via the “Mérida Initiative” aid packages to fortify Mexico’s southern border. This aid intensified after 2011 (Isacson et al. 2015, 5). Following the 2014 surge, US officials and congresspersons called on Mexico to do more to detain and deter migrants from Central America (ibid., 5). At a Senate hearing in July 2014, Ambassador Thomas Shannon stated that a key component of US strategy to stem the flow of unaccompanied children from Central America would be to shore up “the ability of Mexico and Guatemala to interdict migrants before they cross into Mexico” (Shannon 2014). According to Shannon, the United States pledged to spend $86 million in existing funds within the State Department’s International Narcotics Control and Law Enforcement unit (ibid.). The Department of Defense provided significant funding as well, reporting $44.6 million dollars given to Mexican military and police officials for counter-drug efforts (DOD 2014).

With this infusion of cash, the Mexican government intensified its own border control efforts. On July 7, 2014, Mexican President Enrique Peña Nieto and Guatemalan President Otto Pérez Molina announced a joint “Southern Border Program” (*Programa Frontera Sur* (PFS)). Pursuant to this operation, the National Migration Institute (*Instituto Nacional de Migración* (INM)), Mexico’s immigration enforcement agency, increased the number of agents on the Mexico-Guatemala border by 300 (Isacson et al. 2015, 6). Mexican federal police at the border increased as well (ibid., 10).

In the year following the 2014 “surge,” Mexico’s deportations of Central American migrants almost doubled, from 49,893 to 92,889 (WOLA 2015). The number of unaccompanied children apprehended by Mexico jumped from 9,594 in FY 2014 to 16,038 in FY 2015 (Isacson et al. 2015, 8). These increases in apprehensions at the Southern Mexico border correspond exactly with the decrease in apprehension of children and families at the Southern US border. The correlation strongly suggests that heightened enforcement in Mexico, and not diminishment of root causes of migration or US policies at or beyond the US border to deter arrival, led to the decrease in the number of children apprehended by US officials.
Mexico’s asylum system, however, remained woefully inadequate to address the legitimate protection needs of Central Americans fleeing persecution. In 2014, Mexico detained over 107,000 migrants from Central America but recognized only 451 individuals as refugees (WOLA 2015). Moreover, Mexico’s aggressive enforcement efforts, at the urging of the United States, have resulted in serious harm and human rights violations against migrants. Groups documented numerous instances of Central Americans suffering physical and sexual abuse by Mexican authorities, as well as due process failures and *refoulement* of refugees (Isacson et al. 2015, 25-27). In Mexico’s detention centers, deplorable conditions include inadequate provision of food and medical care, as well as physical and sexual violence by prison officials against detainees (ibid., 27). Finally, intensified enforcement efforts have pushed migration routes through Mexico underground, making them deadlier as a result. In particular, as both private and public security officials began cracking down on migrants riding on the top of trains, desperate migrants have resorted to harsher, more remote, and dangerous routes. Along these routes, criminal groups have subjected them to robbery, sexual assault, disappearances, kidnapping, torture, and murder — at times working in tandem or with the acquiescence of Mexican authorities (Isacson et al. 2015, 28-29; Podkul and Kysel 2015, 11-12).

Law enforcement efforts in Central American countries also intensified due to US intervention and funding. In June 2014, Honduran law enforcement units, funded by the US State Department Bureau of International Narcotics and Law Enforcement, began a new operation to prevent children and families from crossing the Honduras and Guatemala border (Podkul and Kysel 2015, 9). These units received equipment and training from US law enforcement, including ICE and US Border Patrol (Carcamo 2014). In Guatemala, the United States provided $17 million in funding to Guatemalan army, police, and prosecutorial officials for the creation of two border initiatives, for both the Guatemala-Mexico border and the Guatemala-Honduras border.

In addition, while the United States government has implemented some in-country refugee processing options for refugees from Central America, these efforts remain woefully inadequate and do not excuse interdiction south of the US-Mexico border. The Central American Minors (CAM) program, for example, provides refugee processing for child refugees in El Salvador, Honduras, and Guatemala, but is limited in scope. As initially implemented, only children with parents who have lawful status in the United States were eligible to apply, and, as of April of 2016, the CAM program had admitted only 197 children (Hennessy-Fisk 2016). In July 2016, the administration announced an expansion of the CAM program to permit older siblings, biological parents, and caregivers of a qualifying child to accompany the child to the United States (Davis 2016). It also increased in-country refugee screening in each of the Northern Triangle countries, as well as a process — in collaboration with the government of Costa Rica, the UN High Commissioner for Refugees (UNCHR), and the International Organization for Migration (IOM) — for transferring pre-screened refugees in danger in their home countries to Costa Rica to await resettlement in the United States (ibid.). Although these reflect significant improvements, the CAM program remains limited to serving only the children and family members (or child caregivers) of parents with legal status in the United States. As a result, it addresses only a fraction of the need for refugee protection in the region. In contrast, US interdiction policies have negatively affected tens or even hundreds of thousands of asylum seekers from Central America.
Taken together, the administration’s actions amount to a multi-pronged, sustained attack on the ability of Central American refugees to secure protection. Its deterrence-based approach has led to aggressive measures not only at its own border but also extending south, to Mexico and Central America. These measures place refugees in harm’s way in transit, upon arrival, and in too many cases, result in their illegal refoulement. As discussed in section III below, restrictive interpretations of refugee law seriously limit protection to bona fide asylum seekers as well, continuing past trends.

Deterrence tactics violate the United States’ international obligations under the 1967 Refugee Protocol, incorporating the 1951 Refugee Convention, in multiple ways. Limiting access to its territory via interdiction — essentially externalizing the US southern border (Podkul and Kysel 2015) — results directly in the return of refugees to situations of persecution. However, aggressive tactics at and within its own borders lead to illegal refoulement as well. Faulty screening processes, detention of traumatized mothers and children, and raids capturing individuals who never had a chance to seek asylum before a judge all result directly or indirectly in erroneous outcomes, and interfere with the fundamental right of refugees to seek asylum under domestic and international law. At the same time, the due process failures of these same policies pose serious constitutional concerns.

The refusal to recognize Central Americans fleeing violence as a legitimate refugee population entirely ignores the reality of conditions in Guatemala, Honduras, and El Salvador — and is especially pernicious given the United States’ role in creating the crisis south of its border. In section II below, we describe the root causes of migration, including the US government’s historical actions.

II. The Real Reasons for Migration: “Push” Factors in the Northern Triangle

The migration surge from the Northern Triangle countries is explained by the dire conditions that prevail in El Salvador, Guatemala and Honduras. Violence plagues the region; the Northern Triangle countries have homicide rates that are among the highest in the world. Violence against women and girls, as well as the gender-motivated killings — referred to as femicide/feminicides — also top global records.

Gangs and organized crime have proliferated, contributing to the skyrocketing levels of violence. Household violence, which disproportionately impacts women and children, is at epidemic proportions. Adding to this are conditions of extreme poverty and income inequality leading to social exclusion, and depriving large segments of the population of those minimal conditions necessary to survive.

Two recent UNHCR studies concur that country conditions in the Northern Triangle countries, rather than pull factors in the United States, have fueled the migration surge. Its 2014 study, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, found that 58 percent of child migrants left situations which presented “international protection concerns” fleeing violence, abuse,
and social exclusion (UNHCR 2014, 25), while its 2015 study, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* similarly found that the women fleeing those countries “present[ed] a clear need for international protection” (UNHCR 2015b, 2).

Assertions that the migration surge is the result of pull rather than push factors ignore the data to the contrary, including statistics documenting that other countries in the region (Mexico, Belize, Costa Rica, Nicaragua, and Panama) have experienced a 13-fold increase in asylum claims from those fleeing Northern Triangle countries (UNHCR 2015b). Although some individuals will have mixed reasons for migration, these numbers reflect the primacy and prevalence of protection-based needs (UNHCR 2014).

The recognition that a majority of migrants from El Salvador, Guatemala, and Honduras have international protection concerns, and may qualify as refugees, has implications for US policy. Punitive responses intended to deter the entry of bona fide asylum seekers — from any region of the world — are inconsistent with obligations pursuant to international norms as well as domestic law and are not consonant with US values and national identity.

However, in the case of the Northern Triangle countries, the United States has a moral obligation that flows not just from international and domestic norms, but arises from its tortured history with each one of the countries. In pursuing its own interests in the region, the United States engaged in policies and undertook actions that indisputably have contributed to the disastrous conditions that currently exist. An acknowledgement of this responsibility would be welcome as an exercise in truth and reconciliation, but beyond that, it would add to the moral heft of arguments that the United States can and should do better in its response to those suffering the violence, inequality, and social exclusion that prevail in El Salvador, Guatemala, and Honduras.

### 1. The History of US Involvement in the Region

The United States took actions and pursued policies in each of the Northern Triangle countries that strengthened authoritarian, anti-democratic elements, and contributed to the legacy of violence, poverty, and social exclusion that are root causes of the current migration surge. The United States viewed the region through a Cold War lens and justified its actions as fighting back the Communist threat in its “backyard.” Towards that end, it supported murderous regimes in Guatemala and El Salvador, while it worked to force the leftist Sandinistas from power in Nicaragua. It drew Honduras into these regional conflicts and secured its compliant support by lavishing cash assistance on its repressive military. All of these actions have had negative consequences that continue to reverberate in the region. It is beyond the scope of this article to provide an extensively detailed description of US interventions, but the summaries below provide a distillation of undisputed facts regarding US involvement and their consequences.

**Guatemala**

Guatemala has “long had one of the most unequal distributions of resources and capital in the world” (InSight Crime Guatemala n.d.). Its indigenous Mayan population has been
“marginalized socially and politically” since the Spanish conquest, and Guatemala’s treatment of its indigenous population has been compared to South Africa’s apartheid (ibid.). Historically, efforts at reform have been met with unbridled repression.

US government involvement in Guatemala can be traced to 1954 when it orchestrated the overthrow of the democratically-elected Guatemalan President, Jacobo Arbenz Guzman (Gibney 1997). Arbenz had drawn the wrath of the US government for implementing a policy of agrarian reform in which the Guatemalan government “expropriate[d] unused land from large landholders” in exchange for government bonds (ibid., 83-84). The United Fruit Company, a US company, which had been operating in Guatemala since 1870 and reaping huge benefits, was not pleased with the new land reform law. The United States subsequently cut off aid to Guatemala and then funded and trained a mercenary force to depose Arbenz (ibid., 82-85).

The overthrow of Arbenz started a “cycle of government-sponsored violence and repression” against Guatemalan citizens in which the United States was complicit (Rohter 1996). Guatemala was the first country in Latin America to experience death squads and disappearances, and “US military advisers were involved in the formation of the death squads, and the head of the US military mission publicly justified their operation” (Jonas 1996, 147).

The coup that unseated Arbenz, and the government repression that followed, were the precursors to the decades-long Guatemalan civil war. Guerrilla forces from the Guatemalan National Revolutionary Union (Unidad Revolucionaria Nacional Guatemalteca (URNG)) fought with the objective of transforming the economic, social, and political systems which had left the mostly indigenous population impoverished and virtually disenfranchised. During that conflict, government security forces committed massive human rights violations, including genocide against the indigenous population, who were perceived as supporting the URNG (Chamarbagwala and Morán 2008). Over 200,000 to 250,000 Guatemalans — many of them Mayan — were killed or disappeared, and more than a million people were displaced (Musalo et al. 2010, 181). State security forces used torture, sexual violence, and violence against women as a strategy of war (ibid., 181).

Beginning in 1966, the United States provided hundreds of millions of dollars in assistance to Guatemala. When reported human rights violations became so egregious that the US government could not openly continue to support the Guatemalan government, it continued its support clandestinely from 1977 to 1983 (Gibney 1997, 80).

When the conflict ended, the URNG was left with very little bargaining power, because the military had essentially won the war. There were no meaningful economic or social transformations, amnesty for war crimes was enacted, and the perpetrators of gross human rights violations during the conflict “remained in the communities and held powerful positions in the government” (Cruz 2011, 15). The failure to purge such violent actors during this transition is a contributing factor to the high levels of crime and corruption that exist today.

20 United Fruit had “unlimited use of much of the country’s best land, complete access to Guatemala’s resources, exemption from nearly all taxes and duties, and unlimited profit remittances” (Gibney 1997, 82).
The US role in undermining democracy by its orchestration of the coup against Arbenz and its support for the Guatemalan military are sobering realities. We do not purport to draw a straight line of causation between these interventions and current conditions of violence, inequality, and social exclusion that prevail in Guatemala. However, there is no doubt that US actions caused untold suffering and setbacks to the struggle for justice and democracy; one can only speculate what Guatemala would be like today if the US government had not forced Arbenz out of office or supported the repressive Guatemalan military during the country’s civil war.

Writing in 1997, well before the current migrant surge, Gibney asked whether “the United States Government bears some responsibility for Guatemala’s decades of horror, and whether American involvement . . . should prompt special measures to help the Guatemalan people achieve some measure of peace, security, and justice” (Gibney 1997, 79). His questions remain valid today, with a slight rewording: To what degree does the United States have a moral obligation to provide protection to those who flee the contemporary violence, inequality and deprivation in Guatemala — conditions which the US government helped create through its misguided and self-interested intervention?

**El Salvador**

El Salvador went through a brutal 12-year civil war that ended with the signing of peace accords in January 1992. The civil war was fought to throw off decades of economic inequality and exploitation suffered by the majority of the population at the hands of an elite oligarchy whose will was enforced by state security forces. During the conflict between the Farabundo Martí National Liberation Front (FMLN) and the government, at least 75,000 people were killed, 7,000 were disappeared, and 500,000 were displaced (Bejarano 2002, 128; Castellano 2015, 70-71). The majority of these abuses were committed by the Salvadoran state.

The United States — beginning with the Carter Administration, but then continuing at a higher level under the Reagan administration — funded the military, despite incontrovertible evidence that it committed wide-scale human rights violations and war crimes. Among the many atrocities committed by military or paramilitary forces were the assassination of Archbishop Oscar Romero, the kidnapping, rape, and murder of four US churchwomen, and the killing of seven Jesuits, their housekeeper, and her daughter at the José Simeón Cañas Central American University (Universidad Centroamericana Simeon Cañas).

Violence during the war was extremely high; by late 1980, it was reported that 200 individuals were killed a week, and in early 1981 that number had jumped to 300 to 500 weekly. Notwithstanding its egregious human rights record, the US government continued to provide military assistance to the Salvadoran government, which by the end of the war had received more than five billion US dollars. The United States finally ended its support in 1989 following a change in US policy and a campaign led by Senator Joseph Moakley protesting human rights abuses in El Salvador (Howard 2007, 93-94).

The Salvadoran civil war ended in a stalemate between the FMLN and the military, with a negotiated peace accord. For the most part, the accords failed to address the economic
inequalities that had led to the conflict. Instead, pressure was in the opposite direction: elite Salvadoran interests, supported by the United States, successfully pushed for the adoption of neoliberal economic policies that led to greater poverty and marginalization among the Salvadoran population. These policies included “eliminating price controls, deregulating interest rates, and cutting public spending, especially in public services such as education and health care” (Moodie 2011, 42). The social exclusion resulting from economic inequality is a driver of migration, and, as discussed further below, is also a factor making youth more susceptible to recruitment into gangs and organized crime syndicates.

Although the accords did not address economic equality in a meaningful manner, they were “ambitious” in terms of reforms and democratization (Cruz 2011, 10-11). However, they fell short in implementation on these issues. As had occurred in Guatemala, a broad amnesty was enacted that prevented the prosecution of gross human rights violators. And as in Guatemala, individuals associated with military or paramilitary groups were able to incorporate into new institutions created after the accords, compromising the integrity of these bodies. The corruption and complicity of state security forces in criminal violence today can be partially explained by the infiltration of human rights violators and criminals into these institutions.

US intervention in El Salvador, and its virtually unwavering support for a brutal military, brings with it a considerable measure of moral culpability. Salvadoran society still bears the scars inflicted by the death and destruction of the conflict, and some have commented that the brutality and loss of life during the civil war normalized violence in the society and contributes to contemporary levels of violence.

US complicity in human rights violations is compounded by US pressure and advocacy for economic policies that denied the majority of Salvadorans an opportunity for self-determination and thwarted the creation of new social and economic arrangements. Twenty years after the end of the conflict, the evidence indicates that poverty, inequality, and resulting social exclusion continue to be the status quo. Acknowledgement of the US role in El Salvador, and its contribution to current conditions would be a constructive step in reconsidering US policies towards Salvadoran migrants.

**Honduras**

When Ronald Reagan assumed the US presidency in the early 1980s, the leftist Sandinistas in Nicaragua had forced from power dictator Anastasio Somoza, and the leftist FMLN was battling the Salvadoran state to determine the destiny of the country. The incoming Reagan administration, with an anti-Communist fervor, was determined to see the FMLN defeated and to “rollback” the revolution in Nicaragua (Shepherd 1984, 112).

Honduras, with its strategic location at the northern border of Nicaragua, became the “launchpad” for the US military intervention in the region (Shepherd 1984, 113). Based in and operated from Honduras, the United States recruited, trained, and funded “contra” forces to attempt to destabilize Nicaragua (ibid., 114-15). The United States also drew Honduran forces into the conflict in El Salvador; US military advisors trained Salvadoran military troops in Honduras. Through these and other measures, Honduras became central to “US counterrevolutionary strategy in Central America” (ibid., 115).
In exchange for undertaking this role, US military aid to Honduras “increased more than tenfold” under the Reagan administration (Shepherd 1984, 116). So intent was the United States on fighting “what it considered a burgeoning communist threat” that it paid a known international drug trafficker, Juan Ramon Matta Ballesteros, to use his “air fleet to get aid and weapons to the Contras” (InSight Crime Honduras n.d.). US policy, and its strengthening of the Honduran military, had an economically harmful and politically destabilizing impact on Honduras. “[D]emocratic institutions and practices [were] undermined” (Shepherd 1984, 135), and there was an “enormous increase in military influence” (Cruz 2011, 11). This rise in influence was “problematic” given that, by the “mid-1980s, the military [in Honduras] were not only responsible for human rights abuses; they were also involved in the growing drug-trafficking rings” (ibid., 17-18).

Subsequent efforts to remove these criminal elements from security institutions had limited success, and similar to what occurred in Guatemala and El Salvador, the criminal elements remained in state institutions where they have had a corrupting influence and continue to contribute to the violence and criminality Honduras is experiencing today. Honduras’ police force is considered one of the most corrupt in the region (InSight Crime Honduras n.d.). Reports have documented the “existence of death squads within the police” (Cruz 2011, 22) as well as the murder of “hundreds of street children and suspected gang members” by so-called “cleansing groups associated with the police” (ibid., 23).

Honduras experienced a coup in 2009. Its democratically elected president, Manual Zelaya, was forced out of office and into exile (Meyer 2013, 3-4). Roberto Micheletti was named by the Honduran Congress to complete Zelaya’s term (ibid., 2). Although US policy in the aftermath of the coup that forcibly removed Zelaya was initially appropriate with condemnation and a series of sanctions, it ultimately softened (ibid., 9-10). Some commentators have attributed this shift to the influence of the US Republican Party which aggressively took up Micheletti’s cause, with 17 Republican senators sending a letter to then Secretary of State Hilary Clinton urging the administration to “overhaul its position on Honduras” (Legler 2010, 609-10).

The human rights situation in Honduras worsened after the coup. The Inter-American Commission on Human Rights found “serious violations of human rights” during Micheletti’s rule (Meyer 2013, 4). There was also an increase in violence against “journalists and political and social activists” (ibid., 18) that continued into the term of President Porfirio Lobo Sosa in 2013 (ibid., 2). The “exacerbated” instability in the country had other negative consequences; “Colombian drug trafficking gangs changed their routes to Honduras . . . just days after the coup and turned it into the principal handover point for cocaine to Mexican cartels” (InSight Crime Honduras n.d.).

As with Guatemala and El Salvador, US interventions in Honduras have been less frequently motivated by lofty ideals, than by shortsighted self-interest. The strengthening of a repressive and corrupt military in Honduras, and the softening of opposition to the 2009 coup have directly contributed to the current situation in Honduras. US responsibility
Seeking a Rational Approach to a Regional Refugee Crisis

for its past actions should inform its response to those who suffer the consequences. But instead of recognizing that, and acting accordingly, the United States has instead contributed training and funding to Honduras Special Forces to prevent the children who are victims of the current circumstances from migrating to safety (Musalo et al. 2015, 125). Although these operations to stop migration have been presented as child protection measures, they are “in reality . . . migration control” measures (ibid., 125). By militarizing the Honduran border, they have made children more vulnerable, and have “obscure[d] the structural causes [behind] migration of children and adolescents” (ibid., 125).

2. Recent History and Its Implications for Criminal Violence

The section above discusses the recent history of the Northern Triangle countries to expose the role of the United States in contributing to the conditions that exist in the region and to raise questions regarding the concomitant US moral responsibilities. An examination of the recent history — with a focus on post-conflict transitions — also sheds light on why El Salvador, Guatemala, and Honduras have been especially fertile ground for the explosion of criminal violence — while a country like Nicaragua has not.

In two compelling articles, Jose Miguel Cruz has pointed to a key distinction between the Northern Triangle countries and Nicaragua (Cruz 2011; Cruz 2015). The four countries have a lot of similarities; all four countries experienced civil conflict and/or repressive military regimes and currently experience high levels of poverty and inequality. Despite these similarities, what distinguishes the Northern Triangle countries from Nicaragua is their post-conflict/post-military regime transitions. In El Salvador, Guatemala, and Honduras, the post-conflict transitions did not remove corrupt and violent state actors or effectively prevent them from incorporating into newly formed “democratic” institutions (Cruz 2011, 14-18). In stark contrast, in Nicaragua, violent state actors were never incorporated into post-conflict state institutions. There was an effective purging of those elements from the dictatorial Somoza regime.

The flawed transitions of the Northern Triangle countries prevented the new security institutions from fulfilling their intended role of strengthening the rule of law. The incorporation of violent and/or criminal holdovers — “violent entrepreneurs” as Cruz calls them — undermined the institutions and contributed to the high levels of corruption and complicity with criminal enterprises which characterize the governments of all three Northern Triangle countries. The strong presence of these unsavory elements from prior regimes has had a secondary — but equally pernicious effect: namely that citizens in the Northern Triangle countries lack trust in the police and related security forces. They do not report crime, which, among other factors, contributes to the perpetuation of impunity.

Nicaragua stands in stark contrast to El Salvador, Guatemala, and Honduras.22 As a result of the Sandinista revolution and its aftermath, the repressive elements of the prior Somoza regime were more fully rooted out (Cruz 2011, 19-21). Although Nicaragua is the second

22 Although the authors note that Nicaragua has not faced the same level of violence country-wide, this does not mean that individuals from Nicaragua do not raise protection needs. Rather, individuals from Nicaragua do continue to raise meritorious refugee and asylum claims when targeted on account of protected grounds in specific situations.
poorest country in the hemisphere (second only to Haiti), it has not been plagued by high levels of violent crime; its homicide rate has been relatively low compared to the Northern Triangle countries, and gangs and organized crime have not established themselves there. Furthermore, in Nicaragua, where efforts to remove violent and corrupt elements were more successful, citizens have notably greater confidence in their country’s law enforcement and are more likely to report crime, both of which contribute to significantly lower rates of criminal violence.23

Contrasting the situation in Nicaragua with those in El Salvador, Guatemala, and Honduras, helps illustrate how decades of US policy helped produce the current conditions that force migrants to flee from Northern Triangle countries.

Additionally, the United States undoubtedly bears significant responsibility for the dramatic spike in violence in the region via its deportation policies from the 1990s onward (Cruz 2011, 6-7). Notwithstanding the volatile and destabilized circumstances in each of the three Northern Triangle countries, the United States dramatically increased its deportations of gang members who had been raised in the United States — and became initiated into gangs while there — to Guatemala, Honduras, and El Salvador. These deportations directly “fed” into the burgeoning gang infrastructure simultaneously surfacing in Northern Triangle countries,” and led to the expansion and deep entrenchment of the transnational gangs there (de Waegh 2015).

3. The Push Factors

Numerous reports and articles detail the conditions in the Northern Triangle countries that drive migration. The following discussion is a brief overview of factors that are at the root cause of the migrant surge. Often, these will be intertwined, as vulnerable segments of society disproportionately suffer from multiple forms of violence and other social ills.

Societal Violence

Societal violence, including high levels of homicides, is a primary cause of migration. In its 2013 publication, the UN Office of Drugs and Crime reported Honduras as having the highest homicide rate globally (90.4 killings per 100,000), El Salvador the fourth highest (41.2 per 100,000), and Guatemala the fifth (39.9 per 100,000) (UNODC 2013, 24). The numbers have shifted since then, with El Salvador gaining the unenviable first place slot for highest homicide rate globally (Watts 2015). UNHCR found that 48 percent of children (UNHCR 2014, 6) and 60 percent of women cited societal violence as a principal reason for fleeing their home countries (UNHCR 2015b, 19). The data for Honduras and Guatemala show that the highest rates of migration are from the departments with the most elevated homicide rates.24

23 When asked whether the police protect against crime or are involved in crime, “65.9 percent of Guatemalans, 48.8 percent of Salvadorans and 47.2 percent of Hondurans said that the police were implicated in criminal activities. In Nicaragua…only 25.1 percent of people saw their police as involved in crime” (Cruz 2011, 24-25).
24 For Honduras those departments are Cortés, Francisco Morazán, Atlántida, Yoro, Comayagua, Olancho, Colón, Copán, and Choluteca (Musalo et al. 2015, 89-90), while in Guatemala they are Guatemala, San Marcos, Huehuetenango, Quetzaltenango, and Jutiapa (ibid., 135).
Children and adolescents often make up a disproportionate number of homicide victims. In El Salvador, over the past ten years, the murder rate for young people between 18 and 30 has been twice the national level, and those most affected by violence are 15 to 19 years old (Musalo et al. 2015, 175). In Honduras, the homicide rate among males between the ages of 20 and 34 was triple the national level, topping 300 per 100,000 (InSight Crime Honduras n.d.).

The killings of women, including gender-motivated killings, or “femicides/feminicides” has also been extraordinarily high in the Northern Triangle countries. From 2007 to 2012, El Salvador was ranked number one, Honduras number two, and Guatemala number four (GDAVD 2015, 94).

The growth of gangs has been a significant contributing factor to increased levels of violence (GAO 2015, 4). The UN Office on Drugs and Crime estimates that there are 54,000 gang members in the Northern Triangle countries, with 20,000 in El Salvador, 12,000 in Honduras, and 22,000 in Guatemala (UNODC 2012, 29). Given that El Salvador’s population is substantially smaller, in relation to the other two countries, at 20,000 gang members, El Salvador had “the highest concentration, with some 323 mareros (gang members) for every 100,000 citizens, double the level of Guatemala and Honduras” (Seelke 2014, 3).

Organized crime networks have also penetrated the region, adding to the levels of violence. The Northern Triangle countries have the “misfortune” of being situated in the route “connecting the world’s largest drug-producing countries in South America with the world’s largest consumer of illicit drugs, the United States” (Stinchcomb and Hershberger 2014, 23). Moreover, anti-drug trafficking initiatives in Colombia and Mexico have caused drug traffickers to change their routes. These route changes have had a disastrous impact on the Northern Triangle countries as Mexican and Colombian drug cartels are now fighting for control of “land and maritime routes and enlisting, to varying degrees, the support of less sophisticated street gangs” (ibid., 23).

As discussed in section II above, flawed transitions which allowed the incorporation of corrupt state actors into new state institutions have contributed greatly to the criminality and levels of violence in the Northern Triangle countries. State actors have been found to support the gangs or to be complicit in their actions. As a consequence, it is extremely difficult for victims to find recourse against criminal elements through reporting to the police force or government of their own countries. When unable to find safety within their home countries, victims are migrating to countries where they believe they will be safe. An additional factor — one also linked to US policy — was the large-scale deportation of gang members from the United States to Northern Triangle countries, as discussed above.

**Violence within the Home**

In addition to societal violence, there are high levels of violence against women and children within the home. Domestic violence is prevalent and widely tolerated. Although rates are difficult to discern due to rampant underreporting and the failure of governments to collect data, there is no doubt the numbers are high (Hermansdorfer 2012; Cárcamo 2011; Bayona 2013; Nájera 2012). In Honduras, for example, three-quarters of over 16,000 violence
against women complaints filed were based on intimate partner and familial violence (Manjoo 2015). The United Nations, moreover, has estimated that around 50 percent of femicides/feminicides are the result of escalating intimate partner violence (UNODC 2012). While all three countries have enacted laws to prevent and punish violence against women, implementation and enforcement of these laws has been limited, and they have yet to bring down the prevalence of violence or the impunity enjoyed by its perpetrators.

Children are also victims of violence within the home. Corporal punishment is accepted, and often takes the form of brutal physical abuse (Musalo et al. 2015, 66-69, 81, 135, 161). Incest is also extremely common and generally underreported; among other ills, it has contributed to high levels of adolescent pregnancies (Musalo et al. 2015, iii, viii, 179).

Children are also subjected to forced labor, or trafficked for sexual exploitation. Many are abandoned by parents or extended family that do not have the means to care for them. All three Northern Triangle countries have enacted extensive child protection laws. However,
as is the situation with laws addressing violence against women, there is a wide breach between what the laws provide for, and what they have actually accomplished in terms of protecting children from harm or punishing those who violate the rights of children (see Musalo et al. 2015, 116, 150-52,169-70).

Poverty, Inequality and the Resulting Social Exclusion

The Northern Triangle countries have some of the highest levels of poverty in the Western Hemisphere (Stinchcomb and Hershberger 2014, 16). In 2011, the World Bank reported that “more than 60 percent of Hondurans, more than 50 percent of Guatemalans, and 30 percent of Salvadorean live below the poverty line” (GAO 2015, 2). The poverty is combined with extreme economic inequalities (GAO 2015, 2-3). The top 20 percent of the population of the three countries receives more than 50 percent of the income (GAO 2015, 3).

History provides some explanation for these extreme levels of poverty and inequality; they are — to some degree — the “legacies of centuries old oligarchic rule [and] decades of civil war[,]” as described in section II above (Stinchcomb and Hershberger 2014, 16). In the Northern Triangle countries hurricanes, earthquakes, floods, volcanic eruptions, and landslides add to the poverty and economic inequalities that traverse the region (see Wisner et al. 2004).

Recent reports focusing on child migration from the Northern Triangle countries and its root causes have noted that social exclusion deprives children of the most basic necessities, such as access to housing, education, food, and health care (Musalo et al. 2015, 80-81; 129-130; 169-170). Certain segments of the population may be more affected by the deep poverty; for example, in Guatemala almost 42 percent of children suffer from chronic malnutrition, but in the northwest highlands, which has a large indigenous population, the malnutrition rate is almost 65 percent (ibid., 13). This desperate poverty prompts many children to migrate in search of a home where they might have their basic needs met.

III. A Repeat of the Past: US Policy towards Salvadorans and Guatemalans in the 1980s

In the 1980s when many Salvadorans and Guatemalans were fleeing their countries’ brutal civil wars, the United States did its best to prevent them from reaching our borders. The US government’s response to those who did manage to arrive was to discourage them from...
making claims to asylum, and when asylum applications were filed, to deny the claims at record rates. This was later rectified after litigation. Now, instead of learning from them, the US policies of the past appear to be the script for its current policies.

1. Constructive Refoulement

As discussed in section I, the United States has engaged in constructive *refoulement* by pressuring the Mexican government to prevent Central American asylum seekers from reaching the southern border with Mexico. As the statistics demonstrate, Mexico has complied, showing a substantial increase in its deportation of migrants from Central America.

This approach is a page from US policy during the Central American refugee crisis of the 1980s. As detailed in Bill Frelick’s seminal article, “Running the Gauntlet: The Central American Journey in Mexico,” the United States engaged in constructive *refoulement* during that earlier period too, by engaging in policies intended to “interdict Central Americans before they ever reached the US border” (Frelick 1991, 211).

Frelick’s article quotes from an internal Immigration and Naturalization Service (INS) memo, which details how it would “[p]ress the State Department and . . . INS liaison to secure the assistance of Mexico and Central American countries to slow down the flow of illegal aliens into the United States” (Frelick 1991, 211). In addition to the INS and State Department, the Central Intelligence Agency (CIA) and the Defense Intelligence Agency were also involved. Interdiction of fleeing Central Americans was accomplished through shared intelligence and increased enforcement along the migration corridor.

Statistics demonstrated the relative “success” of this strategy, with parallels to the present day. The numbers of Salvadorans, Guatemalans, and Hondurans apprehended in the United States went down, while the number of apprehensions and deportations in Mexico went up. Between January 1989 and July 1990 Mexico summarily deported 165,000 Central American migrants, pushing them over the border to Guatemala. At this time the United States could not even hide behind the pretense that the migrants had been given the opportunity to seek protection in Mexico because Mexico was not yet a signatory to the 1951 Refugee Convention or its 1967 Protocol, and “[t]he status of refugee, as defined in international agreements, [did] not exist under Mexican law” (Friedland and Rodriguez y Rodriguez 1987, 53-55).

2. Deter and Discourage

Deterrence policies of today also mirror those implemented in the 1980s and 1990s. For example, the 1989 INS initiative dubbed “Operation Hold the Line,” which consisted of increased border enforcement and expedited proceedings had as its objective “detention and quick deportation[.]” One of its explicit objectives was to deter Central American migration (Frelick 1991, 210-211). Similarly, the current policy of detaining women and children in remote detention facilities — not easily accessible to attorneys — coupled with
policies that accelerate their court proceedings\textsuperscript{29} are intended to deter other migrants from coming to the United States.

Policies implemented in that time period went beyond deterring arrival; similar to what we see in the failures of expedited removal, discussed in section I, the legacy INS of the 1980s also engaged in actions intended to prevent the filing of claims for asylum for those who had reached the United States. These coercive INS policies were successfully challenged in a class action lawsuit on behalf of Salvadoran asylum seekers. The result was the issuance of a permanent injunction, under which the US Immigration and Naturalization Service (INS) was enjoined from forcing detainees to sign voluntary departure agreements, required to notify detainees of their rights to political asylum and to representation by counsel, and enjoined from transferring detainees who had secured attorneys to different detention centers.\textsuperscript{30} The injunction was renewed in 2007 and 2009, and was more recently invoked on behalf of Salvadoran children who are part of the migrant surge.

3. Deny Protection

Salvadorans and Guatemalans seeking asylum in the 1980s were fleeing brutal civil wars in which — as has been documented — the clear majority of the human rights violations were committed by state actors rather than the guerrilla forces. In the case of Guatemala, the state engaged in genocide against its indigenous population. The killings, disappearances, and torture perpetrated by the governments of El Salvador and Guatemala were not random, but were targeted against actual (or perceived) political opponents — arguably bringing the individuals fleeing these practices within the ambit of the 1980 Refugee Act’s protection. Notwithstanding the horrific level of abuses, and the apparent nexus between the acts of persecution and the victims’ political opinions, the asylum grant rates for Salvadorans and Guatemalan during that time period were abysmally low, hovering below three percent (Gzesh 2006).

One need not look far for a number of explanations for these shamefully low grant rates. Perhaps foremost is the fact that the United States was a major supporter of the Salvadoran and Guatemalan governments, and it would not look good to implicitly admit — through the granting of asylum -- that US allies’ military efforts, which we were funding, resulted in persecution of their citizenry. Secondly, the proximity of these countries to the United States via a land route most likely raised fears of that if protection were awarded to some, others would follow.

The clear appearance of adjudicatory bias against Salvadorans and Guatemalans in the 1980s, demonstrated by the persistently low asylum grant rates, led to a nationwide class action lawsuit against the then-INS. American Baptist Churches v. Thornburgh (ABC) alleged a pattern and practice of discrimination in the adjudication of Salvadoran and Guatemalan claims for asylum and withholding of removal. The plaintiffs were engaged in extensive discovery when the INS chose to settle the case rather than to go forward with

\textsuperscript{29} These kind of expedited proceedings have been used against other disfavored nationality groups; the so-called “Haitian program” of 1978 was “designed specifically to adjudicate, and to deny as quickly as possible the asylum claims of Haitians” (Little 1983, 273).

\textsuperscript{30} Orantes-Hernandez v. Thornburgh, 919 F. 2d 549 (9th Cir. 1990).
litigation. A central aspect of the settlement was the INS’s agreement to re-adjudicate the asylum and withholding of removal claims of every Salvadoran and Guatemalan class member whose case had been denied.

The settlement agreement is instructive in its core admissions. It states in relevant part:

[F]oreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; the fact that an individual is from a country whose government the United States supports is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; whether or not the United States Government agrees with the political or ideological beliefs of the individual is not relevant to the determination of whether an applicant has a well-founded fear of persecution; the same standard for determining whether or not an applicant has a well-founded fear of persecution applies to Salvadorans and Guatemalans as applies to all other nationalities.\textsuperscript{31}

Although the contemporary rejection of claims from Salvadorans, Guatemalans, and Hondurans lacks the clear foreign policy motivations that led to \textit{ABC v. Thornburgh}, there are several parallels between the experiences of Central Americans during the 1980s and today that are worth noting.

First, during both time periods, the levels of violence and human suffering in the region have been indisputable. Second, efforts to deter rather than protect bona fide asylum seekers have characterized the policies undertaken. Third, and perhaps most significantly, there have been dramatically divergent views on the proper interpretation of the refugee definition.

During the 1980s, asylum advocates argued that interpretations of the law should be informed more by humanitarian ideals than by restrictionist objectives. Whether it was around issues of burden of proof,\textsuperscript{32} or the meaning of “political opinion,” they argued against rigid constructions and formalisms that would result in a denial of protection to those at great risk. Although asylum advocates won many cases, they were unable to prevent interpretations of the refugee definition that have had an extremely limiting impact on the parameters of protection.\textsuperscript{33}

These limiting interpretations have continued, and — as in earlier times — appear to be less motivated by principled decision-making than by a desire to shut the door on certain kinds of claims, such as gender-based claims and claims arising from Central America. For instance, it has long been recognized that the “particular social group” ground in the refugee definition can be applied to protect persecuted groups not covered by the other four

\textsuperscript{33} It is beyond the scope of this article to discuss the many junctures at which US law adopted definitions which diverged from international norms and severely limited protection. One example would be the US Supreme Court’s ruling that “on account of” requires proof of persecutor’s motivation (\textit{I.N.S. v. Elias-Zacarias}, 502 U.S. 478 (1992)). Another example would be the US Supreme Court’s ruling that the risk and severity of persecution need not be balanced against the gravity of a crime committed, when applying the “serious non-political crime” bar to asylum and withholding (\textit{I.N.S. v. Aguirre-Aguirre}, 526 U.S. 415 (1999).
protected grounds. In a departure from prior precedent, as well as international guidance — the requirements for establishing a cognizable particular social group (PSG) have been modified, making it much more difficult to prove these claims.\textsuperscript{34}

The majority of claims from the Northern Triangle countries are based on the PSG ground of the refugee definition. Protection in these cases has been greatly restricted as a result of the social distinction and particularity requirements.\textsuperscript{35}

Until recently, a restrictive interpretive approach also characterized decision-making around claims for asylum based on domestic violence. The jurisprudence took a wrong turn back in 1999, with the BIA reversing an IJ’s grant of asylum to a Guatemalan woman who had fled brutal domestic violence.\textsuperscript{36} At that time, the outgoing Clinton administration attempted to set the law on the right track, proposing positive regulations in 2000, and vacating the \textit{R-A-} decision in 2001 (Musalo 2010). Notwithstanding these measures, it took a legal battle of more than 15 years to obtain a precedent decision, \textit{Matter of A-R-C-G-}, establishing that women fleeing domestic violence come within the refugee definition.\textsuperscript{37} Adjudicators continue to resist the application of this precedent, which has resulted in arbitrary and inconsistent decision-making (Bookey 2016, 19). Although the domestic violence claims are not unique to Central America, they make up a significant percentage of the surge cases. It is one bright spot in a somewhat bleak landscape that there is positive jurisprudence applicable to these claims, given their prevalence among Central American claims.

\section*{IV. Recommendations for US Policy}

The Obama Administration’s deterrence-based approach to Central American refugees ignored the reality of the humanitarian crisis south of the US-Mexico border and violates US international and domestic legal obligations. Aggressive deterrence tactics have failed to address the root causes of migration — as reflected in heightened numbers of women and children from the Northern Triangle who continue to arrive — while leading to serious human rights abuses against bona fide asylum seekers. This faulty response also

\textsuperscript{34} \textit{Matter of Acosta}, the landmark 1985 ruling defining particular social group (PSG), required that the characteristics defining the group be “immutable or fundamental.” Beginning in 2006, and without explanation, the BIA imposed the additional requirements of “social visibility” and “particularity” which made claims based on PSG much more difficult to establish (Musalo et al. 2011, 616-617). The incorporation of these new requirements has been frequently criticized (see Nestrud 2012), but the BIA position has been upheld by many circuit courts of appeals (\textit{Castillo-Arias v. US Atty’y Gen.}, 445 F.3d 1190 (11\textsuperscript{th} Cir. 2006); \textit{Orellana-Monson v. Holder}, 685 F.3d 511 (5\textsuperscript{th} Cir. 2012)).

\textsuperscript{35} \textit{Matter of S-E-G-}, 24 I&N Dec. 579 (BIA 2008) (holding that neither youth who refused recruitment into a gang nor their family members constitute a particular social group); \textit{Matter of E-A-G-}, 24 I&N Dec. 591 (BIA 2008) (holding that membership in a criminal gang cannot constitute membership in a particular social group); \textit{Matter of M-E-V-G-}, 26 I&N Dec. 227 (BIA 2014) (holding that an “immutable characteristic” must meet the requirement of “particularity” and “social distinction” to ensure that the proposed social group is perceived as a distinct and discrete group by society, although this does not require literal or “ocular” visibility); \textit{Matter of W-G-R-}, 26 I&N Dec. 208 (BIA 2014) (holding that former members of a particular gang who have renounced their gang membership does not qualify as a particular social group because the designation lacks particularity and is also too broad and subjective).

\textsuperscript{36} \textit{Matter of R-A-}, 22 I. & N. Dec. 906 (BIA 1999)

contravenes the United States’ moral duty to address its historical role in the Northern Triangle’s humanitarian crisis, as well as its moral leadership in refugee and human rights protection. We recommend that the United States immediately take the following steps:

- **Recognize the humanitarian crisis occurring within the Northern Triangle countries and the legitimate need of individuals from these countries for refugee protection.** The United States should immediately recognize those fleeing from El Salvador, Honduras, and Guatemala as a refugee population and tailor all policies in accordance with a protection-based approach, informed by humanitarian principles and domestic and international refugee obligations. Failure to do so has led to a raft of misinformed, abusive policies by US authorities as well as law enforcement officials in Mexico and Central America. Taken together, such policies violate myriad rights of refugees, including their fundamental right to *non-refoulement*. US government action must reflect rather than contravene the internationally- and domestically-recognized right of individuals to seek asylum.

- **Cease funding enforcement efforts aimed at stopping the flow of refugees through Mexico and the Northern Triangle countries, and shift funding to protection efforts.** The US government should immediately cease funding, training, and encouraging the governments of Mexico, Honduras, El Salvador, and Guatemala to interdict asylum seekers. Aggressive enforcement action preventing refugees from journeying north to seek protection risks the return of migrant children and families to persecution or torture. Funding that promotes military and police action against bona fide asylum seekers should end entirely. Funding for immigration authorities should shift to support the capacity of Mexico and other countries to screen migrants for protection needs and vulnerabilities and to strengthen countries’ asylum systems, including the provision of full due process protections.

- **End family detention.** DHS must immediately cease its inhumane and misguided deterrence strategy of locking away asylum seeker children and their parents in family detention. There is simply no humane way to incarcerate refugee children. Depriving children of their liberty in remote, for-profit, prison-like detention centers is both morally repugnant and illegal. Numerous studies have shown alternatives to detention to be effective in ensuring appearance at court hearings (Noferi 2015; MRS USCCB and CMS 2015). Family detention serves no legitimate purpose — it has not in fact deterred refugee families from fleeing for their lives — and has caused direct harm to children’s mental, emotional, and physical wellbeing.

- **End raids of Central American families and children.** Raids of Central American families and children have terrorized immigrant communities, spreading fear, misinformation, and trauma. As a result of raids, immigrant children and trauma survivors have even ceased seeking medical treatment and attending school. The raids raise serious constitutional concerns and have also resulted in the return of bona fide

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38 Alternatives to detention programs have extremely high rates of compliance. One study found that, from 2011 to 2013, 95 percent of participants in the “full-service” program offered by the ICE Intensive Supervision Appearance Program (ISAP) appeared at their scheduled removal hearings (Noferi 2015, 2). Additionally, a 2000 study by the Vera Institute of Justice found an 83 percent rate of full court appearance among asylum seekers found to have a credible fear via the expedited removal process (Noferi 2015).
asylum seekers who never had a chance to present their claims in court. DHS should cease these raids and focus limited law enforcement resources on more appropriate priorities for removal — not vulnerable mothers and children fleeing persecution.

- **End the use of expedited removal and reinstatement of removal against asylum seekers from Central America.** DHS should immediately cease using both expedited removal and reinstatement proceedings for all asylum seekers from Central America. Curtailed procedures are neither appropriate nor necessary in light of the humanitarian crisis in the region and the bona fide nature of asylum claims arising from El Salvador, Honduras, and Guatemala. Credible fear and reasonable fear screening processes are too flawed to permit meaningful screening for women and children fleeing persecution and thus using these processes results in *refoulement* of refugees in violation of law. To the extent that individuals lack meritorious claims, normal immigration procedures in immigration court can ensure removal of those with no relief. In particular, DHS should never subject children to expedited screening, even when they arrive with families. Child cases require an appropriate setting, adequate time, and heightened safeguards to ensure correct outcomes. Expedited removal of children arriving with families, by its very nature, provides none of these necessary protections.

- **Cease to accelerate immigration proceedings for unaccompanied children and adults with children, including asylum interviews of children.** Accelerating cases of vulnerable asylum seekers, and in particular families and unaccompanied children, places them at risk of removal to persecution and harm. “Rocket dockets” create serious barriers to obtaining counsel, particularly since many of the lawyers are representing clients on a pro bono basis, and impede the ability of those fortunate enough to find attorneys to adequately prepare their cases. The Executive Office for Immigration Review (EOIR) should cease to accelerate the initial court hearings of children and families and ensure that immigration judges grant appropriate continuances to individuals seeking counsel. In addition, US Citizenship and Immigration Services should not accelerate the asylum interviews of unaccompanied children unless requested to do so by the applicant (USCIS 2015). Children’s cases require careful development over time, as attorneys need to establish rapport and build trust, particularly with children who have suffered trauma or gender-based violence and are reluctant to reveal abuse to people they do not know well.

- **Analyze asylum claims in a manner consistent with international law and guidance on the proper definition of a refugee.** The United States should immediately and publicly clarify that claims based on violence by gangs and organized criminal syndicates may be a basis for asylum, and should cease adopting contrary positions before the federal courts and within its own agencies. As a matter of law, asylum determinations must be made on a case-by-case basis, and numerous courts have granted claims based on violence at the hands of criminal gangs. In addition, the administration should adopt positions in litigation and/or issue regulations that clarify asylum standards consistent with international law and guidance. This should include clarifying that membership in a particular social group requires only that members share an immutable or fundamental characteristic.
• **Expand and fund access to counsel for asylum seekers, and in particular Central American children and families.** The administration should expand funding for counsel for asylum seekers in general, and in particular for Central American children and families. Studies have shown that counsel is critical to the outcomes of asylum cases. Unaccompanied children with counsel are five times more likely to obtain asylum or other relief than unrepresented children; and families with counsel are fourteen times more likely to prevail than unrepresented families (TRAC 2015a; TRAC 2015b). Although we commend the Obama administration for having provided funding for many unaccompanied children in removal proceedings, the United States should increase the scope and scale of funded representation. Children, both unaccompanied and with families, should never be forced to defend themselves without counsel against a government attorney. In addition, in light of the complexity of asylum law, the defensive nature of immigration court proceedings, and the bona fide nature of claims from the region, the government should expand funding for asylum seekers from Central America in general.

• **Fund programs that address root causes of migration in El Salvador, Honduras, and Guatemala, and in particular those that ameliorate the social exclusion, lack of social support, and risk factors underlying violence and persecution.** Funding for the Northern Triangle countries has largely focused on law enforcement and military backing, such as through the Central America Regional Security Initiative (CARSI). This approach raises significant concerns due to well-documented human rights abuses committed by military and police. Moreover, security-based approaches by and large fail in the long-term because they address only the symptoms rather than the underlying conditions that allow violence and persecution to flourish. Funding should instead focus on diminishing poverty and its resulting social exclusion; increasing employment and educational opportunities; ameliorating existing societal inequality and discrimination; building community-based resources; strengthening child welfare protection systems; and improving judicial capacity and governmental transparency.

• **Improve, expand, and strengthen in-country refugee processing for individuals in Guatemala, Honduras, and El Salvador.** The United States should expand in-country processing for both adults and children in need of refugee protections in the Northern Triangle countries. In particular, it should expand the CAM Program to include any child who would meet the definition of a refugee, including children who do not have parents with legal status in the United States. All children in need of refugee protection — irrespective of their parents’ status — are vulnerable to serious abuse in the increasingly dangerous journey north through irregular channels. By excluding many of these children based on the immigration status of their parents, the CAM Program fails to address the protection needs of children in El Salvador, Honduras, and Guatemala. In addition, in-country processing for adults and families should be expanded. The recent expansion of the CAM Program and the collaborations with the government of Costa Rica, UNHCR, and IOM are encouraging developments; however, the US government should broaden refugee processing and protection in the region further.

• **Grant temporary protected status to individuals from Guatemala, Honduras, and El Salvador.** Although we urge the full recognition and protection of those fleeing persecution from the Northern Triangle as refugees through the above measures, DHS
should also enact temporary protections to ensure that no individuals are deported back to persecution. Specifically, the United States should designate the nationals of Guatemala, Honduras, and El Salvador for temporary protected status (TPS). TPS provides relief from the risk of immediate deportation as well as work authorization (although it does not provide a path to more permanent protection and benefits, as does asylum).\(^{39}\) Currently, some nationals of Honduras and El Salvador hold TPS, but only if they entered before 1999 and 2001, respectively. The administration should designate all three Northern Triangle countries for TPS status, including for recent entrants.

**REFERENCES**


\(^{39}\) DHS may designate a foreign country for TPS when civil strife or the effects of a natural disaster make it unsafe for nationals to return home. Once a person from a designated country has been granted TPS, he or she cannot be detained by DHS on the basis of his or her immigration status. A person with TPS may also obtain an employment authorization document and may be granted travel authorization. However, TPS is a temporary benefit that does not lead to lawful permanent resident status or provide any other immigration status. Once DHS deems the country conditions safe again the TPS will expire. See 8 U.S.C. 1254a.


Seeking a Rational Approach to a Regional Refugee Crisis


Executive Summary

Members of Congress have introduced numerous pieces of legislation in recent years related to refugees, asylum seekers, and other populations of migrants seeking protection in the United States. These bills were drafted in reaction to dramatic events within the United States, at its borders, and around the world. For example, roughly 400,000 children traveling alone and mothers with children have arrived at the southern US border since 2013, many seeking protection from organized crime, gang violence, and threats of human trafficking. Similarly, more than a million refugees from the Middle East, North Africa, and Asia sought to reach safety on the European continent in 2015 alone. Terrorist attacks fueled attempts to curtail the US commitment to offer protection to those fleeing persecution, even when those attacks had no connection to refugees or only tenuous links. And yet existing US law has been left virtually unchanged throughout this tumultuous period. This article describes the significant attempts to enact legislation related to refugees and international migrants since 2013 and examines the reasons why those attempts have not succeeded. It also describes American attitudes toward refugees and assesses whether those attitudes affected the fate of legislation.

I. Introduction

This paper documents and explores a conundrum: In an era of unprecedented and rising levels of forced migration, the politicization of humanitarian protection, and pervasive security concerns, US laws related to refugees, asylum seekers, and other forced migrants have remained largely unchanged.\(^2\)

Since 2013, members of Congress have introduced numerous bills related to refugees and other forced migrants, often in reaction to dramatic events within the United States, at its borders, and around the world. For example, roughly 400,000 children traveling alone and mothers with children, have arrived at the southern US border since 2013, most
seeking protection from organized crime, gang violence, and threats of human trafficking. Similarly, more than a million refugees from the Middle East, North Africa, and Asia sought to reach safety on the European continent in 2015 alone. Terrorist attacks fueled attempts to curtail the US commitment to offer protection to those fleeing persecution, even when those attacks had no connection to refugees or only tenuous links. And yet existing US law has remained fundamentally intact through this tumultuous period. This paper describes the significant attempts to enact legislation related to refugees and forced migrants since 2013 and examines the reasons why those attempts have not succeeded. It also describes American and global attitudes toward refugees and assesses whether those attitudes affected the fate of legislation.

II. 113th Congress: 2013–2014

A. Comprehensive Immigration Reform

On June 27, 2013, the US Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, commonly referred to by its Senate number, S.744. The bill attempted to comprehensively reform the nation’s immigration laws. It was the third time in under a decade that Congress attempted to enact such a broad revision of the immigration laws. The Senate vote was 68 yeas to 32 nays, with 14 Republicans joining 54 Democrats to support the bill. However, the House of Representatives declined to debate the bill during the 113th Congress (2013-2014), and it expired along with all other pending legislation at the end of 2014. Neither chamber of Congress attempted to pass substantial reform of the immigration system in the 114th Congress (2015-2016).

Most of the media coverage of S.744 addressed the Senate’s vigorous debates over a few key elements of the sprawling bill, including border security, the allocation of visas for lawful permanent residents (“green cards”), and a program to regularize the status of unauthorized immigrants. The public and the media paid scant attention to measures that would have vastly expanded protections for refugees, asylum seekers, and other populations seeking humanitarian protection in the United States. In fact, S.744 contained nearly two-dozen sections that, if enacted, would have facilitated the entry of refugees selected for resettlement in the United States, eased the burdens on asylum seekers arriving at ports of entry, and provided enhanced protections to children fleeing persecution or trafficking.

The majority of these sections were included in the original version of the bill, a package developed by the so-called “Gang of Eight,” which was composed of four Republican and four Democratic senators. Other humanitarian provisions were added to the bill during the executive business meetings (commonly called “markups”) of the Senate Committee on the Judiciary, where four of the eight “Gang” members served. While slight modifications were made to a few humanitarian sections in the committee markup, none were significantly

4 The Gang of Eight senators were Michael Bennet (D-CO), Richard J. Durbin (D-IL), Jeff Flake (R-AZ), Lindsey Graham (R-SC), John McCain (R-AZ), Robert Menendez (D-NJ), Marco Rubio (R-FL), and Charles Schumer (D-NY).
altered. A few of these sections survived attempts to strike them from the bill. The Judiciary Committee voted to report S.744, as amended, favorably to the full Senate on May 21, 2013 by a vote of 13 yeas to 5 nays, with three Republicans voting in favor.\(^5\)

Ironically, the Senate consideration of S.744 came close on the heels of the April 15, 2013 bombing at the finish line of the Boston Marathon. In the days following the bombing, initial reports suggested that the then-alleged attackers, Tamerlan and Dzhokhar Tsarnaev, were originally admitted to the United States as refugees, suggesting a failure of security screening. In fact, the Tsarnaev brothers were the sons of an asylee from Russia, an ethnic Chechen. Nonetheless, refugee and asylee advocates feared that inaccurate information and suspicions about the suspects would jeopardize the humanitarian provisions in the original bill.

In retrospect, it is remarkable that the refugee and other humanitarian provisions not only survived Senate deliberations, but that additional protective measures were added to the bill during the committee markup. Senate bill 744 was introduced on April 17, 2013, two days after the Boston bombing. The first Judiciary Committee hearing on S.744 took place just two days later, April 19, in the midst of intense dispatches from Boston. The committee convened just hours after one bombing suspect, Tamerlan Tsarnaev, died from gunshot wounds sustained during a shootout with police officers, and while an intense manhunt ensued for the surviving suspect, Dzhokhar Tsarnaev.

The Judiciary Committee began to hold hearings on the bill in May 2016, meeting several times that month to debate amendments to the legislation. The Boston bombing was referenced several times, and the committee voted to add a few amendments related to national security, but the bill’s momentum was not diminished by the attacks.

While S.744 was never enacted, its passage by the full Senate represents the closest that Congress has come to significantly modifying the nation’s refugee and asylum laws in more than a decade. Refugee-related bills introduced in the intervening years, such as the Refugee Protection Act,\(^6\) were considered in committee hearings, but did not receive committee votes or floor debate in either chamber of Congress.

1. **Refugee and Humanitarian Provisions in S.744**

The bipartisan Senate legislation, S.744, contained 23 sections related to refugees, asylum seekers, unaccompanied immigrant children, and other populations of international migrants. This number was extraordinary by comparison to the two prior attempts in recent history to enact comprehensive immigration reform legislation in the Senate, in 2006\(^7\) and 2007,\(^8\) both of which bills contained few refugee and asylum provisions. The last time the

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\(^6\) The Refugee Protection Act, S.3113, 111th Cong. (2010); S.1202 and H.R.2185, 112th Cong. (2011); S.645 and H.R.1365, 113th Cong. (2013); and S.3241 and H.R.5851, 114th Cong (2016). The lead Senate sponsor is Patrick Leahy (D-VT) and the lead House sponsor is Zoe Lofgren (D-CA).


\(^8\) S.1639, 110th Cong. (2007).
Congress enacted refugee and asylee legislation in a significant manner, in 1996, the result was to curb protections, not expand them.9

With S.744, most of the refugee and humanitarian sections were included in the introduced version of the bill. As noted above, most sections remained intact through the committee markup, and some additional humanitarian measures were added in those meetings. Where senators offered amendments in the committee markup to sharply curtail or to strike protections, the amendments failed. A few amendments added during the markup essentially restated current law or policy — for example, by codifying the existing background checks applied to refugee applicants10 and by strengthening the authority of the secretary of homeland security to terminate refugee or asylum status if the recipient of such status returns to their country of origin without good cause.11

Why was S.744 such a strong humanitarian bill? A few factors contributed to this outcome. First, the Gang of Eight included some senators who had strong records on refugee and humanitarian protection. Some favored refugee protection in general, such as Richard Durbin (D-IL) and Robert Menendez (D-NJ). Others, such as John McCain (R-AZ), supported certain populations who were targeted for persecution, including Afghans and Iraqis who experienced threats in their home countries after working for the US military or aid organizations. As the eight senators prepared the base bill for introduction, they drew a number of sections from existing legislation, such as the Refugee Protection Act, and included them in the package.12 While the Gang of Eight did not comment on its internal deliberations as it drafted the package, it chose to defend the base bill throughout Senate consideration. With four of the eight senators serving on the Judiciary Committee,13 and typically voting as a bloc on amendments, the bill emerged with few modifications to the humanitarian sections.

Specifically, S.744ES (the version that passed in the Senate) contained sections that addressed the following:

**a. Special Immigrant Visas for Iraqis and Afghans**

Congress created this category of visa in 2006 to provide lawful permanent residence in the United States to Iraqis and Afghans who assisted the US government in its missions in those nations. Senate bill 744 expanded the availability of the visas, imposed measures to ensure timely processing of applications, and provided a review process for those whose

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10 S.744, supra note 3 (amendment offered by Senator Dianne Feinstein [D-CA] [Feinstein3–MDM13397] and adopted by voice vote on May 20, 2016).
11 S.744, supra note 3 (amendment was offered by Senator Lindsay Graham [R-SC] [Graham1–DAV13389], modified by a second degree amendment offered by Senator Graham [MDM13651], and adopted by a voice vote on May 20, 2016).
12 See, e.g., Refugee Protection Act of 2013, supra note 6.
13 The members of the Gang of Eight who served on the Senate Judiciary Committee in the 113th Congress were Richard J. Durbin (D-IL), Jeff Flake (R-AZ), Lindsey Graham (R-SC), and Charles Schumer (D-NY).
applications were denied.\textsuperscript{14} (While S.744 did not become law, Congress enacted similarly worded sections in the National Defense Authorization Act for FY 2014\textsuperscript{15}).

\textbf{b. Protections for Asylum Seekers}

With limited exceptions, current law requires an asylum seeker to file an application for asylum within one year of arriving on US soil. The Senate bill repealed the filing deadline that is imposed on asylum seekers in the United States.\textsuperscript{16} It also proposed to move all initial adjudications of asylum applications to a non-adversarial interview process at US Citizenship and Immigration Services’ (USCIS) Asylum Office, rather than requiring certain applications to be adjudicated as a defense to deportation in the immigration courts.\textsuperscript{17} Finally, in a section added to the bill during markup, S.744 clarified that an applicant for asylum would be granted a work permit 180 days after the asylum application was filed.\textsuperscript{18} Currently, the issuance of a work permit can be delayed for a variety of reasons, including the long adjudication backlogs for both affirmative and defensive asylum applications. As a result, many asylum seekers struggle to support themselves and their families as they await a decision on their asylum application.

\textbf{c. Protections for Refugees}

The Senate bill contained a number of measures designed to improve access to protection in the United States for refugees selected overseas. It would have conferred authority on the president to designate certain populations as refugees, enabling the secretary of state to establish efficient processes for adjudicating their claims.\textsuperscript{19} This measure was modeled on existing authority, commonly referred to as the Lautenberg Amendment, which offers a similarly streamlined refugee status determination process for religious minorities, and certain other persecuted groups, from designated nations.\textsuperscript{20} The Senate bill also included sections to expand admission for refugee children, and children of children, who accompanied a family member to the United States;\textsuperscript{21} it would have allowed refugees to

\textsuperscript{14} S.744, \textit{supra} note 3, at §§ 2318-2319.
\textsuperscript{16} S.744, \textit{supra} note 3, at § 3401.
\textsuperscript{17} S.744, \textit{supra} note 3, at § 3404.
\textsuperscript{18} S.744, \textit{supra} note 3, at § 3412 (section added by an amendment offered by Senator Christopher Coons [D-DE]; the amendment, Coons8, DAV13356, was adopted by voice vote on May 20, 2013).
\textsuperscript{19} S.744, \textit{supra} note 3, at § 3403. This provision was cited periodically in debates among the Republican presidential candidates, as Senator Ted Cruz (R-TX) claimed that it would weaken security screening of refugees. In fact, all potential refugees selected through this program would be subject to the same security and background checks as required for traditional refugee processing. Senator Cruz implied that Senator Rubio’s support for the bill signified a weakness on national security, yet the section was part of the base bill, which received a bipartisan vote in the Judiciary Committee, and 68 votes in favor when considered by the full Senate.
\textsuperscript{21} S.744, \textit{supra} note 3, at § 3402.
be represented by counsel during the overseas processing of their applications; and it designated 5,000 visas to Tibetan refugees awaiting resettlement from India and Nepal. The Senate bill would have codified in law the series of background and security checks currently applied by the Department of Homeland Security (DHS) to screen refugee and asylum applicants. Finally, as a result of an amendment offered by Senator Graham of South Carolina, a member of the Gang of Eight, the bill would have authorized DHS to terminate the asylee or refugee status of a person who returned to their home country without good cause prior to adjusting to lawful permanent resident status in the United States. Cubans were exempted from this measure. 

\[d. Protection for Stateless Persons in the United States\]

Addressing a gap in current immigration law, S.744 would have created a process by which individuals in the United States who have no nationality could apply for conditional lawful status. The provision would be available only to those who are stateless through no fault of their own, such as a person who had a nationality previously, but lost it when their country of origin experienced a change in government, as when citizens of the Soviet Union were not recognized by successor states. The applicant would have also been required to pass national security and background checks.

\[e. Humanitarian Visas\]

The Senate bill increased the number of U visas available each year to immigrant victims of crime from 10,000 to 18,000. In a section added by an amendment during the committee markup, the bill also ensured that applicants for U visas, T visas (for trafficking victims), and protection under the Violence Against Women Act, would obtain work permits 180 days after filing an application if their claims were still being adjudicated.

\[f. Unaccompanied Immigrant Children\]

Current law offers certain protections and special processes for children under the age of

22 S.744, supra note 3, at § 3408.
23 S.744, supra note 3, at § 3410 (amendment offered by Senator Dianne Feinstein [D-CA] [Feinstein3—MDM13397] and adopted by a voice vote on May 20, 2016).
24 S.744, supra note 3, at § 3409 (amendment offered by Senator Dianne Feinstein [D-CA] [Feinstein4—MDM13398] and adopted by a voice vote on May 20, 2016).
25 S.744, supra note 3, at § 3411 (amendment offered by Senator Lindsay Graham [R-SC] [Graham1—DAV13389], modified by a second degree amendment offered by Senator Graham [MDM13651], and adopted by a voice vote on May 20, 2016).
26 The Senate consideration of S.744 took place 18 months prior to the statement by President Obama on December 17, 2014 that he intended to restore full diplomatic relations with Cuba. Full diplomatic ties were re-established on July 20, 2015.
29 S.744, supra note 3, at § 3407 (amendment offered by Senator Patrick Leahy [D-VT] [Leahy3—MRW13332], and adopted by a voice vote on May 20, 2016).
18 from non-contiguous countries (meaning all nations but Canada and Mexico) who arrive at a US border or other point of entry unaccompanied by a parent or guardian. A section was added to S.744 to pilot the use of child welfare professionals in assisting US Customs and Border Protection (CBP) to screen unaccompanied minors arriving at the US border for human trafficking or other abuses. The amendment was modified to require live training for CBP officials who might come into contact with unaccompanied immigrant children.30

For unaccompanied immigrant children apprehended in the United States, a section added to the bill would require a number of steps to be taken by DHS and the Department of Health and Human Services (DHHS) to enhance protections for the children. With regard to children who did not win a claim for humanitarian protection, it would establish a program to develop best practices for their safe repatriation.31

The Senate bill included a provision clarifying that the attorney general has authority to appoint legal representation for unaccompanied immigrant children and those with serious mental disabilities in certain deportation proceedings to help ensure that such proceedings are expeditious and cost-effective.32 An amendment to that section required DHS to provide a non-citizen who is subject to deportation with a complete copy of his or her Alien File (“A-file”) before commencing removal (deportation) proceedings.33

A section added to the bill during committee markup would transfer the administration of the unaccompanied alien children legal services program from DHHS to the Department of Justice’s (DOJ) Executive Office for Immigration Review.34

**g. Immigration Courts**

At the time S.744 was marked up, the backlog of all cases before the immigration courts was 344,230 (TRAC 2016b); it has since risen to nearly 500,000 (TRAC 2016a). The base bill contained a number of sections to reduce the backlog of cases before the immigration courts, to ensure that immigrants have full and fair access to due process, and to expand resources available to the immigration courts. It increased the number of immigration judge positions,35 codified existing practice for offering Legal Orientation Programs for detained immigrants in removal proceedings,36 and improved the training and reference
Refugee, Asylum, and Related Legislation in the US Congress

materials available to immigration judges. As noted above, a section primarily directed at immigrants’ access to counsel also mandated access to A-files for immigrants in removal proceedings.

2. Amendments Offered to S.744 but Defeated in Committee Markup

During the Judiciary Committee markup, Senator Charles Grassley (R-I) offered amendments to strike provisions of the bill designed to facilitate the process of applying for asylum in the United States. Specifically, one amendment would have (1) struck the full repeal of the one-year filing deadline for asylum applications and replaced it with a filing deadline of 2.5 years, and (2) struck language allowing all asylum seekers to initiate their claims through a non-adversarial process. The Grassley amendment was defeated by a vote of 6 yea to 12 nays. The four members of the Gang of Eight who served on the Judiciary Committee voted against the amendment, apparently as a result of their agreement to jointly defend the base bill.

Senator Grassley also offered an amendment to require the Director of National Intelligence (DNI) to submit to Congress a report on the investigation into the Boston Marathon. The amendment would have imposed a delay on the implementation of the sections described above (the full repeal of the one-year filing deadline, and the use of the non-adversarial process) for one year after the date that the DNI submitted the report. The Grassley amendment was defeated by a voice vote on May 20, 2013.

On May 21, 2013, the Judiciary Committee voted to favorably report S.744, as amended, to the full Senate. The vote was 13 yea to 5 nays, with all Democrats and three Republicans voting yea.

37 S.744, supra note 3, at § 3504-06.
38 S.744, supra note 3, at § 3502 (amendment offered by Senator Christopher Coons [D-DE], Coons5, DAV11374).
39 Senator Grassley offered amendment Grassley27A–ARM13551 in a Senate Judiciary Committee markup to S.744 on May 20, 2013; the text is available at https://www.judiciary.senate.gov/legislation/immigration.
40 The Grassley amendment was not agreed to by a roll call vote as follows (votes by proxy indicated with *): 6 Yeas, 12 Nays; Yeas: Feinstein (D-CA)*, Grassley (R-I), Hatch (R-UT)*, Sessions (R-AL)*, Cornyn (R-TX), Cruz (R-TX), Klobuchar (D-MN)*, Franken (D-MN), Coons (D-DE), Blumenthal (D-CT), Hirono (D-HI), Graham (R-SC), Lee (R-UT), Flake (R-AZ).
41 Senator Grassley offered amendment Grassley52–EAS13415 in a Senate Judiciary Committee markup to S.744 on May 20, 2013; the text is available at https://www.judiciary.senate.gov/legislation/immigration.
42 The Grassley amendment was not agreed to by a roll call vote as follows (votes by proxy indicated with *): 9 Yeas, 9 Nays; Yeas: Feinstein (D-CA)*, Grassley (R-I), Hatch (R-UT)*, Sessions (R-AL)*, Graham (R-SC), Cornyn (R-TX), Lee (R-UT), Cruz (R-TX)*, Flake (R-AZ). Nays: Leahy (D-VT), Schumer (D-NY), Durbin (D-IL), Whitehouse (D-RI), Klobuchar (D-MN)*, Franken (D-MN), Coons (D-DE), Blumenthal (D-CT), Hirono (D-HI).
43 The bill was reported favorably to the full Senate by a roll call of 13 to 5 as follows (votes by proxy indicated with *): Yeas: Leahy (D-VT), Feinstein (D-CA), Schumer (D-NY), Durbin (D-IL), Whitehouse (D-RI), Klobuchar (D-MN), Franken (D-MN), Coons (D-DE), Blumenthal (D-CT), Hirono (D-HI), Hatch (R-UT), Graham (R-SC), Flake (R-AZ). Nays: Grassley (R-I), Sessions (R-AL)*, Cornyn (R-TX), Lee (R-UT)*, Cruz (R-TX).
3. Floor Consideration of S.744

The full Senate began to debate S.744 in June 2013. Due to procedural disagreements between the majority and minority parties, very few amendments were considered and voted upon. As a result, the full Senate did not vote on any amendments related to refugee or humanitarian provisions.

On June 19 and June 20, 2013, Senator Mary Landrieu (D-LA) discussed an amendment she hoped to offer to S.744 related to unaccompanied immigrant children. The amendment would have required federal agencies and immigration courts to consider the best interests of the child in all proceedings and decisions concerning their immigration cases and potential repatriation.\textsuperscript{44} Senators Harry Reid (D-NV) and Patrick Leahy (D-VT) spoke in favor of the amendment.\textsuperscript{45} Senator Landrieu was not able to offer the amendment due to the procedural posture of the bill at that time, which would have required the unanimous consent of all senators for amendments to be offered and voted upon. Senators eventually agreed to vote on a so-called “border surge” amendment offered by Senators Bob Corker (R-TN) and John Hoeven (R-ND) but Senator Landrieu’s amendment was not included in it.\textsuperscript{46}

Senate bill 744 passed the full Senate by a vote of 68-32 on June 27, 2013, with 14 Republicans joining 54 Democrats to vote in favor of the bill.\textsuperscript{47} The House of Representatives declined to consider S.744 in the 113th Congress, and it expired at the end of the second session in 2014.

B. 2014: Unaccompanied Immigrant Children and Families with Children

For the decade leading up to 2011, the number of unaccompanied immigrant children (described above) arriving at US points of entry held steady between 6,000 and 8,000 per year. Starting in 2011, the number of children fleeing El Salvador, Guatemala, and Honduras (the Northern Triangle countries of Central America) increased dramatically and continued rising, reaching a peak of 68,000 children in 2014. The number of mothers with children arriving from Central America rose at similar levels, with an additional 68,000 individuals arriving at the US-Mexico border in 2014. In 2014, an additional 29,000 individuals applied for asylum in other Central American nations, such as Costa Rica, Nicaragua, and Panama, demonstrating that this population was not solely seeking protection in the United States (UNHCR 2016b).\textsuperscript{48} The United Nations High Commissioner for Refugees documented a 1,185 percent increase in the number of applications of asylum seekers from Northern


\textsuperscript{46} Senate amendment SA1183 to S.744, filed by Senators Bob Corker (R-TN) and John Hoeven (R-ND), 159 Cong. Rec. S5205-28 (daily ed. June 26, 2013) (vote tally of 69-29).


\textsuperscript{48} The number of individuals applying for asylum in Central American nations rose to 55,000 in 2015 (UNHCR 2016a).
Refugee, Asylum, and Related Legislation in the US Congress

Triangle countries filed in Mexico, Panama, Nicaragua, Costa Rica, and Belize between 2008 and 2014 (UNHCR 2014).

Legislation in the US Congress related to child migrants proliferated in response to the arriving children and families. In the summer of 2014, as the number of unaccompanied immigrant children and families with children arriving at the US-Mexico border sharply increased, the Obama administration requested emergency appropriations for border control, and for the detention and removal of the arriving migrants, most of whom sought asylum or other forms of humanitarian protection.

In a letter to Congress dated June 30, 2014, President Obama sought “additional authority to exercise discretion in processing the return and removal of unaccompanied minor children.”

Current law provides special screening for unaccompanied children from countries not contiguous to the United States in order to detect trafficking and other threats of harm. As a result, a child deemed to be unaccompanied is transferred to a federal agency, the Office of Refugee Resettlement, which provides care and custody, and seeks to reunify the child with a parent or responsible guardian in the United States. Unaccompanied immigrant children are typically placed in removal proceedings, but are not subject to the expedited removal processes that adults face when apprehended at the border without permission to enter the United States. Unaccompanied immigrant children may pursue humanitarian relief in the United States, such as asylum, visas for crime or trafficking visas, or a “Special Immigrant Juvenile Visa” created for abused, abandoned, or neglected immigrant children.

When President Obama sent a request to Congress on July 8, 2014, he asked for $3.7 billion in emergency appropriations, and noted that he would separately request legal authority “to exercise discretion in processing the return and removal of unaccompanied minor children from non-contiguous countries like Guatemala, Honduras, and El Salvador.” Refugee and child advocates interpreted this to mean that the president would ask Congress to modify current law so that unaccompanied immigrant children from non-contiguous countries would no longer be provided special screening and heightened protections, but would be quickly returned to their country of origin.

The response from Congress was mixed. Most Democrats rallied to preserve the protections in current law. For the most part, Republicans supported the proposed increase to border security, but expressed skepticism about the president’s desire to seek broader authority to expeditiously remove the children. On July 8, 2014, the press reported, “[T]he president was not backing away from a [June 30] request . . . for more flexibility in how enforcement agents treat the Central American migrants who are surging across the border (Shear and Peters 2014).

By mid-July 2014, members in both chambers of Congress introduced bills to curb the protections available to children arriving in the United States alone.\(^{52}\) Policymakers and advocates who favored current law rallied in opposition to any modification related to the children, arguing that a large percentage of the arriving population would win protection in the United States if they had a full and fair opportunity to pursue a claim. In the end, President Obama did not make a specific request to Congress to change the laws applying to unaccompanied immigrant children; rather, he reversed his position and opposed bills that threatened to do so.

After bickering within and between both parties and chambers of Congress throughout July 2014, the House considered an appropriations bill that would have curtailed the protections in current law for unaccompanied minors. The bill, H.R.5230, struck the special screening process for those children from non-contiguous countries and replaced it with an expedited process for holding hearings on the children’s immigration cases. The bill required immigration hearings to be held within seven days of the child being apprehended and deemed unaccompanied. Humanitarian protection advocates in Congress and the nonprofit sector criticized the expedited process as insufficient time for a child to understand how to navigate the immigration system, much less obtain legal counsel and prepare a case seeking humanitarian protection.\(^ {53} \) The White House threatened to veto the bill.\(^ {54} \) Its Statement of Administration Position declared, “This bill will undercut due process for vulnerable children which could result in their removal to life threatening situations in foreign countries.”\(^ {55} \)

The House voted to pass H.R.5230 on August 1, 2014, with a vote of 223 to 189. The political parties largely held their own members, with only one Democrat voting in favor of the bill, and four Republicans voting against it.\(^ {56} \) The Senate did not debate that bill, and no significant changes to refugee or humanitarian law were subsequently enacted in 2014. However, while not modifying substantive law, Congress appropriated funds in a spending bill for FY 2015 directing the secretary of state to “address the key factors in the countries in Central America contributing to the migration of unaccompanied, undocumented minors to the United States.”\(^ {57} \)

### III. 114th Congress: 2015–2016

During the 114th Congress, members of the House and Senate introduced numerous bills related to refugees, asylees, and unaccompanied immigrant children.

\(^ {52} \) See, e.g., Helping Unaccompanied Minors and Alleviating National Emergency Act, H.R.5114, 113th Cong. (2014); S.2611, 113th Cong. (2014).


\(^ {55} \) Id.


The number of unaccompanied children and members of families with children who arrived at the southern border and turned themselves in to or were apprehended by Border Patrol dipped in 2015 to approximately 40,000 in each category (CBP 2015), but climbed again in 2016, with 59,692 children arriving at the southern US border in FY 2016 (CBP 2016). The number of individuals in families arriving at the southern border in FY 2016 was 77,674 (ibid.).

The flows from the Northern Triangle of Central America toward the United States have not diminished. With financial support from the US government, Mexico stepped up the border security efforts along its southern border, significantly increasing its apprehension and deportation rates of Central Americans from approximately 80,000 in 2013 to 165,000 in 2015 (Isacson 2016). As a result, tens of thousands of individuals fleeing persecution and violence in the Northern Triangle nations did not reach the US border.

Meanwhile, over a million would-be refugees reached Europe in 2015, mostly by taking treacherous sea routes across the Mediterranean and Aegean Seas (UNHCR 2016a). Over 300,000 arrived on European shores in the first nine months of 2016 (ibid.). These international factors continued to influence legislation in the United States.

A. Legislation Designed to Curtail Humanitarian Protections

Following the failed attempts to modify current law in the 113th Congress, several amendments and bills were introduced in the first session of the 114th Congress to limit the protections and due process afforded to children arriving alone from non-contiguous nations.

During debate over the budget resolution for FY 2016, Senator John McCain (R-AZ) offered an amendment that, according to the senator’s office, would “prevent another wave of unaccompanied minors from crossing over the US-Mexico border . . . [by] enabl[ing] US officials to expeditiously remove unlawful entrants from non-border countries.”

Despite the opposition of many in Congress and of refugee and child advocates, the McCain Amendment passed by a vote of 58-42. However, as an amendment to the budget resolution, it was non-binding and did not modify current law.

As a side note, the original version of the McCain amendment also called for the establishment of US consulate offices in El Salvador, Guatemala, and Honduras to process children’s applications for refugee status, but that portion of the amendment was stripped before a floor vote on March 26, 2015. In December 2014, and drawing on authority in current law, the Obama administration established a program for child refugee application

processing in these countries called the Central America Minors Refugee/Parole Program (DOS 2014).

Two bills that would broadly rewrite the laws protecting migrants seeking humanitarian protection, H.R.1149 and H.R.1153, were introduced in the House of Representatives, debated in committee, and reported favorably to the House.61 As of this writing, neither has been scheduled for a vote before the full House of Representatives. In the Senate, a bill, S.129, contained many of the same provisions, but has not yet been marked up by a committee.62

The bills address both unaccompanied minors and asylum seekers of all ages. Combined, they would make the following changes to law:

• Modify the definition of an unaccompanied immigrant child, and exclude those with a parent or extended family member in the United States.63
• Require federal agencies to inquire into the immigration status of the parents or guardians of unaccompanied minors in the United States, and report to immigration authorities any parents with unauthorized status, likely creating a disincentive for those parents to claim and care for their children.64
• Require that all unaccompanied immigrant children who are not victims of a severe form of trafficking, and who are not afraid to return to their country of origin, be removed.65
• Strike the special process for screening, care, and custody of unaccompanied immigrant children who are from non-contiguous countries.66
• Clarify that no counsel may be provided to unaccompanied immigrant children at government expense.67
• Allow CBP to hold unaccompanied immigrant children in custody for up to 30 days instead of three days maximum.68
• Require a deportation hearing within 14 days of screening (effectively within 16 days of apprehension).69
• Rewrite eligibility for a “Special Immigrant Juvenile Visa” to deny the visa to a child who is able to reunite with one parent.70

1. Asylum

In the area of asylum law, the bills would remove special protections created for unaccompanied immigrant children seeking asylum. The bills would strike a statute enabling

63 H.R.1153, supra note 72, at § 8; S.129, supra note 73, at § 304.
64 H.R.1149, supra note 72, at § 2; H.R.1153, supra note 72, at § 11; S.129, supra note 73, at § 301.
65 H.R. 1149, supra note 72, at § 2; S.129, supra note 73, at § 301.
66 Id.
67 H.R.1153, supra note 72, at § 2; S.129, supra note 73, at § 601.
68 H.R.1149, supra note 72, at § 2; H.R.1153, supra note 72, at § 10.
69 H.R.1149, supra note 72, at § 2.
70 H.R.1149, supra note 72, at § 3; H.R.1153, supra note 72, at § 3; S.129, supra note 73, at § 302.
this category of child migrant to have an initial asylum proceeding in a non-adversarial interview setting. The bills would also strike an existing exemption for unaccompanied immigrant children to the one-year filing deadline for asylum applications.

2. Credible Fear Interviews

For all asylum seekers, regardless of age, the bills would raise the standard for “credible fear” interviews provided to those seeking protection at a port of entry. After apprehension, if a person expresses a fear of return to their home country, federal authorities conduct an interview to determine if the person has “a significant possibility, taking into account the credibility of the statements made by the alien in support of his or her claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.” The bills would raise the standard by adding “and it is more probable than not that the statements made by the alien in support of the alien’s claim are true.”

3. Withholding of Removal

One bill would codify in the statute that changes made to the asylum law by the REAL ID Act of 2005 also apply to the standard for “withholding of removal.” The REAL ID Act added the following italicized language to the requirements for asylum: “an asylum seeker must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant” (emphasis added). The REAL ID Act did not add similar language to the statute for withholding of removal, but the Board of Immigration Appeals, which considers appeals from the immigration courts, later relied upon principles of statutory interpretation to rule that the “one central reason” language applies to claims for withholding of removal. One of the pending House bills would codify that decision by adding the following statement to the statute governing withholding of removal: “The burden of proof shall be on the alien to establish that the alien’s life or freedom would be threatened in that country, and that race, religion, nationality, membership in a particular social group, or political opinion would be at least one central reason for such threat.”

4. Parole

Two of the bills would severely curtail the parole authority of the secretary of homeland security to grant entry to non-citizens to the United States. A grant of parole is typically offered to a non-citizen for urgent humanitarian reasons or significant public benefit. It does not confer an immigration status but allows an individual to be lawfully present in

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71 H.R.1149, supra note 72, at § 4; H.R.1153, supra note 72, at § 9.
72 H.R.1153, supra note 72, at § 9; S.129, supra note 73, at § 303.
74 H.R.1153, supra note 72, at § 4; S.129, supra note 73, at § 602.
76 8 U.S.C. § 1231(b)(3).
78 H.R.1153, supra note 72, at § 17.
the United States on a temporary basis. Under measures in the bills, those who applied for and did not obtain refugee status would be barred from a grant of parole. This section appeared to be aimed at President Obama’s Central American Minor Refugee/Parole Program, which explicitly contemplates bringing children at risk of harm in El Salvador, Guatemala, or Honduras to the United States on grants of parole.79 The bills would also limit humanitarian grants of parole to those who face an immediate medical emergency or the imminent death of a close family member. It would redefine “public benefit” to mean “reasons deemed strictly in the public interest [and] only if the alien has assisted the United States Government in a matter, such as a criminal investigation, espionage, or other similar law enforcement activity, and either the alien’s presence in the United States is required by the Government or the alien’s life would be threatened if the alien were not permitted to come to the United States.”80

5. Temporary Protected Status

Temporary Protected Status (TPS) is a special form of protection provided to nationals of foreign countries who are present in the United States as of a specified date. It can be authorized when, due to a natural disaster or conflict, conditions in the home country temporarily prevent the United States from safely returning the nationals (see, generally, Bergeron 2014). The Senate bill would suspend the authority of the secretary of homeland security to designate or re-designate any nation for TPS until January 20, 2017 (the final day of the current president’s term of office). It would also limit any future grants of TPS to an initial designation period and one 18-month re-designation. Finally, it would limit eligibility of future grants of TPS to those who had lawful immigration status in the United States on the effective date of the most recent designation of that nation.81

6. Reasons for Failure of Legislation to Advance

Despite being reported favorably to the full House, neither of the bills described above (H.R.1149 and H.R.1153) was brought up for a vote in the House. In the Senate, bills limiting protections for unaccompanied minors and asylum seekers did not receive committee votes, much less floor consideration. As described below, when a house bill curtailing refugee protection was brought to the Senate floor, it failed to pass a cloture with a 60-vote threshold.

In June 2015, Senator Jeff Sessions (R-AL) filed versions of the two House bills as amendments to the National Defense Authorization Act of 2016.82 A month earlier, when the House debated its version of the defense bill, controversy arose over provisions related to the service of undocumented immigrants in the US military. At that time, Senator John

79 See text accompanying note 71 in USCIS (2016).
80 H.R.1153, supra note 72, at § 6; S.129, supra note 73, at § 101.
81 S.129, supra note 73, at § 701-02.
McCain, chairman of the Senate Armed Services Committee, declared that immigration amendments would “crash” the bill (Marcos and Matishak 2015). In the end, when the Senate debated the defense bill, Senator Sessions was not given the opportunity to formally offer or obtain votes on the amendments.

In December 2015, Congress enacted the Consolidated Appropriations Act, 2016, which provided up to $750 million to implement a series of security, economic, and rule of law programs in Central America. The act directed US federal agencies to prioritize “assistance to address the key factors in countries contributing to the migration of unaccompanied undocumented minors to the United States.” The Consolidated Appropriations Act also provided funds to DOJ to hire 55 new immigration judges and associates staff teams to help address the severe backlogs in the immigration courts. Again, Congress did not enact any significant substantive changes to refugee or humanitarian law.

There may be several contributing reasons for the failure of legislation to advance. The Democratic leadership and members in each chamber with records of protecting refugees were largely successful in holding their caucuses together in opposition to the bills. In addition, child and refugee protection advocates pressed the House and Senate leadership to refrain from advancing bills that would repeal safeguards for asylum seekers, refugees, and unaccompanied immigrant children. It may also be the case that in an election cycle, the Republican leadership in each chamber did not relish a vicious political fight over immigration that could further splinter their party. Republican leaders may have also believed that floor votes on these bills could motivate Latino voters to rally to the opposing party in the November 2016 election.

### B. Legislation Designed to Expand Humanitarian Protections

#### 1. Unaccompanied Immigrant Children

In 2016, members of Congress introduced companion bills in the House and Senate to increase due process and access to counsel for unaccompanied minors. Called the Fair Day in Court for Kids Act, 88 Democrats in the House and 27 Democrats and one Independent in the Senate co-sponsored the bill as of October 1, 2016. As of this writing, no Republicans have cosponsored the legislation. The bill authorizes the attorney general to appoint legal representation at government expense to non-citizens in deportation proceedings, and mandates that counsel be provided to unaccompanied immigrant children facing deportation. It also establishes a pilot program whereby nongovernmental organizations assist children and certain other migrants with case management services in an attempt to ensure that those migrants appear for court hearings. Without bipartisan support in either chamber, it is unlikely that the bill will receive a vote in the 114th Congress, but child advocates believe it is nonetheless important to encourage elected officials to publicly

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84 Id.
support the bill. Having taken a position on issues in the bill, members may retain pro-
humanitarian positions in the face of politically charged votes in the future.

In the summer of 2016, Democratic representatives and senators introduced companion
bills called the Secure the Northern Triangle Act.87 The legislation authorizes funding to
enhance security in Central America, combat narcotics and human trafficking, and prosecute
those engaged in organized crime. It expands the processing of refugee women, children,
and families in the region so that they might avoid the dangerous routes typically taken as
these populations flee from their countries of origin. The bill also includes a version of the
Fair Day for Kids in Court Act (described above) and a number of measures designed to
reduce backlogs in the immigration courts.

2. **Refugee Protection Act**

A bill first introduced by Senator Patrick Leahy (D-VT) in 107th Congress, the Refugee
Protection Act of 2001, originally addressed the concern that summary inspection and
expedited removal processes at borders and other points of entry could result in asylees
being turned away or unnecessarily detained in the United States.88 A major rewrite of
the bill in 201089 marked the 30th anniversary of the Refugee Act of 1980, the bill that
codified the 1951 Refugee Convention and the 1967 Refugee Protocol in US law. The
Refugee Protection Act of 2010 encompassed an array of provisions that Senator Leahy
believed would strengthen the US refugee and asylum programs, and bring the nation back
into alignment with the spirit and obligations of the 1951 Refugee Convention. While the
broader version of the Refugee Protection Act has been introduced in the Senate and House
in each Congress since the 111th Congress, it has not received a vote in either chamber.
However, the 2013 version of the bill was the source of many of the refugee, asylee, and
humanitarian provisions that the Gang of Eight included in the original version of S.744.90
In late summer 2016, Senator Leahy and Representative Zoe Lofgren (D-CA) introduced
companion versions of the Refugee Protection Act of 2016.91

The 2016 Refugee Protection Act (RPA) includes a version of the Fair Day in Court for
Kids Act as well as a handful of provisions drawn from (or similar to) those in the Senate-
passed version of S.744 in the 113th Congress that had not been included in prior versions
of the RPA.92 For example, the bill would increase the number of U visas for crime victims
to 20,000 per year, responding to the fact that the current limit of 10,000 has been reached
each year for the past seven years.93 It would also require DHS to grant work authorization
permits to applicants for U and T visas (the latter for trafficking victims) if their applications
for the visas have been pending for 180 days.94 The RPA of 2016 provided protections to
refugees being screened overseas that current law provides only to certain Afghans and
In addition, the 2016 bill would ban the referral of asylum seekers for prosecution for unlawful entry or reentry unless they are found to have no credible fear of persecution.  

3. REFUGEE RESETTLEMENT

In 2015, Senator Debbie Stabenow (D-MI) and Representative Bill Pascrell (D-NJ) introduced companion bills called the Domestic Refugee Resettlement Reform and Modernization Act of 2015.  

The bills were similar to one introduced in prior congresses by then-Representative Gary Peters (D-MI) who was elected to the US Senate in 2014, and who cosponsored the Senate bill. The bills address several long-standing concerns among resettlement advocates in the United States, such as: (1) the quality and relevance of data collected by the federal Office of Refugee Resettlement; (2) the timeliness of information shared by the State Department with resettlement organizations about incoming refugees selected for resettlement in the United States; and (3) data collection on “secondary migration,” which refers to movement by resettled refugees around the United States after they are admitted. To date, neither the House nor Senate has considered the legislation post-introduction.

4. REACTIONS TO EVENTS IN EUROPE

In 2015, over a million refugees and displaced persons reached Europe from North Africa and the Middle East by traversing land borders or crossing the Mediterranean or Aegean seas. The United States responded by saying it would increase the number of refugees it resettles. It set goals of 85,000 in 2016 and 100,000 in 2017, respectively, with 10,000 spots per year reserved for Syrians. (In September 2016, the Obama administration adjusted its goal upward, now planning to resettle 110,000 refugees in fiscal year 2017). In 2015, some members of Congress supported admitting even higher numbers of refugees, while others questioned the ability of the US government to effectively screen incoming refugees for national security concerns. The refugee screening process is conducted by a number of intelligence and law enforcement agencies and provides the most thorough vetting of any incoming immigrants to the United States (Kerwin 2016, 83, 112-17). The screening, which can take 18 to 24 months, led to a trickle of Syrians entering the United States through the first half of fiscal year 2016. However, admissions increased through the summer of 2016, reaching 12,587 Syrians as of the end of the fiscal year on September 30, 2016 (RPC 2016). The total number of refugees admitted to the United States in fiscal year 2016 was 84,995, effectively meeting the target goal of 85,000.

The refugee issue reached a fever pitch in response to the November 13, 2015 terrorist attacks in Paris, France, when the media reported that one of the perpetrators might have used a Syrian passport to enter Europe. Authorities later stated that the passport was a fake, but many in the United States equated the attackers with refugees from the Middle East (Legum 2015). It was later discovered that two of the Paris attackers were Iraqis who

95 Id., at § 33.
96 Id., at § 31.
98 Id.
entered Europe on October 3, 2015, claiming to be Syrian refugees and carrying false passports. Two other would-be attackers were stopped by suspicious border guards and did not reach Paris. They eventually entered Europe and were captured in Salzburg, Austria on December 10, 2015 (Faiola and Mekhennet 2016).

By November 16, 2015, just three days after the Paris attacks, 31 governors called for a moratorium on admitting Syrian refugees to the United States. By November 17, 2015, 12 Republican candidates for president called for a ban on Syrian refugees entering the United States; the remaining two candidates, Jeb Bush and Ted Cruz, suggested that they would consider allowing Christians from Syria to be admitted as refugees (Kaplan and Andrews 2015). Donald Trump declared that, as president, he would expel any Syrian refugee allowed into the country by the Obama administration (ibid.).

On November 17, 2015, Representative Michael McCaul (R-TX) introduced H.R.4038, the American Security Against Foreign Enemies Act of 2015, or the “American SAFE Act.” The bill would limit the admission any refugee from certain nations until federal law enforcement and intelligence agencies had certified that the refugee was not a national security threat. The bill would apply to refugees from Iraq and Syria, or to refugees who had been in Iraq or Syria after March 1, 2011.

Two days after introduction, the bill passed the House of Representatives by a vote of 289 to 137. Nearly four-dozen Democrats joined all Republicans in the House to vote in favor of the bill.

In early January 2016, two Iraqis who had been admitted to the United States as refugees were arrested — one for allegedly providing material support to a terrorist organization and the other for allegedly fighting alongside a terrorist organization overseas and then lying about his activities to immigration authorities (DOJ 2016a, 2016b). Some governors reiterated their calls for a moratorium on refugee admissions.

Refugee advocates in Congress and the nonprofit sector urged members of the Senate to oppose the American SAFE Act, reminding policymakers that refugees already receive the most intensive screening of any population for admission entering the United States. The advocates believed that by forcing officials to certify that each individual refugee was not a threat, the bill would lead to diminished admissions overall and would discourage officials from admitting any refugees from the named countries, effectively terminating protection in the United States for persecuted Iraqis and Syrians.

On January 20, 2016, when the Senate held a cloture vote to cut off debate and allow for a vote on the American SAFE Act, it did not meet the required 60-vote threshold. The 55 to 43 vote tally was nearly party-line, with all Republicans present voting in favor or cloture,

99 Alabama and Texas sued the federal government to block the entry of refugees selected for resettlement in their states. A federal judge dismissed the Texas suit on June 15, 2016. Indiana’s governor issued an order to block the resettlement of Syrians in his state. The order was blocked by a preliminary injunction, which was upheld by the US Court of Appeals for the Seventh Circuit. Texas, Kansas, and New Jersey withdrew from the federal resettlement program in 2016, but refugees may still be resettled in those states through privately run programs operating in cooperation with the federal government.

and all but two Democrats voting against. Those voting against cloture cited the intense screening conducted by multiple law enforcement and intelligence agencies that is applied to every refugee selected for admission to the United States.

IV. Role of Public Opinion

In 2015 and 2016, a number of research institutions, advocacy organizations, and philanthropies conducted research into public opinion on attitudes toward refugees.

In a survey released in September 2015, prior to the attacks in Paris that took place two months later, the Chicago Council on Global Affairs found that in the United States, 63 percent of Republicans viewed “large numbers of immigrants and refugees coming into the US as a critical threat” while only 29 percent of Democrats and 46 percent of Independents held that view (Kafura and McElmurry 2015).

The Tent Foundation commissioned research into public perceptions of the global refugee crisis, conducting field interviews in November 2015 and January 2016 in 11 nations (Tent Foundation 2016a). It found that “watershed moments” had a profound impact on public opinion in the 11 nations, whether generating sympathy or fear. For example, the public expressed a desire to assist refugees after seeing the photo of a three-year old boy, Aylan al-Kurdi, on a beach in Turkey. The child drowned trying to cross from Turkey to Greece with his family. On the other hand, when terrorist attacks are linked (accurately or inaccurately) with refugees, the public responds with suspicion to refugees (ibid.).

Consistent with these mixed opinions, just over half of those surveyed in the 11 nations believe that refugees are an economic burden on a receiving state, though the remainder (42-43 percent) said they believe that refugees could contribute economically (ibid.). An additional 6 to 7 percent believed that new arrivals from other nations benefitted the receiving state’s economy (ibid.). Eighty-six percent said they thought refugees could pose a security risk, yet almost half believe that the risk can be controlled (ibid.; Tent Foundation 2016b).

In the United States, the Tent survey found public opinion to be mixed (Tent Foundation 2016b). Thirty-eight percent of US respondents indicated an overtly negative attitude toward refugees (ibid.). Overall, the US averages were almost identical to the international averages of 12 percent overtly positive attitudes toward refugees, 49 percent mixed views, and 39 percent overtly negative (ibid.).

Sixty-six percent of the Tent US survey respondents said they would accept a set quota of refugees (54 percent) or any number the government determined to welcome (12 percent) (ibid.). The combined 66 percent number is lower than the international average of 73 percent of respondents saying they would welcome refugees (Tent Foundation 2016a, note 123). Amnesty International released polling in May 2016 finding 72 percent of Americans responded “yes” to the question, “Would you personally accept people fleeing war or persecution into your country?” (Amnesty International 2016). Under the Amnesty

102 Field research for the cumulative report was conducted in Australia, Canada, France, Germany, Hungary, Serbia, Sweden, Turkey, the United Kingdom, and the United States.
International results, 63 percent of Americans stated that their government should do more to help refugees fleeing war or persecution (ibid.).

A Brookings Institution poll released in June 2016 similarly found that 59 percent of Americans support welcoming refugees from the Middle East (Telhami 2016). When the Brookings poll asked Americans what worried them most about resettlement from this region, 46 percent expressed a concern over terrorism and 41 percent cited anxiety over potential economic burden. Results from the Tent survey found that 55 percent of Americans believe refugees (from any region, not specifically the Middle East) pose no risk or that the risk can be managed (Tent Foundation 2016b, note 127). Fifty-nine percent of Americans believe that refugees work hard to fit into their new communities (ibid.).

A survey conducted by the Chicago Council on Global Affairs in June 2016, and released in October 2016, asked questions based on party affiliation. The Chicago Council found that 56 percent of Democrats in the United States support resettling Syrian refugees, while 18 percent of Republicans do (Smeltz et al. 2016). The survey also queried those who described themselves as core supporters of Republican nominee for president, Donald Trump. Of those, only 9 percent support admitting Syrian refugees in the United States (ibid.).

A full 60 percent of Americans responded to the Tent survey that refugees should be helped equally, regardless of their individual religious orientation (Tent Foundation 2016b, note 127). Twelve percent favor giving preference to Christians, a position held by some politicians (ibid.). The Brookings poll found that 38 percent of Americans would support “a total shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on,” referring to the language that Republican presidential candidate Donald Trump used in December 2015 (Telhami 2016, note 135).

The Tent report summarized its findings this way: “Americans responded with empathy to the clear and present danger in which refugees find themselves and many want to help. However, saber-rattling and loose talk from high profile politicians and media commentators conflates victims of terrorism with the very perpetrators from whom they flee” (Tent Foundation 2016b, note 127). That summation is consistent with the actions of some legislators, state governors, and political candidates.

V. Conclusion

Given recent events, it is somewhat remarkable that US refugee and humanitarian statutes have remained largely unchanged. The Paris attacks in November 2015, the sharp increase in arrivals of refugees at the southern border of the United States, and other events have all contributed to a climate of fear, but this has not affected existing policy.

Nonetheless, since the Senate passage of S.744 in the summer of 2013, those who favor laws and policies that protect refugees, asylees, and other forced migrants have been on the defensive. Legislators introduced bills to curb protections in US law, and in some cases to place significant impediments in the path of refugees from Middle Eastern nations. However, Congress enacted virtually no changes to the law.
Members of Congress who favor humanitarian protection opposed these bills and for the most part maintained party unity when bills were scheduled for votes. Refugee and asylum advocates coordinated with child protection supporters to recommend retention of current law where the statute favors humanitarian relief. Occasionally, Republican leadership blocked members of its own party from offering amendments to bills in order to avoid political fights over broader immigration issues. As a result, congressional leadership advanced very few bills to committee or floor consideration.

The political dynamics of the election seasons in 2014 and 2016 also influenced the legislative process. The leadership in both chambers of Congress showed some reluctance to raise immigration issues that might divide the majority party. Moreover, the overall gridlock in Congress surely contributed to the lack of action on refugee or unaccompanied immigrant child legislation. As a result, in an era of rising forced migration, the US Congress has retained the existing protections available to refugees and asylum seekers despite a political climate defined by the politicization of migration.

REFERENCES


How Robust Refugee Protection Policies Can Strengthen Human and National Security

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Executive Summary
This paper makes the case that refugee protection and national security should be viewed as complementary, not conflicting state goals. It argues that refugee protection can further the security of refugees, affected states, and the international community. Refugees and international migrants can also advance national security by contributing to a state’s economic vitality, military strength, diplomatic standing, and civic values. The paper identifies several strategies that would, if implemented, promote both security and refugee protection. It also outlines additional steps that the US Congress should take to enhance US refugee protection policies and security. Finally, it argues for the efficacy of political engagement in support of pro-protection, pro-security policies, and against the assumption that political populism will invariably impede support for refugee protection.

I. Introduction
From its genesis in the debates of medieval canon lawyers, the concept of subjective human rights, including the right to self-preservation, has been premised on the idea of the moral equality of persons buttressed by a zone of human autonomy that permits the free exercise of rights (Siedentrop 2014, 245-46; Tierney 1997, 83-89). These intuitions ultimately gave rise, following the great upheaval of World War II, to a series of seminal human rights instruments that vested in states, individually and collectively, the core responsibility to defend human dignity, rights, and security.

Refugees and other forcibly displaced persons have fled violence, persecution and other untenable situations.¹ The overwhelming majority seeks a level of protection and security

¹ A refugee is a person 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 or her nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.” Convention relating to the Status of Refugees (Geneva, 28 July 1951) 189 U.N.T.S. 137, entered into force 22 April 1954 [the Refugee Convention]; Protocol relating to the Status of Refugees (New York, 31 Jan. 1967) 606 U.N.T.S. 267, entered into force 4 Oct. 1967 [the Refugee Protocol]. The term “forcibly displaced” refers to refugees, asylum seekers (seeking refugee status in host states), and internally displaced persons (IDPs) (UNHCR 2015a). As used in this paper, the term “refugee protection” denotes more than the rights afforded refugees under the Refugee Convention and Protocol: it refers to the range of policies and programs to prevent and respond to forcible displacement.
to which they are legally entitled. At the same time, large-scale refugee and migrant streams include persons with a mix of motives (some dangerous) and aspirations (some illiberal).

States have a responsibility to prevent terrorist incursions and attacks: they exist, in part, to protect the lives and rights of their residents. However, they also have a responsibility to protect members of other states who are fleeing persecution and violence. In public and political discourse, refugees are often treated as a threat to national security and, in particular, as a source and conduit for terrorism. However, robust refugee protection policies do not cause and need not exacerbate the threat of terrorism. In fact, they can diminish it.

This paper addresses the intersection of refugee protection and national security, which should be conceived of as complementary, not competing, imperatives. It makes the case that: (1) refugee protection can advance both human and state security; (2) refugees and forcibly displaced persons can contribute to a state’s vitality, economic well-being, diversity, core values, and military strength; and (3) refugee protection and national security strategies largely align.

Refugee protection and national security respond to the aspiration for human security, albeit from different perspectives and with different emphases. National security underscores the responsibility of states to protect the lives and safeguard the rights of their residents, while refugee protection speaks to the responsibility of states — individually and collectively — to defend the rights of persons who are at risk of persecution, either by their own states or by groups that their states cannot or will not control. National security also encompasses the protection of a state’s economic vitality and fundamental values, including those values reflected in its commitments under domestic and international law.

A substantial body of literature has examined the nexus between international migration and terrorism (Adamson 2006; Leiken and Brooks 2006; Kerwin and Stock 2007; Martin 2009; Ginsburg 2006; and 2010), but there has been less scholarship on the relationships between refugee protection and national security (Koser and Cunningham 2015; Schmid 2016). That said, these two bodies of literature overlap, as do the lines between refugees and international migrants, and between national security and counterterrorism.

This paper builds on the paradigm described by Susan Ginsburg as “securing human mobility” (Ginsburg 2010), which speaks to the need for refugee- and migration-related security measures that go beyond default border control and immigration enforcement strategies. This framework recognizes the need to replace large-scale irregular flight with orderly, legal migration; to secure migration channels and infrastructure; to safeguard migrants in transit; to maximize the benefits of migration to all stakeholders in this process; and to foil terrorists, traffickers, and members of organized criminal groups.

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2 “International migration” refers to the movement of persons across national borders. The United Nations (UN) defines an “international migrant” as a person living outside his or her country of birth (UN DESA 2016, 4). In 2015, there were roughly 244 million international migrants (ibid.).

3 The US national security agenda identifies a range of priorities under the categories of security, prosperity, values and international order (White House 2015b). Combating the threat of terrorism constitutes one of eight priorities under the security rubric.
After this introduction, the paper begins by describing, in Section II, the causes and catastrophic dimensions of the global refugee crisis. Its third section outlines two of the paper’s main themes; i.e., that refugee protection can further the security of refugees, affected states, and the international community, and that refugees and international migrants can advance national security by contributing to a state’s economic vitality, military strength, diplomatic standing, and civic values.

Section IV examines the scope of the global terrorist threat, and the potential nexus between refugees, migrants, and terrorists. It concludes that terrorist violence leads to refugee flows and that robust screening can substantially diminish the risk of entry by terrorists posing as refugees.

Section V evaluates US migration-related security strategies following the September 11, 2011 attacks. This section describes the need for effective intelligence collection, information sharing, identity assurance, and strategies that promote national unity. It compares the US response to Muslim Americans and immigrants following the 9/11 attacks, with proposals to suspend the admission of Muslims and kill the families of terrorists. It also describes failed and misguided US security strategies and its overemphasis on US-Mexico border security.

Section VI describes the rigorous vetting and screening built into the US refugee resettlement system, and contrasts the US system with Europe’s patchwork of migration-related security measures, which has exacerbated the vulnerability of European states to terrorist attacks.

Section VII offers three sets of policy recommendations. The first set starts from the premise that security and refugee protection reflect a common aspiration for human safety and well-being and that the primary refugee protection strategies promote national security, including strategies:

- to address refugee producing conditions through conflict prevention, mediation, and resolution;
- to strengthen the rule of law in refugee sending communities;
- to provide development and humanitarian assistance to the communities that host the vast majority of the world’s refugees and forcibly displaced persons;
- to create conditions that permit the safe and voluntary return of refugees; and
- to screen refugees and migrants seeking entry to potential host countries.

The second set of recommendations outlines steps that the US Congress should take to enhance national security and refugee protection. These speak to improved congressional oversight and governance of the US Department of Homeland Security (DHS), the establishment of a US coordinator for refugee affairs, measures to prevent bona fide terrorists from purchasing firearms and explosives, and the need to depoliticize the US refugee resettlement program. The third argues for the efficacy of political engagement in support of pro-protection, pro-security policies.

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4 The paper uses the term “refugee crisis” to describe the international community’s failure to anticipate and respond effectively to refugee-producing conditions, the failure of responsibility sharing in meeting the needs and fostering the talents of refugees, and the massive human crisis that has resulted from these twin failures.
II. The Global Refugee Crisis: Causes, Consequences, and Response

At 65.3 million, the world’s forcibly displaced population roughly equals in size the number of persons uprooted by World War II and its aftermath (UNHCR 2016; Proudfoot 1956). Moreover, the tenacity of the world’s refugee-producing situations, the lack of progress in developing viable and permanent solutions for protracted refugees, and the regular emergence of new refugee-producing situations mean that this crisis will continue to intensify, absent a coordinated and generous global response (Nordland 2015).

As these situations reveal, if states do not successfully address the causes of refugee flows, they will invariably face the herculean task of responding to their human consequences.

The world’s “spiraling” refugee-producing crises reflect the failure of states to forego, prevent, and stem armed conflict, civil war, terrorism, and breakdowns in the rule of law (UNHCR 2015a, 5). Refugee-producing conflicts have regularly “erupted or reignited” and long-term crises “drag on with no solutions in sight.” In October 2015, former United Nations High Commissioner for Refugees António Guterres spoke of the world’s “shrinking humanitarian space,” resulting from the “interlinked mega-crisis in Syria and Iraq” and the displacement within the preceding year of 1.1 million Yemenis, 500,000 South Sudanese, 190,000 Burundians, and tens of thousands of Bangladeshis, stateless ethnic Rohingya, Central America children, and refugees from the Central African Republic (CAR), Nigeria, Ukraine, and the Democratic Republic of Congo (DRC) (UNHCR 2015d). In August 2016, the Office of the United Nations High Commissioner for Refugees (UNHCR) reported that 1.6 million South Sudanese were internally displaced and 930,000 had fled to the surrounding nations of Uganda, Sudan, DRC, CAR, Ethiopia, and Kenya, with more arriving daily (UN News Centre 2016). UN officials lament a vast “arc of crisis” which extends from “southwest Asia through the Middle East to the Horn of Africa and the Lake Chad Basin.” As these situations reveal, if states do not successfully address the causes of refugee flows, they will invariably face the herculean task of responding to their human consequences.

The global refugee crisis can also be attributed, in part, to the finely honed strategies of developed states to deny access to protection through border externalization.

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5 UNHCR defines protracted refugees as those who have been displaced for five years or more and have no immediate prospects for durable solutions.


8 “Border externalization” refers to a range of developed state policies and practices that prevent refugees
enforcement, onerous procedures, and pinched interpretations that violate the spirit, intent and, often, the letter of international law (Schoenholtz 2015, 86-90; Hathaway and Gammeltoft-Hansen 2014).\(^9\) Border externalization strategies place the onus of refugee protection on less developed states in proximity to crises (UNGA 2016 § 112). They also force refugees to take perilous journeys, contribute to a public conception of refugees as a threat and burden, and bolster human trafficking syndicates (UNHCR 2015c).

One-half of the world’s refugees are children (UNHCR 2016, 8), and their treatment can be particularly callous. Since 2014, for example, Mexico’s immigration agency, Instituto Nacional de Migración, has intercepted tens of thousands of Central American unaccompanied children and families with young children who are fleeing some of the world’s most violent communities.\(^10\) However, it has failed to inform most of those children of their right to seek recognition as refugees, to screen or question them for potential refugee claims, or to offer them legal assistance (HRW 39-56, 71-73). It has also detained, deterred and effectively prevented many children from pursuing refugee claims in violation of Mexican and international law (ibid., 57-64).

The United States has underwritten Mexico’s interception and detention program, while doing little to ensure screening and protection for those fleeing from violence and persecution in Central America and elsewhere. The United States has also built and populated its own vast “family detention” centers (USCCB/MRS and CMS 2015, 164).

The global refugee crisis can also be blamed on public indifference and insufficient state responsibility sharing in the form of traditional durable solutions and legal migration opportunities for refugees (UNHCR 2015d).\(^11\) Like other human rights conventions, the Refugee Convention does not set forth a “precise balance of responsibility” between states or offer a blueprint for every contingency, but it recognizes refugee protection as a shared responsibility that should be addressed in a spirit of generosity and cooperation (Goodwin-Gill 2003, 25).

The preamble to the 1951 Refugee Convention acknowledges that because “asylum may place unduly heavy burdens on certain countries,” a “satisfactory solution” to refugees cannot “be achieved without international co-operation.”\(^12\) Former United Nations High Commissioner for Refugees Antonio Guterres argued that nations “that host large numbers of refugees — thus producing a global public good — deserve particular focus” for humanitarian, equitable, and security reasons:

> Many of these States are crucial pillars of peace and stability in their regions, and with conflicts and terrorism threatening to spill across borders, they de facto form the first line of defense for our collective security.

\(^{12}\) The 1951 Refugee Convention.
Yet the world’s response to the communities that host large-scale refugee populations and that bear the burden for multiple humanitarian crises has been dismal. Only 35 percent of the needs of UN programs in Africa, for example, have been met, and UNHCR has received only 20 percent of the funding needed for the South Sudanese refugee crisis (UN News Centre 2016).

The Refugee Act of 1980, which established the US Refugee Admissions Program (USRAP), locates resettlement within a broader protection response that includes “humanitarian assistance” and “voluntary repatriation.” In fact, most refugees want to return home and there is a “growing consensus among states that repatriation constitutes the only feasible solution for the vast majority of refugees” (Long 2013 §§ 21, 197). However, the international community has failed to devote the level of resources or systematic engagement necessary to prevent refugee-producing conflicts, to mediate disputes, to engage difficult peace processes, or to create the conditions that would permit the safe return of refugees and other forcibly displaced persons. As a result, only 126,800 refugees were voluntarily repatriated in 2014, the smallest number in 30 years (UNHCR 2015a, 8) and 201,400 in 2015 (UNHCR 2016), the third lowest number in 20 years (ibid., 25). These figures call into question safe, voluntary repatriation as a continued pillar of the global refugee protection system.

Moreover, repatriation and other durable solutions are less likely for the growing numbers of persons that have been displaced for extended periods (UNGA 2016 § 17; WEF 2016, 15). By the end of 2015, 6.7 million refugees lived in protracted situations; that is, they had been displaced for at least five years and had no immediate prospects of repatriation, incorporation into host communities, or third-country resettlement (UNHCR 2016, 8). The average protracted refugee situation has lasted 26 years (ibid., 20). Some refugee camps and urban settings are now home to a third generation of displaced persons (UNGA 2016 § 2), including the 1.6 million Afghani refugees in Pakistan.

Although less than 1 percent of refugees are ultimately resettled in third-countries (DOS 2015a), this option complements other durable solutions like safe repatriation and integration into host communities. UNHCR conservatively projected that 960,000 refugees would need to be resettled in 2015 (UNHCR 2014a, 9), but it referred only 134,000 cases for resettlement and only 107,100 refugees “departed” to a third-country, with 90 percent resettled in the United States, Canada, and Australia (UNHCR 2016, 26).

15 The DRC and Mali received most of the repatriated refugees in 2014.
16 In 2015, 83 percent of voluntarily repatriated refugees returned to Afghanistan, Sudan, Somali, CAR, and Côte d’Ivoire (UNHCR 2016, 8).
17 Eighty percent of IDPs have been displaced for more than five years (UNHCR 2015c).
18 According to UN officials, an additional 380,000 Afghanis “were newly displaced in 2015” (Pitterman 2016).
For some refugees, third-country resettlement constitutes their only viable option. US refugee resettlement “priority” cases fit within this category. Former DHS Secretaries Janet Napolitano and Michael Chertoff describe the refugees eligible for resettlement in the United States as “the most vulnerable — particularly survivors of violence and torture, those with severe medical conditions, and women and children.” This population also includes persons at risk because they worked with Americans and US institutions in Iraq and Afghanistan.

The failure of states to protect can be seen starkly in the Syrian civil war and the humanitarian disaster that has emanated from it. Now in its sixth year, the war has claimed an estimated 400,000 lives, and includes a dizzying array of participants, including global and regional powers, the Assad regime, the Islamic State of Iraq and the Levant (ISIL), the al-Nusra Front (which primarily seeks an Islamic state in Syria), and a large number of brigades and “gangs” that vie for control over small areas.

An estimated 13.5 million persons in Syria need humanitarian aid, 6.5 million are internally displaced, and 4.5 million live in besieged or hard-to-reach regions (European Commission 2016). The Syrian crisis has convulsed the Middle East, exhausted the resources of Syria’s neighbors, shaken the foundations of the European Union (EU), led to thousands of migrant deaths, and become a global catastrophe. By August 2016, 4.81 million Syrians had been registered as refugees or were awaiting registration in Turkey (2.72 million), Lebanon (1.03 million), Jordan (656,198), Iraq (249,395), and Egypt (114,911), with smaller numbers in North Africa (3RP 2016). These five nations have a combined GDP of $1.4 trillion, or $1.1 trillion (if Egypt is excluded). Their combined population is roughly 220 million or 128.5 million, excluding Egypt (UN DESA 2015, 14-17). In comparison, the US GDP is $17.4 trillion (World Bank 2015), and its population is 321.8 million (UN DESA 2015, 17).

The international community has a strong interest in an effective, coordinated response to the Syrian refugee crisis, but state contributions to international institutions and direct support have been decidedly unequal to the need. By the end of January 2016, the United

21 The International Organization for Migration (IOM) reports that 5,600 migrants perished in 2015, including 3,765 in the Mediterranean (IOM 2016). IOM records only deaths reported by the United Nations, state, media and non-government organizations (NGOs). These figures significantly underestimate actual migrant deaths. During the first eight months of 2016, the pace of migrant deaths increased compared to the same period in 2015, with a higher concentration of deaths in the Mediterranean.
22 Since the beginning of the October 2015 military offensive by the Syrian Arab Army, 137,802 have been displaced from Aleppo, Idlib, Hama, and Homs (ECHO 2016).
23 The GDPs of the states hosting the overwhelming majority of Syrian refugees are, respectively, Turkey ($800 billion), Egypt ($287 billion), Iraq ($221 billion), Lebanon ($46 billion), and Jordan ($36 billion) (World Bank 2015).
24 The populations of the states hosting the most Syrian refugees are Turkey (78.7 million), Lebanon (5.8 million), Jordan (7.6 million), Iraq (36.4 million) and Egypt (91.5 million) (UN DESA 2015, 14-17).
Nations had received only 61 percent of its $4.3 billion humanitarian appeal for Syrian refugees for 2015.\textsuperscript{25} Funding shortfalls, in turn, have contributed to crises in refugee housing, health care, food, water, sanitation, education, and reception. The high rate of Syrian refugee girls forced into marriages starkly reflects the level of desperation among refugees (Save the Children 2014, 3-5; UNICEF 2014, 27). The girls’ parents often view marriage as the only way available to support their families, protect their daughters, or otherwise escape their predicament (ibid.).

Condemned to marginal, insecure, and provisional lives in host states, hundreds of thousands of Syrians and other refugees have embarked on perilous journeys to Europe (Mahecic 2016; Grant 2015), overwhelming the screening capacity of Greece and Italy. The resulting crisis has undermined support for the Schengen Agreement’s passport-free movement of residents within participating EU states, and eroded confidence in the ability of EU states to work in solidarity to address common challenges. Drastic cuts in food aid to refugees by the underfunded UN World Food Programme, the prospect of asylum in Europe, and diminishing hopes that the Assad regime will be replaced have also contributed to the onward migration of Syrians from neighboring states (Schmid 2016, 47).

As a result of these and other developments, the number of first-time asylum applicants in the EU-28 reached 1.26 million in 2015, with 29 percent from Syria (Eurostat 2016).\textsuperscript{26} Germany alone registered 1.1 million first-time asylum-seekers in 2015 (Pandy 2016), more than one-third from Syria. Overall, between April 2011 and March 2016, more than one million Syrian asylum applications were filed in European nations (3RP 2016).

In a slightly shorter time period between 2012 and 2015, the United States granted asylum to 242 Syrians in immigration court and to an unreported (but modest) number of Syrians who made “affirmative” asylum claims to US Citizenship and Immigration Services (USCIS) (DOJ 2016). The United States has also extended temporary protected status (TPS) to roughly 5,800 Syrians and an additional 2,500 may be able to apply under the most recent TPS redesignation (Dinan 2016). TPS confers a reprieve from removal and work authorization for designated nationals who arrived before a designated date (Bergeron 2014, 25), in this case March 29, 2012.\textsuperscript{27} Subsequently, DHS has redesignated Syria for TPS three times, most recently on August 1, 2016 (USCIS 2016). Unlike an extension of TPS, a redesignation covers nationals of designated states who arrive after the earlier designation and redesignation dates (Kerwin 2014, 57).

\textsuperscript{25} Between FY 2012 and FY 2015, the United States contributed $4.53 billion in humanitarian funding for Syrians, including $2.1 billion from the US Department of State’s (DOS’s) Bureau of Population, Refugees and Migration (PRM), $1.6 billion from US Agency for International Development (USAID), Office of Food for Peace, and $866 million through the USAID Office of Foreign Disaster Assistance (USAID 2015). It committed to contribute an additional $600 million in aid at the February 4, 2016 London donors’ conference (ECHO 2016). The EU and its member states have contributed €5 billion for relief and humanitarian aid in Syria, Lebanon, Jordan, Iraq, Turkey and Egypt, and pledged an additional €3 billion at the donors’ conference in London (ibid.).

\textsuperscript{26} In stark contrast, the Gulf Cooperation Council states — Qatar, United Arab Emirates, Saudi Arabia, Kuwait, Bahrain, and Oman — failed to resettle any Syrian refugees between the war’s onset and late 2015 (Amnesty 2015).

\textsuperscript{27} Because it does not lead to lawful permanent resident status and typically extends well beyond the initial designation period, TPS has been criticized for locking beneficiaries into a “legal limbo” that does not lead to permanent protection or integration (Bergeron 2014, 29).
While the United States has accepted roughly 70 percent of all UNHCR-submitted refugees for resettlement in recent years (UNHCR 2014a, 61; UNHCR 2015b, 53), from the beginning of FY 2012 through September 6, 2016, the United States admitted 12,910 Syrians for resettlement, which is roughly one-fourth of 1 percent of Syrian refugees. Its admission of 11,056 Syrian refugees in slightly more than eleven months of FY 2016 exceeds its FY 2016 goal of 10,000 Syrian admissions (DOS, DHS, and HHS 2015, iv).

III. Refugee Protection: A Potential Source of Security

Security-related fears do not constitute the only barrier to generous refugee policies. Concerns over social cohesion, social order, native employment, and economic prospects also underlie anti-refugee sentiment. Large-scale refugee admissions have never enjoyed high levels of public support in the United States (DeSilver 2015). Yet in recent years refugee-related terrorism concerns have been particularly tenacious in the United States, Europe, Kenya, and elsewhere, contributing to the backlash against refugees and the uneven and parsimonious response to the global refugee crisis.

Refugee protection and legal migration policies can also further the rule-of-law by minimizing irregular migration, curbing the use of human smugglers, limiting the risk of trafficking, and making life more difficult for terrorists who depend upon and often profit from smuggling networks

Refugee protection and national security are inextricably linked needs. Both reflect a desire for safety and security. However, they approach this aspiration from different perspectives and have different emphases. Refugee protection arises from an ethic of solidarity rooted in a belief in human dignity and equality. It reflects the enlightened self-interest of states in a “stable and moral world, one in which peace and respect for human rights are pervasive and firmly rooted” (Helton 2002, 120).

In its thick sense, national security refers to more than national defense and homeland security. It speaks to the protection of “a people, territory and way of life” (Jordan et al. 2009, 3-4). It “is not an end in itself,” but a means to preserve a nation’s “values, principles, and way of life” (DHS 2010, v). It underscores a state’s responsibility to defend its members from foreign domination and to safeguard their rights at home and abroad, and also to uphold the rights of imperiled noncitizens at its borders, in transit through its territory, and (in extreme circumstances like genocide) in their states of origin.

States often use the language of security, crisis, and risk to justify harsh policy responses to refugees and other forcibly displaced persons. Yet this language also points to the potential complementarity between security and refugee protection. Conflict and terrorism create insecurity for their victims, for targeted and neighboring states, and for the international community. As a result, they require both security and protection responses.


29 Ibid.
A survey of 750 “experts and decision-makers” from the World Economic Forum’s (WEF’s) “multistakeholder communities” identified “large-scale involuntary migration” as the most likely “global risk” and one “strongly interconnected with other risks that are considered highly worrisome in the longer term,” including state collapse, interstate conflict, climate change, and water crises (WEF 2016, 6, 15). The survey identified the international refugee crisis as one of three risks that could “give rise to cascading risks” (ibid., 7). To address this crisis, the WEF’s report argued for a comprehensive response to interstate conflict and terrorist violence, as well as to the human insecurity caused by protracted refugee situations, ineffective integration, and inadequate “global humanitarian architecture.” (ibid., 15-16). In other words, its diagnosis (crisis and risk) led it to identify security and protection as complementary needs.

Michael Chertoff holds a similar position on the need for integrated refugee protection and security strategies. In a June 2016 interview, he said:

[T]he sheer number of people moving not only puts those people themselves at risk in terms of their own security, but can cause a real dislocation in society … You also don’t want to have a situation where people are just stagnating in camps year in and year out because you’re creating essentially a hospitable environment for people to recruit extremists and criminals. So I think you’ve got to look at the system end-to-end. Part of that means dealing with countries that are failed states … Where you do have war and you do have flight, you need to have a robust system for housing people, continuing to educate them, and processing them in a secure but reasonable timeframe. And frankly it’s enough of a global issue that it warrants the whole global community kicking in money to make sure that could be operated in an efficient way. And finally when people do qualify for asylum and are moved into host countries, there has to be a process in place to integrate them, get them educated, make sure they can find work so they become productive members of society and not simply embittered clusters of people who are marginalized.

Rather than a threat, robust refugee protection and migration policies can positively influence three “core areas of state power: economic, military and diplomatic” (Adamson 2006, 185). They can advance a state’s economic interests because in a globalized, interconnected world “no nation can prosper, or even achieve modest economic success, without ready contact with the rest of the world” (Martin 2009, 4). In addition, they can help to meet labor needs (Chamie 2013), improve the productivity and prospects of millions (Clemens, Montenegro, and Pritchett 2008), and contribute to the development of source and destination nations (UNGA 2013). Refugee protection and legal migration policies can also further the rule-of-law by minimizing irregular migration, curbing the use of human smugglers, limiting the risk of trafficking, and making life more difficult for terrorists who depend upon and often profit from smuggling networks (Ginsburg 2010, 58-65; Schmid 2016, 27-29).

Refugees have historically made important economic, scientific, diplomatic, cultural, and ethical contributions to their new states. Prominent US refugees have included Albert

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30 It defined global risk as “an uncertain event or condition that, if it occurs, can cause significant negative impact for several countries or industries within the next 10 years” (WEF 2016, 6).
31 CMS interview with Michael Chertoff, former DHS Secretary and Assistant Attorney General, DOJ Criminal Division (June 9, 2016), http://cmsny.org/podcast-secretary-michael-chertoff/.
Einstein, Enrico Fermi, Elie Weisel, Madeleine Albright, Andrew Grove, and Sergey Brin. The Council on Foreign Relations’ Independent Task Force on US Immigration Policy cautioned that to “keep out talented immigrants or significantly disrupt legitimate cross-border traffic or commerce” would weaken “the long-term foundations of America’s economy and military strength, and consequently its security” (CFR 2009, 21). Noncitizens also serve in substantial and growing numbers in the US armed forces to which they bring lower attrition rates than citizens, “a track record of superior performance” and linguistic and cultural diversity that supports US counterterror objectives (Hattiangadi et al. 2005, 24, 55-67, 83, 87).

The UN 2030 Sustainable Development Goals (SDG), adopted in September 2015, recognized the importance of migration as a potential instrument of human and economic development by setting development targets related to the protection of labor rights, orderly and safe migration, and reduced remittance fees (UNGA 2015). The SDG migration-related targets speak to the need to channel what often begin as poorly managed, irregular refugee and migrant flows into legal migration and refugee protection systems that maximize the development potential of refugees, migrants, and source and destination communities.

From a foreign policy perspective, refugee protection can help states prevail “in the battle of ideas, in a contest for the support and even the affection of the world’s population” (Martin 2009, 4). It can allow states to distinguish themselves from geopolitical rivals and to appeal to global public opinion. The US refugee program, for example, seeks to further “the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands.” It has also supported specific foreign policy objectives like protection of Soviet Jews and other religious minorities, while responding to domestic constituencies. Resettlement can also promote the stability of allied states that host large refugee populations and, as illustrated by the 1989 Comprehensive Plan of Action (CPA) concerning Indochinese refugees, can preserve the availability of protection in nations of first asylum.

In the United States, refugees serve as a continuous, living reminder of the nation’s core values, including its commitment to religious liberty. And, as the Obama administration has recognized, US success in promoting its security and values abroad turns on its adherence to its values “at home” (White House 2015b, 19).

National security has traditionally been defined by state interests or collective identity which, in the post-Westphalian era, has been based on “nationalism” (Adamson 2006,

32 For an extended discussion of why national security concerns demand an appeal to global public opinion, see Pistone and Hoeffner (2011, 637-58, 674-76).
34 After the Vietnam War, the United States “became the principal architect of the entire resettlement system” (Suhrke 1998, 406, 413). Its response offers a framework for a comprehensive, integrated response to large-scale refugee crises. Together, the 1979 Geneva conference which established the Orderly Departure Program (ODP) and the second Geneva conference of June 1989 which adopted the Comprehensive Plan of Action (CPA) provided for direct, legal departures from Vietnam, temporary protection in nations of first asylum, and large-scale, third-country refugee resettlement. The CPA also provided for the repatriation of those not deemed to be refugees. Not counting direct departures from Vietnam under the ODP, the United States took in 822,977 of the 1.3 million Indochinese refugees resettled worldwide between 1979 and 1995 (UNHCR 2010, 99).
In a globalized world, international migration “calls into question traditional models of national security, which assume a unitary national identity from which a set of national interests can be derived” (ibid., 175).

Refugees and migrants can also make crucial contributions to the struggle against terrorism. Indeed, following the 9/11 terrorist attacks, law enforcement and intelligence experts recognized the need to engage communities in which terrorists might attempt to hide, to draw on immigrants as a source of intelligence and support, and to enlist them in counterterror efforts (Kerwin and Stock 2007, 418-19). They insisted (correctly) that immigrant communities have a strong interest and incentive to cooperate in responding to a shared threat. Not only do the members of these communities overwhelmingly reject extremist ideologies and terrorism, but they bear the brunt of hate crimes and vilification by anti-immigrant extremists following attacks. In fact, tips from community or family members helped to expose one-quarter of the 330 cases of persons charged with jihadist terrorist offenses in the United States since 9/11 (Bergen 2016, 101-02).

Persons fleeing persecution and violence seek a degree of security denied them in their countries of origin, an aspiration that mirrors the desire for public safety by citizens in receiving communities

Finally, it should be emphasized that the Refugee Convention does not apply to persons who have “committed a crime against peace, a war crime, or a crime against humanity,” a “serious non-political crime outside the country of refuge” pre-admission, or have been “guilty of acts contrary to the purposes and principles of the United Nations.” Nor does the right to non-refoulement extend to a refugee who can reasonably be regarded “as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

A December 1, 2015 letter to the US Congress from a group of former US diplomatic, intelligence, military, and homeland security officials — including Madeleine Albright, Henry Kissinger, David Petraeus, and George Schultz — made this point plainly, stating that refugees “are victims, not perpetrators, of terrorism.” One-half of the world’s refugees are children, large numbers have survived violence and torture, and many have severe or chronic medical conditions. Persons fleeing persecution and violence seek a degree of security denied them in their countries of origin, an aspiration that mirrors the desire for public safety by citizens in receiving communities.

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35 The 1951 Refugee Convention, Art. 1(F).
36 The 1951 Refugee Convention, Art. 33(2).
IV. National Security and the Terrorist Threat

The term terrorism arose in response to the French Revolution’s Reign of Terror and was later used to describe state actors like the National Socialist Party and Stalinist Russia (Aly 2015, 85-86). In recent years, this phenomenon has become associated with violence against civilians or non-combatants by non-state actors. The Global Terrorism Index produced by the Institute for Economics and Peace defines terrorism as “the threatened or actual use of illegal force and violence by a non-state actor to attain a political, economic, religious, or social goal through fear, coercion, or intimidation” (IEP 2015, 6). Commentators regularly characterize terrorism as a tactic, not an enemy or an ideology, an observation that doubled as a criticism of the open-ended nature of the US war on terrorism. This “tactic” is often adopted by non-state actors in asymmetric conflicts with states.

The line between state and non-state terrorism can be blurred (WEF 2016, 31). On the one hand, terrorist groups like ISIL, the Revolutionary Armed Forces of Colombia (FARC), and al-Shabaab, have assumed some of the responsibilities of states (Glazzard 2015, 81). On the other hand, many states use terror as an instrument of repression, domination, and social control (Schmid 2016, 14). For instance, the Assad regime has terrorized Syrians in rebel-held areas and other perceived opponents through the widespread use of torture, extrajudicial killing, barrel bombs, and chemical weapons.

A. Scope and Dimensions of the Non-State Terrorist Threat

In recent years, terrorism-related killings have been overwhelmingly concentrated in a handful of nations. In 2014 terrorists carried out 13,463 attacks which resulted in 32,727 deaths, including of 6,200 perpetrators (START 2015, 3-6). Sixty percent of the attacks took place in Iraq, Pakistan, Afghanistan, India, and Nigeria, and 78 percent of fatalities occurred in Iraq, Nigeria, Afghanistan, Pakistan, and Syria (ibid.). ISIL or “Daesh” (an Arabic language acronym for ISIL) committed 17 percent of the attacks, followed by the Taliban in Afghanistan, al-Shabaab in Somalia, Boko Haram in Nigeria, and Maoists in India (ibid., 11).

Nine of the 20 deadliest attacks occurred in Nigeria (ibid., 9). Indeed, in 2014, the number of Boko Haram killings exceeded even those by ISIL (IEP 2015, 22, 41), to whom it declared allegiance in March 2015 (Almukhtar 2015). Boko Haram began 2015 with the January 3–7 massacre of an estimated 2,000 residents of the town of Baga in Nigeria’s Borno state and ended the year with an offensive in Maiduguri, home to an estimated one million refugees and the capital of Borno state, and in the town of Madagali, southwest of Maiduguri (Sawab 2015).

Between 2000 and 2014, the 3,659 terrorist killings in Western states accounted for 2.6 percent of the world’s total, with 91 percent of that number attributable to the September 11, 2001 attacks, the Madrid train bombings on March 11, 2004, the July 22, 2011 murders of 77 in Norway, and the three London bombings on July 7, 2005 which killed 56 (IEP 2015, 50-51).³⁸

³⁸ Between 2006 and 2014, lone wolf attacks represented 70 percent of all terrorism-related killings in Western states (IEP 2015, 54-58).
Jihadist killings in the United States since 9/11 have invariably been committed by “lone wolves” acting without guidance, direction, or assistance from terrorist groups (ibid., 69), a phenomenon known as “leaderless jihad” (Bergen 2016, 52-53). 39 Forty-five persons were killed in the nine jihadist terrorist attacks in the United States between 2002 and 2015 (New America Foundation 2015). 40 Fifty more persons were killed in the June 12, 2016 terrorist attack at a gay nightclub in Orlando, Florida. 41

The absence of large-scale coordinated attacks since 9/11 speaks, in part, to the degree of public support for the counterterror struggle (Brooks 2011, 27). 42 An analysis of US terrorist plots in the decade after 9/11 concluded that those “most likely to succeed” involved “accessible weapons (e.g., firearms) and small numbers of individuals that require minimal skill and pre-operational steps” (ibid., 39). Intelligence and law enforcement officials believe that attacks against soft targets, modeled on the November 26–29, 2008 attacks in Mumbai by Lashkar-e-Taiba terrorists which killed 172 persons, have a greater probability of success than complex and ambitious 9/11-style attacks (Riedel 2015). Former New York City Police Department (NYPD) Commissioner Raymond Kelly characterized the November 13, 2015 Paris attacks as “shockingly simple” to plan and implement (Daly 2015).

The statistics on jihadist killings in the United States help to contextualize the risk of a catastrophic attack by a person admitted as a refugee, a very small category of well-screened and vetted residents. According to the US Department of State (DOS), “only about a dozen” of the nearly 785,000 refugees admitted since 9/11 have been “arrested or removed from the U.S. due to terrorism concerns” which preceded their admission (Ye He Lee 2015). There have been no domestic terrorist attacks by refugees during this period.

However, these figures hardly offer cause for complacency. Terrorists will continue to try to exploit all admission channels to targeted states (Adamson 2006, 195; Leiken and Brooke 2006, 510), including refugee programs (Hattem 2016). In addition, ISIL, al-Qaeda, and other groups are committed to inflicting catastrophic damage on their near and far enemies. Military and intelligence officials have repeatedly warned of the risk of terrorist attacks against Western states using improvised devices containing chemical, biological, radiological, or nuclear (CBRN) materials (Rudischhauser 2015). In 2004, the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) warned that al-Qaeda had been trying to secure “weapons of mass destruction” for at least a decade and viewed the United States as a “prime target” (9/11 Commission, 381), which it remains today.

B. The Refugee/Migrant and Terrorism Nexus

The need for refugee-related security measures assumes a connection between refugees and a security threat. To develop effective security strategies and robust refugee protection

39 These terrorists could also aptly be described as mass murderers.
40 These numbers reflect the success of US intelligence and law enforcement agencies in disrupting terrorist plots and preventing large-scale attacks since 9/11.
41 In that case, Omar Mateen, a US citizen of Afghani descent, claimed allegiance to ISIL, but had no connection to the group and seemed to act from mixed motives (Apuzzo and Lichtblau 2016).
42 The same conditions do not obtain in some European communities.
systems requires clarity on the relationship between the two. The nexus between terrorism and refugees can take a number of forms.

First, state (political) terror, internal conflict, and international conflict are correlated with high rates of terrorism (IEP 2015, 67-69; Schmid 2016, 17). An analysis of terrorist attacks by non-state or sub-state actors resulting in at least one fatality between 1989 and 2014 found that 92 percent occurred where levels of political terror were very high, 55 percent in nations undergoing internal armed conflict, and 33 percent in nations embroiled in an “internationalized” conflict (IEP 2015, 70-72). Conversely, terrorist attacks occurred at very low rates (less than 1 percent) in states with no political terror or ongoing conflict (ibid., 72).

Second, terrorist violence results in refugee flows and displacement. The 11 nations that experienced more than 500 terrorism-related deaths in 2014 produced the highest average numbers of refugees and IDPs (IEP 2015, 59-60). Similarly, high fatality rates from terrorism in Syria, Iraq, Pakistan, and Afghanistan strongly correspond to numbers of first-time asylum seekers in Europe (Schmid 2016, 27). Given their flight from nations with high levels of terrorist violence, it stands to reason that refugees would not typically opt to migrate to those same states. In fact, of the 10 largest refugee-hosting nations, only Pakistan ranks among the top 10 countries affected by terrorist violence (IEP 2015, 59-60).

Forced displacement has been a goal of Lord’s Resistance Army, Boko Haram, and other terrorist groups (Koser and Cunningham 2015, 83). ISIL has killed, subjugated and driven religious minorities and others from its territory, while appealing to Muslim refugees to return “home,” warning that they will be forced to convert in infidel lands (Zelin 2015). In a modern version of draining the sea (civilians) to catch the fish (insurgents), the Assad regime has targeted civilian populations and infrastructure, leading to massive displacement, in order to isolate and weaken rebel factions (Schmid 2016, 20).

While both state terror and non-state terrorism lead to refugee flows, it does not follow that refugees negatively impact security in host states. A recent analysis compared UN data on the location of refugees, IDPs, asylum seekers and returnees, with subnational data on conflict onset from 1989 to 2008. The study concluded that refugee host communities tend “to experience more stability over time,” possibly due to the influx of humanitarian and security actors that often accompany refugees. It found “no evidence” that refugee communities increase the likelihood of conflict or facilitate “regional conflict diffusion” (Shaver and Zhou 2015, 2, 24).

Most resettled refugees do not fit terrorist profiles. Former DHS Secretaries Napolitano and Chertoff described Syrian refugees as “the most vulnerable — particularly survivors of violence and torture, those with severe medical conditions, and women and children.”

43 The Global Terrorist Index defines political terror as “state sanctioned or state perpetrated violence against its citizens” (IEP 2015, 70).
44 In Organisation for Economic Co-operation and Development (OECD) nations, terrorism is associated with “social disenfranchisement,” as reflected in youth unemployment, low confidence in democracy and the press, and other factors (IEP 2015, 69).
45 Forced migration from has also been a strategic goal of the Assad regime and of many past regimes, like the Slobodan Milosevic’s regime in Serbia.
46 Letter from Janet Napolitano and Michael Chertoff, former DHS Secretaries, to President Barack Obama
The United States has also prioritized the resettlement of Iraqis and Afghans who worked at great peril with the US military and other US institutions.

Third, although refugee settlement does not increase the overall probability of conflict in a region (Shaver and Zhou 2015, 2, 24), international migration can “provide conduits for the diffusion of network-based forms of political violence and instability,” which particularly threaten less stable and weaker states (Adamson 2006, 191, 198).

In El Salvador, Guatemala and Honduras, for example, transnational criminal syndicates, fueled in part by US deportation policies and trafficked firearms, have subverted state institutions (CIDEHUM and UNHCR 2012, 11, 13). Gangs (maras) subjugate many communities in these states, extorting monies from businesses and individuals, conscripting youth, and effectively controlling access to public institutions like schools. Gang violence and recruitment has, in turn, led to the migration of tens of thousands of unaccompanied children from Mexico and Central America, often to join parents who previously migrated to the United States (Donato and Sisk 2015, 73). As a measure of their desperation, US-resident parents have chosen to hire smugglers, rather than expose their children to the risk of gang violence during the lengthy application processing period for refugee or humanitarian admission to the United States (Hennessy-Fiske 2016).

Likewise, failed states and the effective absence of states in particular regions have paved the way for terrorist groups to establish strongholds in Somalia (al-Shabaab), Uganda (Lord’s Resistance Army), and elsewhere. These groups, in turn, have displaced millions (Schmid 2016, 22-23).

Fourth, counterterror and counter-insurgency initiatives, particularly in terrorist strongholds, can also cause large-scale displacement (ibid., 46-47). Following 9/11, counterterror experts voiced concern over the ability of al-Qaeda and the Taliban to operate and plan attacks from ungoverned “safe havens” like the Waziristan tribal region on the Afghanistan and Pakistan borders (Rotberg 2002). A Pakistani military offensive in this region in 2014 led to the displacement of an estimated one million civilians (Schmid 2016, 46).47

Fifth, nationals of Western states have increasingly travelled abroad to receive training and to fight with terrorist groups. As of December 2015, an estimated 27,000 to 31,000 persons from 86 nations had traveled to Syria and Iraq to join ISIL and other extremist groups, including more than 5,000 from Europe (primarily from France, the United Kingdom, Germany, and Belgium) and roughly 250 each from the United States and Australia (Sofian Group, 4, 7-9, 12). Some terrorists, particularly those who can no longer return home, move from one jihadist conflict to the next (Schmid 2016, 43).

Jihadists have also returned to European and other Western states in high numbers, posing a substantial threat of violence and accounting for a large percentage of terrorist plots in Western states (ibid., 39, 42-43).48 An examination of 330 persons charged with a jihadist

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47 The Iraq War displaced an estimated 2.7 million persons.
48 Counterterror expert Bruce Hoffman argues that “while the threat of homegrown violent extremism … is now accepted as fact, there is still surprisingly little consensus on the potentially far greater danger posed by radicalized foreign fighters trained by ISIS, returning to their native or adopted homelands in the West …” (Hoffman 2015).

terrorist-related offence in the United States since 9/11 found that nearly one-half had traveled overseas to join a jihadist group or had attempted to do so (Bergen 2016, 168-69).49

Sixth, the migration-related security threat most commonly articulated in media and policy circles involves the potential entry of foreign terrorist operatives into states, whether for reconnaissance, as “sleepers” for future mobilization, or as “muscle” for imminent attacks. Some threats originate in Western states. US citizen David Headley, for example, made seven reconnaissance trips in preparation for Lashkar-e-Taiba’s November 26–29, 2008 attacks in Mumbai (Bergen 2016, 193).

International migrants hardly constitute the only source of the terrorist threat. A study of 373 “charged, convicted, and/or killed” jihadi terrorists from “transnational Sunni Islamist terrorist groups” operating in Western Europe and North America from 1993 through December 14, 2004 concluded that 41 percent were nationals of EU or North American states (Leiken and Brooke 2016, 507-08). However it also found “some degree of overlap” between immigration and terrorist networks, particularly of North African immigrants in the European Union and Canada (ibid., 509, 513).

Terrorists will continue to probe the security of migration channels and try to enter targeted states in whatever ways might be available to them, as evidenced by the entry of Tashfeen Malik, one of the two San Bernardino killers, on an F-1 (fiancée) visa. Perhaps the most troubling breaches of the US refugee program have involved Iraqi nationals arrested prior to planned attacks.50 The first case involved Waad Alwan and Mohanad Hammadi, who were admitted as refugees in 2009 (DOJ 2013), despite having participated in the insurgency against US troops in Iraq and Afghanistan. After settling in Bowling Green, Kentucky, they became the subject of an FBI sting operation (based on a tip) and sought to purchase weapons for al Qaeda in Iraq (AQI), a predecessor to ISIL.

The Federal Bureau of Investigation (FBI) subsequently found Alwan’s finger and palm prints on the base of a cordless phone which had been connected to unexploded IEDs in Iraq.51 As a result of this case, the federal government halted Iraqi refugee admissions for several months, intensified screening of Iraqis (Meek and Ross 2015; Madhani 2012), and eliminated delays in processing weapons for biometric and other evidence.


50 For this reason, some view these arrests as a counterterror and law enforcement success, an example of the “system working.”

51 The phone was stored in an FBI repository for ordnance from conflict zones in Iraq, Afghanistan, and elsewhere. Alwan pled guilty to conspiring to kill and to the use of a weapon of mass destruction (explosives) against US nationals abroad; “distributing information on the manufacture and use of IEDs; attempting to provide material support to terrorists and AQI; and conspiring to transfer, possess and export Stinger missiles.” Hammadi pled guilty to “attempting to provide material support to terrorists and AQI; conspiring to transfer, possess and export Stinger missiles; and making a false statement in an immigration application” (DOJ 2013).
In January 2016, the US Department of Justice (DOJ) announced the arrests of two more Iraqi nationals, Aws Mohammed Younis Al-Jayab and Omar Faraj Saeed Al Hardan, who entered as refugees. Al-Jayab allegedly left the United States to fight in Syria with terrorist groups between November 2013 and January 2014. Unlike Al-Jayab, Al Hardan apparently became radicalized after his arrival. He allegedly conspired with Al Jayab to fight for ISIL and to commit terrorist acts in the United States (Lozano 2016).

Seventh, terrorist groups have sought to recruit and radicalize vulnerable, often long-term refugees (Koser and Cunnigham 2015, 83-84; Schmid 2016, 32-37). Some scholars have argued that refugee camps serve as “breeding grounds” for terrorism and a “source of insecurity” for host states and entire regions (Loesher and Milner 2014, 7). Syrian refugees reportedly face ISIL recruitment in Lebanese, Jordanian, and Turkish camps (Schmid 2016, 33-35; Speckhard 2015). Beyond the threat of terrorist violence (Naylor 2016), refugees have suffered xenophobic attacks in host communities (Schmid 2016, 40).

Eighth, politicians and the media treat radicalization, which can be highly sophisticated and incessant, as a migration-related phenomenon. However, terrorist recruitment often occurs after the migration process takes place and does not involve immigrants. Of the 71 persons charged by the United States with ISIL-related activities between March 2014 and December 2015, 58 percent were US citizens and six were US lawful permanent residents (LPRs) (Vidino and Hughes 2015, ix, 7).

Yet ISIL, al-Shabaab, Jabhat al-Nusra and other terrorist groups have also had some success in targeting persons from select refugee communities for recruitment (Jordan and Kesling 2015). A group of nine Somali-Americans from the Minneapolis/St. Paul area, for example, have been convicted of terrorism-related offenses related to a plot to join ISIL in Syria and a 10th member of the group is thought to have fled to Syria (McDowell 2016). According to the FBI, since 2007, 22 men have left Minnesota to join al-Shabab and roughly 12 Minnesotans (men and women) have joined militant groups in Syria (ibid.). Another person of Somali descent, a naturalized US citizen living in Columbus, Ohio, allegedly received terrorist training in Syria and, upon his return, intended to carry out attacks in the United States (DOJ 2015a).

Persons of other nationalities have also supported terrorist groups. For example, Abdullah Ramo Pazara, a Bosnian native from St. Louis, left the United States to join ISIL in May 2013. Six other Bosnians, including refugee Mediha Salkicevic, allegedly sent equipment and funds to Pazara who was killed in fall of 2014, to ISIL and to other terrorist groups (Patrick 2015). In addition, Fazliddin Kurbanov, an Uzbek refugee living in Boise, Idaho, was convicted in August 2015 of conspiracy and attempting to provide material support to the Islamic Movement of Uzbekistan, and possession of an unregistered destructive device (DOJ 2015b).

ISIL, for example, seeks to create an echo chamber and virtual community in order to indoctrinate recruits and convince them to join ISIL fighters abroad or to commit attacks in the United States (Vidino and Hughes 2015, ix, 5, 21-26). Many thousand Americans access ISIL’s online propaganda each day.

September 11, 2016 represents the 15th anniversary of the 9/11 attacks when 19 al-Qaeda terrorists hijacked four airplanes, killing 2,977 persons and injuring many thousand more at the World Trade Center (2,753 killed, including 11 pregnant women), Pentagon (184 killed), and United Flight 93 (40 killed). Among the victims were persons from 93 nations, 71 New York City and Port Authority police officers, and 343 firefighters.

The attacks led to a period of national soul searching over how to safeguard the nation from extremist violence while preserving its diverse, rights-respecting and open character. The US immigration system has invariably been implicated in this debate because of immigration’s defining significance in US history and because the 9/11 terrorists exploited legal immigration channels to enter and remain. Several counterterror strategies have been pursued during this era. Some have proven successful and others misguided and even counter-productive.

A. Risk Management

Risk management has emerged as an integrating, organizational principle in the post-9/11 era (DHS 2014, 32; DHS 2011a). This concept speaks to the need to allocate (necessarily) limited resources in proportion to the likelihood of a threat coming to pass and its potential severity. It weighs the benefit of a security measure against its financial and other costs (Kerwin and Stock 2007, 394). Under this principle, a state “accepts certain risks, reduces others, and concentrates on the most consequential” (DHS 2010, 55). In its Strategic National Risk Assessment, DHS identifies natural disasters, technological hazards, and terrorist attacks as among the greatest threats to the US homeland, but does not include immigration and border violations which it characterizes as “chronic society concerns” (DHS 2011b).

The United States issued nearly 10 million non-immigrant (temporary) visas in 2014 (DOS 2015b). Although these numbers dwarf refugee admissions, non-immigrant tourists, business people, and students have not been subject to nearly the same level of scrutiny and suspicion as refugees have, which raises the question: why not?

Like the refugee program, many non-immigrant programs have an underlying non-economic rationale. However, they also bring immediate economic benefits, which a lengthy and burdensome screening process would threaten. Visitors to the United States, for example, spent $220.8 billion and created an estimated 7.9 million jobs in 2014 (ITA 2014). The nearly one million international students in US colleges and universities in 2014/15 contributed $30.8 billion to the US economy (IIE 2015). The US immigration system delivers “an inordinate share of the world’s best talent,” providing “a windfall in a global economy where heavy advantages accrue to the most innovative companies and the countries where they are based” (CFR 2009, 14).

53 As the 9/11 Commission put it, “America can be attacked in many ways and has many vulnerabilities. No defenses are perfect. But risks must be calculated; hard choices must be made about allocating resources” (9/11 Commission 2004, 364).

54 For example, foreign students are exposed to the United States’ culturally diverse, democratic society, often winning their life-long support and admiration (CFR 2009, 8).
DHS has been criticized for its inability to bring risk-analysis capabilities and cost-benefit analysis to its decision making and program evaluation (Steward, Ellingwood, and Mueller 2011, 369, 383). Yet the concept itself is widely embraced by US law enforcement, intelligence, and homeland security agencies, albeit not by politicians who do not want to concede the possibility of terrorist attacks or the need for security trade-offs.

Terrorists will seek to enter targeted states through whatever migration routes might be open to them. Even the most exhaustive screening processes must be continuously adjusted based on evolving intelligence, field experience, and newly discovered vulnerabilities. Because risk cannot be eliminated, to demand absolute security for refugee protection programs represents a transparent way to oppose and politicize protection.

The question of whether radicalized European nationals might enter the United States through the Visa Waiver Program (VWP) has been intensely debated since the November 2015 Paris attacks. Terrorists exploited the VWP program both before and after the 9/11 attacks, and counterterror experts and commentators (including the author) identified the program as a source of vulnerability (Kerwin and Stock 2007, 402-04; Ginsburg 2010, 283-86). Since that time, the security of the VWP program has been significantly strengthened.

The VWP allows nationals from 38 states to enter the United States for business or pleasure for up to 90 days without a visa. Commentators point out that the program is more secure than US non-immigrant (temporary) and immigrant visa programs because participating states must agree to share terrorism-related intelligence and use machine-readable “E” passports which contain biographic data and biometric identifiers in an electronic chip (Alden 2015). At this writing, the United States has entered Preventing and Combating Serious Crime (PCSC) agreements with 35 VWP nations and with other nations that seek admission to the program (DHS 2015a). These agreements provide for access to other countries’ biographic and biometric data about potential terrorists and serious criminals. The EU, however, does not share biometric data (fingerprints) with the United States from its Eurodac system, which is used to detect multiple asylum applications from the same person and to screen for unauthorized entry.

The United States requires visitors from VWP states to register, prior to travel, through its Electronic System for Travel Authorization (ESTA) program, which collects biographic, criminal and other information. It screens ESTA information against multiple databases and watch lists. Participating states must also share information on lost or stolen passports and agree to airport security requirements.

In 2015 and 2016, DHS and Congress sought to strengthen the VWP’s security and promote full compliance with its requirements. On August 6, 2015, DHS announced that all VWP

55 The alternative to risk-management is to devote insufficient resources to substantial risks or excessive resources to less severe and likely threats.

56 In March 2016, DHS Secretary Jeh Johnson expressed concern over the potential for terrorists to enter through the US refugee program (Hattem 2016).

57 The March 18, 2016 agreement between Turkey and the European Union has intensified concerns related to the infiltration of criminals and terrorists into the European Union from Turkey, Serbia, and other candidates for visa liberalization (Coates 2016). Under this agreement, Turkey has agreed to readmit from Greece “new irregular migrants” in return for visa-free travel of Turkish nationals to the European Union, increased resettlement in Europe of Syrian refugees residing in Turkey, and greater EU financial support to Turkey.
travelers would need e-passports, participating states would be required to use INTERPOL Lost and Stolen Passport Database to screen travelers crossing their borders, and the use of US federal air marshals on international flights from VWP nations would be expanded (DHS 2015b). On November 30, 2015, DHS announced that the ESTA process would collect information on travel to nations that constitute “a terrorist safe haven” (White House 2015a).

The omnibus appropriations’ bill for 2016 incorporated H.R. 158, the Visa Waiver Improvement and Terrorist Travel Prevention Action of 2015.\(^\text{58}\) This legislation:

\begin{itemize}
  \item bars persons from Iraq, Syria, Iran, Sudan and “any other country or area of concern” on or after March 1, 2011 from participating in the program;
  \item sets deadlines for VWP nations to issue and use machine-readable, fraud-resistant passports with biometric information; to screen and validate such passports at ports-of-entry (POEs); and to screen non-citizens against INTERPOL databases on arrival and departure “for unlawful activity”; and
  \item provides for the termination of nations in the VWP for failure to share information or to screen properly.
\end{itemize}

DHS subsequently announced that it would add Libya, Somalia, and Yemen as countries “of concern” (DHS 2016b).

**B. Intelligence Collection, Information Sharing, and Identity Assurance**

The 9/11 attacks constituted a failure of intelligence gathering and information sharing. Fifteen of the 19 hijackers were “vulnerable to interception” (9/11 Commission 2004, 752-53). Three had been identified by the intelligence community as potential terrorists and the Central Intelligence Agency (CIA) knew that two of the three had entered the United States. However, the CIA failed to provide this information to the FBI in a timely way and the terrorists’ names were only belatedly added to the DOS’s list of known or suspected terrorists (ibid., 181-82). In addition, neither the CIA or FBI shared information on terrorist travel and passport practices with immigration, consular, or customs’ officials (Kerwin 2005, 752), or “systematically captured and analyzed” the substantial knowledge of these agencies on terrorist travel methods (Ginsburg 2010, 130-31).\(^\text{59}\)

In addition, states and localities had long resented the paucity of information sharing by federal law enforcement agencies. The NYPD repeatedly voiced these concerns in the aftermath of the first World Trade Center bombing on February 26, 1993, which killed six and injured more than 1,000 persons, including 88 firefighters, 35 police officers, and an emergency medical services worker (Kelly 2015, 90-91, 95-96). Following the 9/11 attacks, the NYPD built its own immense intelligence and counterterrorism apparatus to complement the work of federal agencies (ibid., 165-78).


\textsuperscript{59} Refugees can also be a source of information on the conditions in terrorist-producing countries and (on occasion) regarding potential terrorists in their communities (Kerwin and Stock 2007, 400-01).
After 9/11, the United States prioritized intelligence collection, combined pre-9-11 terrorist watch-lists into a single, federal Terrorist Screening Data Base (TSDB), made this information available to federal, state and local officials, and established a feedback loop to the FBI on all encounters with known or suspected terrorists. It also prioritized the need for secure identification documents and, in particular, biometrically-enhanced, machine-readable passports for those seeking admission to the United States (Ginsburg 2010, 194-97).

Aggravating the threat, ISIL has secured hundreds of thousands of false, stolen and blank Syrian and Iraqi passports, and German officials have been able to obtain fingerprints on only a small percentage of arriving refugees and migrants.

By contrast, information sharing in Europe on suspected terrorists and criminals remains far from systematic (De La Baume and Paravicini 2015; Mazzetti 2016). European states lack a comprehensive list of suspected extremists and do not consistently check arriving migrants against INTERPOL databases of stolen passports and terrorist alerts (Fidler and Pop 2015). Before the November 13, 2015 Paris attacks, only 20 percent of the migrants entering Greece from Turkey received full security screening and processing (Faiola and Mekhennet 2016). Moreover, a low percentage of arriving refugees in Germany (25 to 30 percent) possessed passports or travel documents. Aggravating the threat, ISIL has secured hundreds of thousands of false, stolen and blank Syrian and Iraqi passports, and German officials have been able to obtain fingerprints on only a small percentage of arriving refugees and migrants (Schmid 2016, 8-9). The November 13, 2015 Paris attacks have been attributed to “[p]oor information-sharing among intelligence agencies, a threadbare system for tracking suspects across open borders, and an unmanageably long list of homegrown extremists” (Witte and Morris 2015).

Most migrants to Europe have fled violence and war, extreme poverty, and untenable conditions. However, this massive population has included persons with bad motives. An estimated three dozen terrorists who entered Europe posing as migrants have been arrested while planning attacks or have died during attacks (Faiola and Mekhennet 2016). The inability of EU and state officials to establish the identity and effectively screen refugees and migrants presents an immense source of vulnerability. Germany has endured several attacks by asylum seekers, as it works through its processing backlogs and slowly gains intelligence on recently arrived asylum seekers and migrants (Faiola and Kirchner 2016).

Two of the terrorists responsible for the coordinated attacks in Paris on November 13, 2015 entered as migrants through Greece, claiming to be asylum seekers, and they subsequently registered at a refugee camp in Serbia (Faiola and Mekhennet 2016). Others who entered in refugee and migrant streams have also been implicated in terrorist plots (Troianovski and Turner 2016).

Although federal law enforcement agencies characterized irregular immigrants as a threat to national security in the immediate aftermath of 9/11, a consensus subsequently developed among intelligence and law enforcement professionals that terrorist groups preferred recruits without criminal records or immigration problems, so-called “clean skins” who were not likely to draw the attention of the police or security services (Kerwin and Stock 2007, 406-07). However, many jihadists and terrorist sympathizers operate relatively openly in European and other nations. The perpetrators of the January and November 2015 Paris attacks and the March 2016 Brussels attacks included extremists whose jihadist sympathies, ties, and even past conspiracies were well-known to European law enforcement and security services. The size of the threat posed by their own nationals has overwhelmed the surveillance and law enforcement capacity of several European states: an estimated 38,000 foreign fighters have travelled to Syria and Iraq since 2012, including 5,000 Europeans and 1,700 from France (Ignatius 2016; Erlanger and Yardley 2015).

The 9/11 attacks also underscored the importance of establishing the identity of persons seeking admission, leading to a renewed focus on the integrity of the “breeder” documents (particularly birth certificates) used to obtain other identity documents, the need for biometrically-enhanced passports and other travel documents, and the importance of information sharing on lost and stolen passports (Ginsburg 2010, 191-216). Returning jihadists and foreign terrorists have used falsified passports and identity documents to enter Western states (Schmid 2016, 43-44).

**C. National Unity and Enlisting Community and International Support**

Law enforcement and intelligence experts post-9/11 stressed the need for resilience in response to the terrorist threat; that is, to combat terrorism in ways that do not compromise national unity or civic values (Flynn 2004, 163-64). Rights-respecting enforcement is also a strong theme of DHS’s planning process and communications (DHS 2014, 32). By contrast, demagoguery and divisive counterterror strategies can compromise national unity and alienate groups that may have information on potential threats and have the most to lose from an attack by a perceived member of their national, ethnic, or religious community.

The vilification of Muslims represents one of the greatest threats to national unity and a boon to terrorists, who seek to polarize populations (Schmid 2016, 46). David Petraeus, the former CIA director and commander of coalition forces in Iraq and Afghanistan, warns that anti-Muslim rhetoric is “playing directly into the hands” of al Qaeda and ISIL, which hope “to provoke a clash of civilizations” (Petraeus 2016). To that end, al-Shabaab has featured the proposal to suspend Muslim immigration to the United States in one of its recruitment videos (Stack 2016).

Following the 9/11 attacks, President George W. Bush, New York City Mayor Rudolph Giuliani, Immigration and Naturalization Service (INS) Commissioner James Ziglar, DHS Secretary Tom Ridge and other leaders took pains to distinguish between law-abiding immigrants and refugees. In the immediate aftermath of the attacks, President Bush visited

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61 As of yet, there is no documented case of a terrorist arriving in the United States through illegal migration channels, although many have entered fraudulently through legal immigration system.
the Islamic Center in Washington, DC, where he made a powerful appeal to national unity and tolerance:

The face of terror is not the true faith of Islam. That’s not what Islam is all about. Islam is peace. These terrorists don’t represent peace. They represent evil and war.

When we think of Islam we think of a faith that brings comfort to a billion people around the world. Billions of people find comfort and solace and peace. And that’s made brothers and sisters out of every race — out of every race.

America counts millions of Muslims amongst our citizens, and Muslims make an incredibly valuable contribution to our country. Muslims are doctors, lawyers, law professors, members of the military, entrepreneurs, shopkeepers, moms and dads. And they need to be treated with respect. In our anger and emotion, our fellow Americans must treat each other with respect.

(White House 2001).

The 9/11 Commission report also made this point starkly:

Islam is not the enemy. It is not synonymous with terror. Nor does Islam teach terror. America and its friends oppose a perversion of Islam, not the great world faith itself.

(9/11 Commission 2004, 363)

In stark contrast, Donald Trump, the Republican presidential nominee, has flaunted international and domestic law by proposing that the United States suspend the admission of non-US citizen Muslims, deny entry to Syrian refugees, kill the families of terrorists, renew waterboarding of terrorist suspects, and track refugees in the United States (Bradner 2015). This anti-Muslim invective follows a 15-year period in which not a single attack was committed in the United States by a terrorist posing as a refugee, and every jihadist attack has been roundly condemned by Muslim leaders and groups.

Some politicians have proposed patrolling Muslim neighborhoods and admitting only or mostly Christian refugees (Davidson 2015). Christians and other religious minorities endure forced conversion, extortion, religious “cleansing” (what some have characterized as genocide), and extraordinary levels of persecution in large swaths of the Middle-East, where they have lived for centuries. Yet scores of Muslims, the great majority of the region’s refugees, likewise have no viable option to resettlement. Although difficult to estimate, Muslims certainly constitute a large percentage of the victims of terrorist violence if only because terrorism-related fatalities in recent years have mostly occurred in nations with high Muslim populations (Schmid 2016, 12; Alexander and Moore 2015).

The December 1, 2015 letter from former, high-level US diplomatic, intelligence, military, and homeland security officials opposed a de facto moratorium on admissions of refugees

62 Throughout its history, the United States has offered protection to victims of religious intolerance and persecution. In addition, it has regularly renewed legislation that creates a presumption of refugee status for religious minorities and other historically persecuted groups (Nezer 2014, 128). In addition, resettlement priority cases of “special humanitarian concern” include members of persecuted religious groups.
from Syria and Iraq on the grounds that it “would be contrary to our nation’s traditions of openness and inclusivity, and would undermine our core objective of combating terrorism.”\textsuperscript{63} They argued that refugee resettlement helps to “advance US national security interests by supporting the stability of our allies and partners that are struggling to host large number of refugees.”\textsuperscript{64}

They also averred that “[c]ategorically refusing” to admit Muslims “feeds the narrative of ISIL that there is a war between Islam and the West, that Muslims are not welcome in the United States and Europe, and that the ISIL caliphate is their true home.”\textsuperscript{65} This latter point merits particular attention. ISIL views the flight of refugees from territories that it controls as a “challenge to the legitimacy of its caliphate.”\textsuperscript{66} As a result, it has appealed to Syrian refugees to return, arguing that they will be forced to convert in the lands of infidels and will be welcomed home in its territory (Zelin 2015).

Michael Hayden, the former director of the CIA and the National Security Agency (NSA), argues that anti-Muslim rhetoric and discriminatory proposals play into the extremist narrative that Muslims “are born into a world of unrelenting hostility towards Islam from the Judeo-Christian West” (CFR 2015). Hayden called it “doubly stupid when we say things that reinforce that incredibly false narrative” (ibid.).

Former DHS Secretary Chertoff argues that a religious litmus test would be “odious to the values of America and utterly impractical to enforce in the real world.”\textsuperscript{67} DHS Secretary Jeh Johnson said that this approach “‘would burn bridges to American Muslims when we’re trying to go in the exact opposite direction’” (Kim 2015).

James Ziglar argues that a moratorium on Muslim immigration “would not achieve any national security objective, and would likely create an even more hostile and dangerous environment for the United States in its relations with the Muslim world.”\textsuperscript{68} David Petraeus points out that the proposal would undermine US armed forces, which have depended heavily on Muslim forces to fight al-Qaeda in Iraq, the Taliban in Afghanistan, and the ISIL in Iraq and Syria, and which need Muslim partners to root out terrorist networks and hold territory formerly occupied by terrorists.

To deny entry to desperate refugees, to treat refugees with hostility, or to create discriminatory immigration policies based on fear of radicalization could become a self-fulfilling prophecy. Anti-Muslim rhetoric and proposals also foment hostility against

\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid.
\textsuperscript{67} Chertoff argues that “it’s not clear … how you would know what somebody’s religion was and how you would prove what their religion was.” CMS interview with Michael Chertoff, former DHS Secretary and Assistant Attorney General, DOJ Criminal Division (June 9, 2016), http://cmsny.org/podcast-secretary-michael-chertoff/.
\textsuperscript{68} Interview by author with James Ziglar, former INS Commissioner (Dec. 29, 2015).
Muslims, lead to increases in hate crimes, undermine the security and integration of Muslim immigrants, and embolden US extremist groups. Jihadist terrorists seek to drive a wedge between refugees and their host states. As one commentator put it, “equating refugees with terrorists is simple: It’s exactly what the Islamic State wants” (Taylor 2015).

D. Failed and Misguided Strategies
If intelligence collection, information sharing, identity assurance, and national unity emerged from the post-9/11 era as hallmarks of an effective and coordinated counterterror strategy, this era also produced several excesses and anomalies. Many post-9/11 refugee- and migration-related security strategies have since been discredited as counterterror tools.

In the weeks following 9/11, US law enforcement and immigration agencies desperately sought to disrupt and prevent what they believed to be imminent, additional attacks. The National Security Entry-Exit Registration System (NSEERS) registered (temporary) non-immigrants from certain countries upon their entry and required that they re-register after 30 days and annually thereafter. It also included a “call-in,” “domestic” registration program for those in the United States at the program’s inception. The latter program led to the registration of 83,519 non-immigrants from 25 nations and the arrest of roughly 13,000 persons of Middle Eastern and South Asian descent for immigration violations, but it yielded little useful intelligence (Martin 2009, 25-26; Kerwin 2005, 760-61). An analysis of this program concluded that the order in which national groups were required to register did not align with the stated criteria (an “al-Qaeda presence”) for inclusion of states in the program (Leiken and Brooke 2006, 515). Nor was it rational from a security perspective to limit the program to non-immigrants (ibid.).

In the immediate aftermath of the 9/11 attacks, the United States also arrested and detained in often abusive conditions hundreds of non-citizen men who purportedly had some connection (however attenuated) to the 9/11 terrorists (Kerwin 2002, 23-26). Many detainees were held incommunicado and could not be located by family members or counsel for protracted periods. Federal officials held the detainees for immigration violations or as material witnesses for criminal proceedings, while pressuring them for information on terrorist plots which they mostly did not possess. A significant number were subject to closed court hearings. However, the initiative led to only one arrest of an al-Qaeda-affiliated terrorist (Bergen 2016, 32).

In 2008, adopting a similar “broad net” strategy, the FBI’s Controlled Application Review and Resolution Program (CARRP) began to pressure mostly Muslim, “known or suspected” or “non-known or suspected terrorists” to become government informants by delaying consideration of their applications for immigration status, naturalization, or protection (Ansari and Datoo 2016). Critics contend that this program withholds immigration benefits from persons who present no threat and produces little, if any, actionable intelligence (ibid.).

The FBI has also been criticized for using its large network of informants to propose terrorist operations to often impressionable and hapless persons, and to help execute plots

69 In addition, these practices can potentially alienate populations in which terrorists might try to hide and could diminish cooperation with intelligence and law enforcement agencies (Kerwin et al. 2003).
that would not otherwise be pursued (Bergen 2016, 97-98). The strategy has been defended on the grounds that it increases suspicion among terrorists and makes it difficult to organize, large-scale attacks (ibid., 100). However, it can also lead to long-term prison sentences for persons who would never have conceived of or carried out plots on their own.

A common denominator of these tactics has been their reliance on broad profiling and preventive or “pre-textual” use of immigration enforcement tools. As many counterterror experts cautioned after 9/11, strategies that target persons based on race, religion, ethnicity, or national origin cast far too wide and indiscriminate a net to be useful law enforcement tools (Kerwin 2005, 755). In addition, discriminatory policies cannot attract the kind of broad, sustained support necessary to address what will likely be a long-term threat (Heymann 2003, 88-92, 162).

On the other hand, profiling based on terrorist behavior, tactics, and real-time intelligence constitutes a crucial counterterror and law enforcement tool. An analysis of 475 ISIL recruits from Western states found that one in seven were women (Bergen 2016, 267-68), a substantial increase that demonstrates how terrorists adapt to established profiles. In recent years, the FBI has sought to identify serious threats through “universal indicators” of violence. The typical progression to a terrorist attack, for example, moves from a grievance, to a sense of the necessity of violence, to concrete planning, and to “leakage” of information about an imminent attack (ibid., 233-38). Law enforcement intervention would be indicated at the latter stages of this process.

The post-9/11 era also witnessed several dubious and exaggerated security claims for measures as diverse as the interdiction and detention of Haitian boat people, the indefinite detention of immigrants who had been ordered removed, and the US-Canada safe-third country asylum agreement which requires that asylum claims, with some exceptions, be lodged in the first of the two states that an asylum-seeker enters.

### E. Border Security

In the post-9/11 era, borders have become a potent political symbol of migration-related security concerns. Borders also represent a potential point of vulnerability and exposure for terrorists. The ease with which the perpetrators of the November 13, 2015 Paris and the March 22, 2016 Brussels attacks moved within EU states and returned to the EU following jihadist activity abroad underscores the potential security function of borders and ports-of-entry (Mazzetti 2016). Porous borders have also been blamed for al-Shabab attacks in Kenya, Boko Haram’s infiltration of Niger, Chad and Cameroon, and ISIL attacks in Libya, Tunisia, and Egypt (Sieff 2016).

The massive growth in border infrastructure since 9/11 in the United States may deter some terrorists from seeking to enter. However, the greater security need is to identify and foil committed terrorists, preferably before they reach national boundaries, to promote orderly, regulated migration flows so that states can concentrate their resources on the small number of border crossers that may present a public safety or security risk, and to combat the radicalization of residents.

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70 Belgian national Abdelhamid Abaaoud, the mastermind of the November 13, 2015 attacks, repeatedly left and returned to the European Union without being detected.
Moreover, the US investment in hardening the southern border does not correspond to the size of the security threat posed by the border. An analysis of 373 jihadi terrorists between 1993 and 2004 found that not a single terrorist crossed the US-Mexico border where 87 percent of Border Patrol agents are stationed (US Border Patrol 2015), but it identified 26 confirmed terrorists in Canada, three of whom had entered or tried to enter the United States (Leiken and Brooke 2006, 513). DHS’s main metrics for “border security” — apprehensions, repeat crossings (“recidivism”) and “effectiveness” in arresting or turning back unauthorized migrants (CRS 2016, 22-23) — speak almost entirely to irregular migration, not to terrorism. In addition, most newly “unauthorized” US residents enter the nation legally and violate the terms of their temporary visas, rather than cross in irregular migration streams (Warren and Kerwin 2015, 93-94). Thus, even if unauthorized persons posed a heightened security risk (which they do not), greater investment in border control would not significantly mitigate that risk.

Border enforcement growth has also led to diminished refugee protection. Over the last 20 years, security and enforcement agencies have been vested with broad refugee protection responsibilities. Under US law, migrants without sufficient travel documents or who are stopped at a port-of-entry or apprehended at or near a border face expedited removal unless they request political asylum or express a fear of return to a border official. If they do, they must be referred for a “credible fear” interview by a member of USCIS’s specially trained asylum corps. If determined to possess a credible fear of persecution, they can seek political asylum.

US Customs and Border Protection (CBP) and, in particular, the US Border Patrol, draw heavily from US military veterans and enjoy a strong paramilitary and law enforcement culture. Yet these officials also bear responsibility for deciding whether to refer migrants for credible fear determinations (which can lead to political asylum hearings) or to remove them without judicial recourse. Border officials often seek to dissuade asylum seekers from pursuing their claims by threatening them with detention and separation from their families (Cabot 2014, 366-67). The US Commission on International Religious Freedom has twice investigated the US expedited removal process and found that border officials often fail to ask migrants if they fear returning home and fail to note when migrants express fear, which can lead to their detention and summary removal (USCIRF 2005, 20-23; USCIRF 2016, 21-23). CBP’s screening of unaccompanied children to determine if they fear return or have been trafficked has been similarly problematic (GAO 2015). In addition, dozens of complaints have been filed regarding the poor and abusive treatment of children in Border Patrol holding cells (Burnett 2014).

In 2015, DHS’s Office of Inspector General (OIG) reported that certain Border Patrol sectors refer asylum seekers for criminal prosecution (OIG 2015, 16) in violation of the Refugee Convention. Criminal prosecution makes it far more difficult to sustain an asylum claim, punishes bona fide asylum seekers for reaching protection in the only way available to many of them, and causes asylees to begin life in their new communities with a criminal record (Kerwin 2015, 218-19). In response to this practice, OIG accepted the Border Patrol’s claim that criminal prosecutions for illegal entry and the asylum process should proceed on parallel tracks (OIG 2015, 17-18) — which manifestly they should not — while recommending only that the Border Patrol develop guidance on this issue.
VI. The US Refugee Resettlement Program: A Case Study in Securing Refugee Flows

The current era of record displacement demands US leadership. Yet not since USRAP’s creation in 1980 has there been greater opposition in the United States to refugee resettlement. This section examines security-related concerns regarding the program in light of its strong vetting and screening process.

A. Recent Opposition to US Refugee Resettlement

In late 2015, the US House of Representatives passed the American Security Against Foreign Enemies Act of 2015 (the SAFE Act), which would have precluded the admission of refugees from Iraq or Syria, or refugees who last lived in or recently visited these two nations, until the director of the FBI, the secretary of DHS, and the director of national intelligence (DNI) certified to 12 congressional committees that the refugee did not represent a threat. In addition, the Act would have required the DHS inspector general to review and report annually to the same committees on each certification. Requiring high-level sign-off on individual admissions from these nations would have brought resettlement to a standstill for some of the world’s most desperate refugees and would have risked “diverting limited homeland security and law enforcement resources from more pressing needs.” President Obama vowed to veto this legislation (EOP 2015), and in January 2016 the bill failed to win sufficient support to proceed to passage in the Senate.

In recent years, many states and localities have voiced concerns that refugees pose a terrorist threat, strain local resources, and cannot be absorbed into their communities (Brown and Scribner 2014, 109-10). In 2015, 31 US governors vowed to prevent Syrian refugees from resettling in their states (Fantz and Brumfield 2015), despite the well-established authority of the federal government to set immigration and refugee policies. The state of Texas brought an ultimately unsuccessful lawsuit to enjoin the resettlement of Syrian refugees, based on the claim that the federal government and federally funded resettlement agencies had failed in their statutory responsibility to consult with the state prior to placement of refugees (Walters and Ura 2016).

State hostility toward resettlement of Syrian and Iraqi refugees may be less a legal than a practical threat to the refugee program, which depends heavily on partnerships between participating federal agencies, non-governmental resettlement agencies, and states and localities. The Refugee Act of 1980 provides for advance consultation with states and local governments and consideration of their placement concerns, suitability, and capacity. As a result, resettlement agencies meet on a regular basis with state and local officials regarding the services available to refugees in their communities and their ability to accommodate new arrivals. State resettlement offices receive federal funding to provide cash assistance, medical assistance, language programs, and social services. In the past, DOS has occasionally urged the modification of refugee placement plans based on feedback from states. In addition, under federal law, if states do not want to distribute benefits to refugees,
the Office of Refugee Resettlement can enter into arrangements with NGOs to provide benefits in those states.\textsuperscript{72}

Opposition to the admission of Syrians and Iraqis would be more understandable if the United States had agreed to resettle far larger numbers of refugees. Yet its commitment to resettle 10,000 Syrians in FY 2016 pales in comparison to the nearly five million refugees hosted by Syria’s neighboring states and to the generosity of Germany and Sweden in entertaining hundreds of thousands of Syrian political asylum claims. It also represents a substantial retreat from the nation’s historic leadership in responding to large-scale refugee crises.

Terrorist groups seek to terrorize their targets — whether through ruthlessness, technical sophistication, or an aura of invincibility — in order to achieve their political, ideological, and strategic objectives (Brooks 2011, 39-40). Communities may be at demonstrably greater risk from workplace homicides (ibid., 39), or alcohol-related car crashes,\textsuperscript{73} but terrorism succeeds when it provokes overreaction. While the resilience of targeted communities can help to diminish terrorism’s efficacy, exaggeration of a program’s risks can undermine security. In fact, as discussed below, the US resettlement program is the most secure US admissions program.

**B. The US Refugee Resettlement Program**

DHS has championed a multi-layered, risk-based approach to security in which “each layer must be effective in its own right,” but there is a high degree of coordination and redundancy since no “single security measure is foolproof.” (9/11 Commission 2004, 392). Former DHS Secretaries Napolitano and Chertoff have characterized the refugee screening process as “thorough and robust,” but not without risk.\textsuperscript{74} Vincent Cannistraro, former Chief of Operations and Analysis for the CIA’s Counterterrorism Center, describes refugee resettlement “a program in the nation’s interest” and a relatively secure program:

> The United States makes it far more difficult than other countries for a person with bad intentions to enter. In addition, the refugee screening and admissions process is a more lengthy, difficult and secure process than we have for any other group seeking to enter. This program is certainly less of a risk than the normal immigration systems for tourists, business people and others.\textsuperscript{75}

In 2002 and 2003, following the 9/11 attacks, refugee admissions fell sharply as the United States undertook a comprehensive review and analysis of the program based on concerns that it could be used by terrorists to gain entry into the United States (Kerwin and Stock 2007, 389). Current refugee screening and admissions policies reflect the hardening and

\textsuperscript{72} Most refugees receive cash and medical assistance for a period of eight months (Brown and Scribner 2014, 108).
\textsuperscript{73} Drunk driving killed 13,365 in 2010 (Chambers, Liu, and Moore 2011).
\textsuperscript{74} Letter from Janet Napolitano and Michael Chertoff, former DHS Secretaries, to President Barack Obama (Nov. 19, 2015), https://www.whitehouse.gov/blog/2015/11/19/two-former-homeland-security-secretaries-wrote-president-obama-safely-welcoming.
\textsuperscript{75} Interview by author with Vincent Cannistraro, former Chief of Operations and Analysis in the CIA’s Counterterrorism Center (Nov. 20, 2015).
securitizing of this program. After the review, refugee admissions rebounded. At the time, national security and law enforcement experts believed that program vulnerabilities could be sufficiently mitigated (ibid., 405, n.122). More recently, Napolitano and Chertoff have argued that homeland security and refugee protection are not “mutually exclusive” goals, provided that vetting and screening processes remain robust and undiluted.76

Obama administration officials have characterized the refugee program as the most secure process for non-citizens seeking admission to the United States.77 Indeed, until recent years, refugee screening was often criticized for a level of redundancy that put refugees and their families at risk for extended periods (HRF 2010, 21-26; Kerwin 2012, 6-8).

The multiplicity of institutional stakeholders in the refugee screening and admissions process operate as a check against fraud and terrorist infiltration. Moreover, the eligibility standard for refugee status is narrow, and refugees can be found inadmissible on security, criminal, and other grounds. The US processing priorities and commitment to resettle the most vulnerable further limit the refugees considered for admission.78 The cases referred by UNHCR for US resettlement are highly vulnerable, low-risk persons, including single women with children, torture survivors, and persons with special medical needs (Sengupta 2015). Roughly 2 percent are single men without US families to receive them.

The US refugee resettlement program enjoys the comparative advantage of being able to vet and screen refugees prior to their admission.79 This process is deliberate and thorough (Brown and Scribner, 115-16). Because the schedules and periods of validity of security and health screenings do not perfectly overlap, some screenings must be completed a second time (Nezer 2014, 129). Applicants also undergo continuous review and recurrent vetting, meaning that they can be denied admission based on new information at any point in the process.

UNHCR assesses refugee claims and refers persons for resettlement. It interviews potential refugees and collects biographic information and biometric data on them: it has collected


78 US processing and admission priorities include: (1) Priority 1 (P-1) cases referred by UNHCR, a US embassy, or a designated NGO; (2) P-2 cases which include groups of special humanitarian concern identified by the US refugee program (this category has traditionally included religious minorities); and (3) P-3 family reunification cases (USCIS 2015a).

79 “Pushing the border out” became a centerpiece of post-9/11 immigration enforcement and security strategies, and rigorous screening outside US borders became one layer in the defense against terrorist infiltration.
1.5 million iris scans of registered refugees (O’Toole 2015). It also seeks to determine if refugees fall within 45 “categories of concern,” whether based on their family ties, service in “particular government ministries or military units,” or even “being in specific locations at specific times” (ibid.). According to UNHCR officials, “almost any flag will scuttle the refugee’s case indefinitely” and UNHCR screens out at least half of the cases it reviews (ibid.). Fraud prevention represents one its top priorities (UNHCR 2014b §§ 19-20).

The interview process itself — the probing and recording of a refugee’s story — permits credibility assessments. The process also connects a name to biometric data, which helps to establish an “identity” and to promote security moving ahead. Screening allows UNHCR and states to identify the humanitarian and integration needs of refugees for placement purposes.

The State Department’s Bureau of Population, Refugees and Migration (DOS/PRM) contracts with Resettlement Support Centers (RSC) to pre-screen persons for admission and to prepare cases for review by USCIS. RSCs collect information for case adjudication and security screening, including biographic information that includes name, aliases, date of birth, family tree, education, the basis of the persecution claim, and the date and place from which the refugee departed. RSCs also initiate biographic checks of names (using linguistic logarithms), aliases, places of birth, nationalities, and other data against DOS’s Consular Lookout and Support System (CLASS). CLASS includes multi-agency records with information on intelligence, criminal histories, immigration violations, and potential terrorists.  

Prior to the USCIS interview, the Refugee Affairs Division reviews and refers cases that meet certain criteria to USCIS’s Fraud Detection and National Security Directorate (FDNS), which liaises with US intelligence agencies. FDNS conducts open-source and classified research on referred cases, and produces an assessment for the USCIS interviewing officer. If the interview raises any red flags, the case is referred again to FDNS.

It may seem counterintuitive, but social media, in particular, can be a very rich source of information on terrorists. An estimated 40 percent of persons charged with a jihadist terrorist-related offence since 9/11 either posted jihadist content online or “used the Internet in an operational manner” (Bergen 2016, 135-36). Terrorists use social media to organize, recruit, and even declare their terrorist affiliations. As a result, DHS has been working aggressively to enhance its review of the social media footprint of refugees, asylum seekers, and visa applicants (Nixon 2016).

RSCs also initiate Security Advisory Opinions (SAOs) by law enforcement and intelligence agencies. These reviews consist of running the applicant’s name and other data through multiple intelligence and law enforcement databases. Thus, they build a level of redundancy into the vetting process. The profile of recipients of SAO reviews remained the same for

80 CLASS contains information from DOS, the National Counterterrorism Center (NCTC), the FBI’s Terrorist Screening Center, CBP’s TECS system, the Drug Enforcement Administration, and Health and Human Services (USCIS 2015b).
81 San Bernardino terrorist Tashfeen Malik, for example, posted comments expressing her desire to participate in violent jihad prior to her arrival to the United States on an F-1 (fiancée) visa (Apuzzo, Schmidt, and Preston 2015).
several years after 9/11 (Kerwin 2012, 6), but has been an expanded in recent years. The reviews are based on criteria that include nationality (roughly 30 nations), gender, and age. Persons in unclassified categories selected by DOS based on US foreign policy interests and security concerns also receive SAO screening. Most reviews are completed within 45 to 60 days, not an inconsequential period for refugees in desperate, often dangerous circumstances. However, in some cases, it can take months for the participating agencies to respond. Significant delays can result when the name of an intending refugee resembles or matches a name in a government database.

US family ties help to establish a refugee’s identity and connections. RSCs also secure “sponsorship assurance” from domestic resettlement agencies. The more information that intelligence and law enforcement agencies gather on an applicant, the more confident they can be regarding his or her background and intentions. Family and sponsoring agencies also facilitate integration by helping refugees find a place to live, secure work, and register for school.

USCIS reviews refugee applications for eligibility and admissibility. On the day of the refugee interview, USCIS conducts biometric checks (fingerprints and photographs) against: (1) the FBI’s Next Generation Identification system (NGI), the world’s largest repository of criminal records; (2) DHS’s Automated Biometric Identification System (IDENT) which contains immigration and travel history and records; and (3) the Department of Defense’s (DOD’s) Automated Biometric Identification System (ABIS), which includes biometric records from Iraq, Afghanistan, and other areas of conflict (USCIS 2015b).

In 2011, DHS initiated an additional screening process, Inter-Agency Checks (IACs), which refugees receive prior to the refugee interview and pre-departure to the United States. The National Counterterrorism Center (NCTC) helps to coordinate the review. NCTC was established in response to a 9/11 Commission recommendation for “a center for joint operational planning and joint intelligence” (9/11 Commission 2004, 403).

The USCIS Refugee Corps plays an underappreciated role in the vetting process. Officers receive extensive, specialized training on “refugee law, grounds of inadmissibility, fraud detection and prevention, security protocols, interviewing techniques, credibility analysis and country conditions research.” Prior to deployment, they undergo additional training.

82 NCTC connects multiple departments and agencies within the US intelligence community. It falls within the Office of the Director of National Intelligence (ODNI). Its mission is to lead US efforts “to combat terrorism at home and abroad by analyzing the threat, sharing that information with our partners, and integrating all instruments of national power to ensure unity of effort” (ODNI 2015). The director of national intelligence (DNI) heads the US Intelligence Community, which comprises 16 agencies and includes Air Force Intelligence, Army Intelligence, the CIA, Coast Guard Intelligence, the Defense Intelligence Agency, the Department of Energy, DHS, DOS, the Department of the Treasury, the Drug Enforcement Administration, the FBI, Marine Corps Intelligence, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, the NSA, and Navy Intelligence.

Refugee Protection Policies and National Security

on “the types of refugee claims they are likely to encounter, detailed country of origin information, and updates on any fraud trends and security issues.” They also receive expert training on country-specific intelligence issues.

Refugee officers conduct in-depth interviews in which they assess the merits of claims, probe and test credibility, and explore potential fraud and security concerns. Since 9/11, security has been a pervasive DHS priority, including for its USCIS Refugee Corps.

Prior to their departure to the United States, refugees pass through a second inter-agency review which seeks to identify new derogatory information. Prior to admission, CBP screens refugees against its National Targeting Center-Passenger and the Transportation Security Administration (TSA) Secure Flight program. CBP also screens newly arrived refugees for admission at ports-of-entry, reviewing their documents and conducting additional security checks.

Terrorist information obtained during refugee screening is entered into the Terrorist Identities Datamart Environment (TIDES), which includes biographic data, fingerprints, and other classified holdings. Thus, the refugee program not only benefits from intelligence, but contributes to it as well.

High-ranking FBI, DHS, and NCTC officials have lamented deficiencies in intelligence collection related to Syrian refugees, arguing that effective screening requires datasets that contain accurate and thorough information on potential terrorists and criminals (HHSC 2015, 4). Republican presidential candidates and members of Congress have interpreted these concerns as evidence that the United States cannot vet or run “background checks” against Syrian refugees and, thus, should not admit any of them (Saddiqi 2015). This is not the case.

The United States can collect intelligence more easily from Iraq or Afghanistan, where it has had a large military presence, than from Syria. At the same time, its military engagements have engendered terrorist blowback. The large numbers of watch-listed Iraqis should not be viewed as a counterterror triumph. In addition, the lack of US access to information from Syrian state intelligence and police agencies, is not an insurmountable barrier to identifying Syrian terrorists.

Since 9/11, the United States has created a vast intelligence, counterterror and homeland security infrastructure that by 2010 reportedly encompassed 1,271 government organizations and 1,931 private corporations, and 854,000 persons with top-secret clearances in the Washington, DC area alone (Priest and Arkin 2010). One study found that annual US expenditure on homeland security increased by $75 billion between 2001 and 2009 (in 2010 dollars), including by $50 billion for federal agencies (other than intelligence agencies), $15 billion for federal intelligence agencies, and $10 billion for states and localities (Stewart, Ellingwood and Mueller 2011, 373). Moreover, this “very conservative” estimate did not account for private sector expenses (ibid., 373). In FY 2015, US intelligence agency

Id.

budgets totaled nearly $67 billion, $50.3 billion for the National Intelligence Program, and $16.5 billion for the Military Intelligence Program (FAS 2016).

The combined, enacted budgets of the two principal federal homeland security and immigration enforcement agencies, CBP and Immigration and Customs Enforcement (ICE), exceeded $19 billion in 2015 (DHS 2016a, 10). Given these immense investments and the widely recognized need for better intelligence exposed by the 9/11 attacks, it is no surprise that US intelligence agencies have, in fact, generated derogatory information on individual Syrians seeking admission to the United States.

The “known unknown” presents a real but manageable challenge for the US screening system. Previously unknown terrorists can be identified through their associations, travel methods, tradecraft, evasiveness, inconsistencies, use of social media, and other means. In other words, they can be detected through a rigorous vetting, screening, and admissions process. As Robert Bonner, former CBP Commissioner, has said: “We are capable of vetting …. There’s certainly the opportunity to make sure that the refugees that we do admit do not pose a security threat to our country.”

Finally, Syrian refugees in Europe come from upper middle-class backgrounds at higher rates than refugee populations from other nations (McHugh 2015). They include doctors, bankers, business people, and other professionals whose “identity” can be documented and well-established (ibid.). They come from a society that prior to civil war served as a haven for large numbers of Middle Eastern refugees, including two million Iraqis (Polk 2013), and that ranked among the “medium human development” states in the 2010 Human Development Index (UNDP 2010, 145). As UNHCR and DHS have found, the identity of many Syrian refugees can be determined with a high degree of confidence.

In a November 19, 2015 letter to President Obama, former DHS Secretaries Napolitano and Chertoff wrote that the “highest priority of our government is to keep American’s safe” and “we can achieve this mission in a manner that is consistent with American values of openness and inclusiveness.” In particular, the United States can “admit the most vulnerable of these refugees … as long as we do not compromise the already established protections.”

VII. Policy Recommendations

This paper makes the case that refugee protection and national security should be viewed as complementary, not conflicting, state goals. To that end, this section identifies several strategies that promote both security and refugee protection. It also outlines steps that the US Congress should take to enhance US refugee protection policies and security. Finally, it argues for the efficacy of political engagement in support of pro-protection, pro-security policies, and against the assumption that political populism will invariably impede support for refugee protection.

86 Id.
88 Ibid.
A. Strategies to Further National Security and Refugee Protection

As a conceptual matter, national security and refugee protection express the aspiration for human safety and well-being, but from different perspectives and with different emphases. From a practical perspective, strategies to advance these dual priorities — conflict prevention, peacebuilding, reconstruction, reconciliation, safe return, humanitarian and development assistance, and integration — largely align and can re-enforce each other.

“Conflict prevention” represents a national security priority (White House 2015b, 10), and a refugee protection imperative. The “early and durable resolution of armed conflicts” (UNGA 2016 § 100[e]), and reductions in conflict, political terror, and human rights violations can reduce forced migration (Shaver and Zhou 2015), and avoid the “escalating series of negative, and often perverse, consequences and growing costs for host countries, the international community, and refugees themselves” (Papademetriou 2015, 8).

States should commit far greater political and diplomatic capital to resolve the world’s multiple refugee-producing crises, which include the Syrian and Iraqi “mega-crisis,” the ravages of “Africa’s first world war” centered in the DRC, the quarter century of chaos and turmoil in Somalia, the civil war in South Sudan, the sectarian violence in the CAR, the flight of Eritreans from poverty and conscription, the breakdown of the rule-of-law in El Salvador, Honduras, and Guatemala, the protracted and newly displaced Afghani refugees, and the stateless Rohingya, among others. A “national security framework” cannot be sustained without addressing the other conditions that “create human insecurity” and displacement (Vietti and Scribner 2014, 27). Nor can safe, voluntary return, the preferred option for most refugees, be brought to scale as a durable solution without systematically addressing refugee-producing conditions.

In the UN summit report *Addressing the Large Movements of Refugees and Migrants*, the UN secretary-general urged states to take concrete steps to uphold “the safety and dignity” of refugees and migrants; to adopt a “global compact” that would entail greater, more integrated and differentiated commitments to refugee protection; and to develop a “global compact for safe, regular and orderly migration” (UN Secretary-General 2016 § 24-29). The United States has expressed its commitment to expanded and diversified state commitments to address this immense human crisis. While the language in the UN report has been watered down in the summit outcome document, many of the report’s key ideas have survived. In particular, the idea of a global compact on refugee protection, buttressed by concrete state commitments, deserves support from both a refugee protection and national security perspective.

Developed states should offer orderly and expanded access to their own territories. They should also increase opportunities for protection through greater use of humanitarian, medical, family, student, labor, and private resettlement channels (UN Secretary-General

89 Moreover, many conflicts and other refugee-producing conditions can be anticipated (Rupp 2016, 81).
90 The United States has announced that it will seek to identify an additional 10 states to contribute regularly to UN humanitarian appeals and agencies, to secure a 30 percent increase in state commitments for this work (from $10 billion in 2015 to $13 billion in 2016), to double the number of refugee resettlement or other legal avenues of admission worldwide, and to expand refugee education and employment opportunities by one million persons in each of 10 refugee host states (Campbell 2016).
Legal migration contributes to security by denying traffickers access to vulnerable persons, preventing crossing deaths, and allowing states to identify persons seeking admission and to concentrate their resources on bad actors. By contrast, terrorists often profit from and occasionally control criminal smuggling rings (Adamson 2006, 178; Schmid 2016, 27-28). Smugglers and traffickers flourish “when the demand for opportunities to immigrate outstrips the supply provided by official channels” (Adamson 2006, 193). In order to minimize criminally organized flows, states should align their legal migration policies with their own socio-economic interests. They should also regularly legalize unauthorized populations.

The threat of terrorist recruitment, conscription and violence speaks to the need to safeguard refugees in camps and urban settings, the need to expand and expedite durable solutions, and the need to extend legal migration channels to refugees. In addition, greater educational and employment opportunities can immunize refugees from terrorist propaganda and diminish onward migration, while affording them portable skills (UN Secretary-General 2016 § 82).

Developed states should provide far greater support to refugee hosting states for both humanitarian and security reasons. The latter states can serve as a bulwark against extremism and dangerous, unregulated migration. With appropriate support, they can offer development opportunities to all of their residents (including refugees) and, thus, increase the prospects for refugee integration.

Terrorists seek to radicalize socially disenfranchised youth and young adults in Western states (IEP 2015, 69). In response, states and civil society should prioritize youth education, employment, socially inclusive policies, and holistic policing strategies (IEP 2015, 74). The literature on immigrant integration illustrates that the policies, values, and prejudices of receiving communities strongly influence integration outcomes (Portes and Zhou 1993, 83). Thus, host states should adopt strong and inclusive policies for their refugee and forcibly displaced populations.

Integration also demands a commitment by refugees and asylees to the core, rights-respecting values and laws of receiving states. Extremist groups, by contrast, seek to create homogeneous societies: they reject pluralism and minority rights, and view the “rule-of-law” as an impediment to their goals (Schmid 2016, 8-9).

An integrated response to refugee integration is also a hallmark of effective policies: integration between state agencies; between localities, states, supranational, and international
Refugee Protection Policies and National Security

bodies; and between government, the private sector, and NGOs (UN Secretary-General 2016 § 114[a]). Similarly, counterterrorism requires the integrated use of “all elements of national power,” including “diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense” (9/11 Commission 2004, 205).

States whose members are targeted for terrorist recruitment should also prioritize countering violent extremism (CVE). As part of its “national security” strategy, for example, the United States has committed to addressing “the underlying conditions that can help foster violent extremism” and to support “alternatives to extremist messaging and greater economic opportunities for women and disaffected youth” (White House 2015b, 9). These important goals need to be operationalized.

The success of CVE programs depends, in part, on their responsiveness to the diverse contexts and motivations of terrorist recruits, and on engagement of these programs with family, school, law enforcement, and other community institutions. An analysis of “counter-radicalization” programs in the United Kingdom, the Netherlands, Denmark and Norway found that programs that targeted at risk persons or those already on a path to radicalization were more effective than broad, preventive initiatives (Vidino and Brandon 2012, 70). CVE initiatives can be difficult to assess given the difficulties in proving “prevention” or abandonment of an ideology or affiliation (Schmid 2016, 45-54). However, they should nonetheless be targeted, context-specific, and rigorously evaluated.

Liberal democracies have historically treated migration from totalitarian states as an expression of the aspiration for freedom by persons who would otherwise be consigned to lives of repression and poverty. These concerns are not implicated in cases of persons seeking to join a terrorist organization or to evade arrest for domestic or overseas terrorist activity. Returning jihadists, in particular, should receive exhaustive screening, with an eye toward determining which of a continuum of responses to impose, from release and surveillance to criminal prosecution and, in extreme circumstances, to revocation of citizenship through judicial proceedings.

Robust refugee and migrant vetting procedures can advance national security and pave the way for generous refugee protection policies. In the post-9/11 era, the United States has sought to “secure mobility” through:

94 The related term “counter-radicalization” has been described as a “catch all” that encompasses de-radicalization (to abandon one’s radical views), disengagement (to abandon a terrorist affiliation and activities, if not its ideology), and radicalization prevention (which targets a particular segment of society whose members may be vulnerable to radicalization) (Vidino and Brandon 2012, 9).
95 To that end, in 2015, the United States hosted national and regional summits on countering violent extremism (CVE). In May 2016, it released a strategy document describing its priorities in this area. CVE initiatives seek to eliminate or minimize the factors that cause members of targeted communities to join or support terrorist organizations (Schmid 2016, 53-54).
96 A study of 2,032 persons who fought for al Qaeda broke down their motivations into four categories, identity seeking (40 percent), revenge seeking (30 percent), status seeking (25 percent), and thrill seeking (5 percent) (IEP 2015, 73).
97 Under the US strategy, CVE encompasses not just prevention, but rehabilitation and reintegration programs (DOS and USAID 2016, 7).
98 Denaturalization might be fitting, for example, in cases of hardened terrorists, war criminals, and others who were granted citizenship based on willful misrepresentation.
• intelligence collection;
• expanded and accurate terrorist and criminal databases;
• information sharing within and between states;
• secure, biometrically enhanced identity documents;\textsuperscript{99}
• layered screening, including interviews to assess eligibility for admission and credibility;
• enhanced background checks on migrants who meet evidence-based profiles;
• strategies that enlist public support and advance national unity; and
• continuous assessment of terrorist threats, tactics, and methods.

Many states cannot afford such an extensive vetting and screening regime. However, the severe, sometimes existential threat posed by transnational terrorists and criminal organizations to fragile states argues for “increased levels of interstate cooperation” in the form of intelligence collection, information sharing, law enforcement support, and regulated migration (Adamson 2006, 198).

While potentially an important point of exposure and vulnerability for terrorists, borders should not be the sole or main locus for identifying terrorists or preventing their entry. In addition, the level of investment in border and immigration enforcement policies should be subjected to risk management principles. Enforcement agencies should not be charged with screening refugees and migrants for protection. However, if they are vested with these responsibilities, an independent, specially trained unit should be created for this purpose.

\textbf{B. Proposals to Strengthen and Secure the US Refugee Protection System}

The US Congress should take six steps to strengthen the US refugee protection system and national security. First, Congress should “create a single, principal point of oversight and review for homeland security” (9/11 Commission 2004, 421). On the 10th anniversary of the attacks, the National Security Preparedness Group (NSPG) composed of 9/11 Commission members reported that dysfunctional congressional oversight had created gross inefficiencies and security vulnerabilities. The NSPG found that DHS answered to “more than 100 committees and subcommittees” and, in 2009 and 2010, “provided more than 3,900 briefings” and “testified more than 285 times” (NSPG 2011, 16). As a result, DHS operates under “unclear security policies,” duplicates efforts, receives “conflicting guidance,” and has not successfully integrated its constituent parts (ibid.)

According to James Ziglar, “the failure of Congress to have a focused oversight strategy for DHS actually endangers our national security interests by forcing DHS to respond to the policy and political interests of hundreds of members of Congress (and committees), as well as the increased risk of disclosure of confidential and classified information in the hands of so many Members.”\textsuperscript{100} Ziglar argues that DHS’s responsibilities “are as important as those of US intelligence agencies, yet the Congress refuses to manage the oversight of DHS with the same seriousness as it does with the intelligence agencies.”\textsuperscript{101}

\textsuperscript{99} Identity assurance can also increase the efficiency of humanitarian and resettlement assistance.
\textsuperscript{100} Interview by author with James Ziglar, former INS Commissioner (Dec. 29, 2015).
\textsuperscript{101} Ibid.
should move with alacrity to streamline its oversight of the nation’s homeland security agency.

Second, Congress should ensure that DHS creates a unified command structure to respond to terrorist attacks and other catastrophic events that implicate multiple jurisdictions and agencies (NSPG 2011, 12-13). Just as integration between diverse government agencies is central to preventing terrorism, so too can an integrated response to terrorist attacks minimize their impact and transform them into an occasion for national unity.

Third, as stipulated in the Refugee Act of 1980, Congress should also create a presidentially appointed US coordinator for refugee affairs to develop refugee policy, coordinate admission and resettlement programs, and serve as a liaison to foreign governments, Congress, relevant federal agencies, state and local governments, and NGOs. Given the high degree of interest in and misinformation related to the refugee program, the time is ripe to create such a position.

As it stands, the United States cannot credibly deny admission to desperate, well-vetted refugees on security-related grounds, but allow potential terrorists to purchase firearms and explosives

Fourth, Congress should pass legislation to prevent suspected terrorists from purchasing firearms and explosives, while permitting those who wish to purchase firearms and are incorrectly on the FBI’s terrorist watch list to clear their names in an expedited way. ISIS has identified US firearm policies as a source of vulnerability to the United States (Taylor 2016). The FBI operates the National Instant Criminal Background Check System (NICS), which allows federal, state, and local law enforcement to conduct checks on persons seeking to purchase firearms or to secure a permit to obtain, sell, or transfer explosives. NICS searches the FBI’s National Crime Information Center (NCIC) database, which contains information on persons “wanted” by federal, state, and local law enforcement, and the FBI’s consolidated terrorist screening database. As the law stands, felons, fugitives, and persons without immigration status cannot purchase firearms or explosives in the United States, but suspected terrorists can.

In March 2015, the US Government Accountability Office (GAO) reported that from February 2004 through 2014, persons on the terrorist watch list “were involved in firearm or explosives background checks 2,233 times” and that “2,043 (about 91 percent) of the transactions were allowed to proceed ...” (GAOa 2015). The FBI can use information on an attempted purchase in its counterterror investigations. However, it does not always know if suspected terrorists have actually obtained firearms or a license or permit for explosives because gun and explosives dealers must keep this information, but need not report it (GAO 2010, 4).

Despite strong public support, bills to allow potential gun purchasers to challenge an incorrect terrorist watch list designation and to prevent terrorists from purchasing firearms and explosives have been reliably defeated (Ingraham 2015; Ingraham 2016), including

by the US Senate on December 3, 2015 (after the San Bernardino attack) and on June 20, 2016 (after the Orlando attack by a US citizen formerly on a terrorist watch list). Congress should pass bipartisan legislation to address these dual imperatives. As it stands, the United States cannot credibly deny admission to desperate, well-vetted refugees on security-related grounds, but allow potential terrorists to purchase firearms and explosives. Nor should it deny the right to purchase firearms to persons mistakenly or incorrectly placed on the terrorist watch list.

Fifth, Congress should depoliticize its oversight of the US refugee program. The need for generous refugee protection policies and for a rational assessment of their security vulnerabilities has never been so great. It represents an exercise in cynicism to conflate persons who have fled for their lives, with the terrorist groups who, in many cases, prompted their flights, or to portray the interests of those seeking protection as at odds with citizens who expect to be safe and secure in their own nations. Like national security, refugee protection should be a “valence issue,” supported across the political spectrum and debated on the level of strategy and tactics.

Effective responses to large-scale refugee crises have invariably resulted from political leadership, strong domestic constituencies, and a high level of public understanding and acceptance of those seeking protection.

Sixth, while “100 percent security” cannot be guaranteed, the US refugee resettlement program is highly securitized. The response to a security breach in this program should not be a bar on the admission of desperate people. Instead, it should be an exhaustive review of whether officials rigorously followed all the steps in the vetting and screening process. If they did not, quality control and oversight need to be improved. If they did, previously unrecognized vulnerabilities need to be immediately remedied. As a matter of course, refugee and international migration policies should be continuously assessed and, if necessary, strengthened based on evolving intelligence on terrorist intentions, methods and tactics.

C. Making Refugee Protection a Popular Cause

It is a central paradox in the debate over refugee protection and security that effective protection policies can further security, but security-driven fears often impede their adoption. Many policymakers, commentators, and advocates attribute hostility to refugees and other forcibly displaced persons to political populism, stoked by demagogues. Extremist political movements have been on the ascent in Europe and the United States (Troianovski 2016). These movements criticize what they perceive to be collusion between the press and the political elite. They maintain that Islam is incompatible with liberal democracy, challenge the legitimacy of state institutions, oppose the putative loss of sovereignty to supranational and international institutions, and support generous social welfare policies.
Refugee Protection Policies and National Security

for natives. They seek an exclusive kind of order and security that diminishes the prospects for security for refugees and other forcibly displaced persons.

National defense and public safety represent core responsibilities of sovereign states. Yet as reflected in a succession of seminal human rights instruments since World War II, states also exist to safeguard the rights of their citizens at home and abroad, non-citizens in transit, persons fleeing persecution at their borders, refugees and immigrants who settle in their territories and (in limited circumstances) imperiled person beyond their borders (UN Secretary-General 2016 §§ 13, 54).

The debate over how to reconcile these broad responsibilities will remain messy and fraught, but it must be engaged politically and cannot remain a debate between refugee protection and national security. Refugee resettlement and admission policies arise from political commitments, not from international legal commitments. Effective responses to large-scale refugee crises have invariably resulted from political leadership, strong domestic constituencies, and a high level of public understanding and acceptance of those seeking protection. It seems trite to make the case that public opinion matters for refugee protection, but in fact it does. Moreover, public opinion surveys, and the great generosity of many host communities offer abundant evidence of public support for refugees. The need is not to extinguish populist politics, but to educate the public on the interconnectedness of refugee protection and security, and to make protection a popular cause.

REFERENCES


104 Eighty percent of respondents in a global survey of 27,000 persons in 27 nations said they would accept persons fleeing war or persecution into their countries, 10 percent said they would accept such persons into their homes, 73 percent believed that such persons should be able to take refuge in other countries, and 66 percent said that states should do more to help persons fleeing war or persecution (Amnesty 2016).


Refugee Protection Policies and National Security


Refugee Protection Policies and National Security


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Another Story: What Public Opinion Data Tell Us About Refugee and Humanitarian Policy

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Executive Summary

The global reaction to US President Donald Trump’s executive order, “Protecting the Nation from Foreign Terrorist Entry into the United States” of January 27, 2017,1 revealed great public sympathy for the fate of refugees and the principle of refugee protection. In the case of Europe, such sympathy has, however, been dismissed by politicians who have read concerns regarding security and integration as reason for introducing restrictive policies on asylum and humanitarian assistance. These policies are at odds with public sentiment. Drawing upon public opinion surveys conducted by Amnesty International, the European Social Survey (ESS), and Pew Global Attitudes Survey across the European Union and neighboring states, this article records a marked divide between public attitudes towards the treatment of refugees and asylum seekers and official policies regarding asylum and humanitarian assistance, and seeks to understand why this is the case.

The article suggests that post-9/11 there has been a reconfiguration of refugee policy and a reconnecting of humanitarian and security interests which has enabled a discourse antithetical to the universal right to asylum. It offers five possible explanations for this trend: i) fears over cultural antagonism in host countries; ii) the conflation of refugees and immigrants, both those deemed economically advantageous as well as those labelled as “illegal”; iii) dominance of human capital thinking; iv) foreign policy justification; and v) the normalization of border controls. The main conclusion is that in a post-post-Cold War era characterized in part by the reconnecting of security and humanitarian policy, European governments have developed restrictive policies despite public sympathy. Support for the admission of refugees is not, however, unqualified, and most states and European populations prefer skilled populations that can be easily assimilated. In order to achieve greater protection and more open policies, this article recommends human rights actors work with the United Nations High Commissioner for Refugees (UNHCR) and its partners to challenge the above discourse through media campaigns and grassroots messaging.

Further recommendations include:

- Challenging efforts to normalize and drawing attention to the extreme and unprecedented activities of illegal and inhumane practices, e.g., detention, offshore processing, and the separation of families through the courts as part of a coordinated information campaign to present a counter moral argument.

- Identifying how restrictive asylum policies fail to advance foreign policy interests and are contrary to international law.

- Evidencing persecution by sharing information with the press and government agencies on the nature of claims by those currently considered ineligible for refugee protection as part of a wider campaign of information and inclusion.

- Engaging with minority, and in particular Muslim, communities to redress public concerns regarding the possibility of cultural integration in the host country.

- Clarifying the rights of refugees and migrants in line with the UNHCR and International Organization for Migration (IOM) guidelines and European and national law in order to hold governments to account and to ensure that all — irrespective of their skills, status, nationality or religion — are given the opportunity to seek asylum.

- Identifying and promoting leadership among states and regional bodies to advance the rights of refugees.

**Introduction**

The global reaction to US President Donald Trump’s executive order, “Protecting the Nation from Foreign Terrorist Entry into the United States” of January 27, 2017, revealed great public sympathy to the fate of refugees and the principle of refugee protection more generally. Demonstrations in the United States were accompanied by European protests and demands that the UK Prime Minister Theresa May explicitly condemn the “Muslim ban” (House of Commons 2017a). These protests were also accompanied by acts of hospitality where both British and other Europeans opened up their homes to those affected by the ban who were caught in transit. Such expressions of solidarity were not new. Throughout the “refugee crisis” of 2015-2016, large sections of European society showed their support for a more humane and effective response from their governments through charitable acts and public outcry. In addition to solidarity campaigns and direct assistance to migrants arriving onto European soil, public opinion was occasionally reflected in successful advocacy efforts. For example, following much pressure from Calais Solidarity groups, the 2016 UK Immigration Act was amended further to the “Dubs amendment” which called upon the UK government to relocate unaccompanied children from European countries.

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2 Id.
3 Immigration Act 2016, c. 19, § 67 (Eng.).
During this period, in spite of public support, European governments introduced many restrictions to curb arrivals in the name of both border management and the preservation of national sovereignty. Most notably, in February 2017, the UK government cancelled the Dubs relocation scheme which was to be capped at just 350 unaccompanied children admitted to the UK (House of Commons 2017b).

This article reviews the development of European asylum and humanitarian policy and the public response to growing restrictions against the right to asylum. Drawing upon public opinion surveys conducted across the European Union and neighboring states on either side of the peak of the 2015 refugee crisis — the Amnesty International Refugees Welcome Index (Amnesty 2016), the European Social Survey (ESS 2016), and the Pew Global Attitudes Survey (Pew 2016) — this article argues that there has been a marked divide between public attitudes towards the treatment of refugees and asylum seekers and official policies regarding asylum and humanitarian assistance. This article seeks to explain the reasons for the above discord.

The first part of the article provides a brief review of the historical context for the development of contemporary national and EU policies on asylum management and humanitarian assistance. Noting how Cold War security interests eventually became decoupled from humanitarian policy in the 1990s, this article describes how security interests were reinserted in the formulation of humanitarian policy during the past decade. The second part then presents public opinion data from multiple sources to reveal a noticeable discord between sections of the European public and their political leaders. Drawing upon data collected on either side of the peak in the refugee “crisis,” that is, before and after April 2015, this article assesses their reliability as evidence of European sympathy for more open refugee and asylum policies before offering some explanations for the divide between recorded public opinion and the direction of national policies on asylum and humanitarian assistance.

The central argument of this paper is that, following 9/11, there has been a reconfiguration of refugee policy and a reconnecting of humanitarian and security interests which has enabled a discourse antithetical to the universal right to asylum. It offers five possible explanations for this shift: 1) refugees are often perceived and treated as immigrants, irrespective of their claims of persecution; 2) Western states have expressed vocal fears that refugees may not integrate but rather antagonize cultural sensitivities in host countries; 3) the refugee regime is being undermined by a shift towards a human capital logic which favors skilled individuals; 4) the control on asylum is informed by foreign policy justifications; and 5) the use of border controls and prevalence of border management discourse is undermining concerns regarding protection. The main conclusion of this paper is that in a post-post-Cold War era characterized in part by the reconnecting of security and humanitarian policy, European governments have developed restrictive policies in spite of widespread public sympathy for refugees and asylum seekers. Furthermore, refugee-receiving states have expressed clear preferences and favor certain groups over others. The data record that, irrespective of their need for protection, most states and European populations prefer to admit skilled populations that can be easily assimilated. Such preferences risk undermining the nondiscrimination principle that is central to refugee protection.
Historical Developments and the Current Refugee Crisis

The design of humanitarian and asylum policies during the twentieth and early twenty-first century replicated major geopolitical trends. During the Cold War especially, humanitarian policy was a visible offshoot of overseas development and foreign policies which reflected wider security concerns. This was clearly expressed in the Truman Doctrine of 1947. The then president of the largest donor state to the United Nations declared that:

“[I]t must be the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures . . . to work out their own destinies in their own way. I believe that our help should be through economic and financial aid which is essential to economic stability and orderly political processes.”

(Truman 1947)

Following the expansion of the Marshall Plan to western and southeastern Europe, in addition to the placement of troops and weaponry, superpower rivalry between the United States and the then Soviet Union was expressed through their distribution of foreign assistance to weak and frontline states, above all, in the Middle East and Africa.

In addition, the Cold War brought a utilitarian logic to the idea of refugee protection. In spite of the rights focus heralded by the 1951 Convention relating to the Status of Refugees (“the Refugee Convention”) and expanding UN system, throughout the Cold War, certain nationalities were privileged in the design of both immigration and refugee policy, most notably more than one million Cubans who enjoyed preferential treatment by the United States (Bon Tempo 2008; Garcia 1996; Zucker and Zucker 1995). Unlike other nationalities, as a result of domestic political pressure and geopolitical alignments, Cubans were granted access to refugee resettlement in the United States and exempted from immigration quotas as a result of the 1966 Cuban Adjustment Act\(^4\) and the Immigration and Nationality Act Amendments of 1976.\(^5\) Such treatment stood in marked contrast to the fate of Haitians seeking to enter the United States and who were also fleeing political oppression, raising charges of racism at the heart of US refugee policy (Loescher and Scanlan 1986; Zucker and Zucker 1995).

While US immigration and refugee policies saw some revision during the later years of the Cold War, in particular with the “wet foot, dry foot” policy that curtailed Cuban settlement in the United States to those who managed to reach the shore, not simply territorial waters as in the past (Bon Tempo 2008; Loescher and Scanlan 1986), the logic of the Truman Doctrine remained intact for more than four decades. During this time, with the exception of some small flows of largely political refugees from Hungary, Chile, and Argentina, and others fleeing Communist regimes, refugee flows were regionally contained as a result of the political divisions which reinforced Atlantic and Soviet claims of competing and distinct spheres of influence. Palestinians, the most controversial face of refugees in the Cold War, were treated as a special category within the UN system, placed under the management of

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the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), an agency that operated without a specific charter or statute (Bocco 2009). Exempt from the Refugee Convention, Palestinian refugees were confined to camps in neighboring states where they were denied the prospect of integration, as well as many civil and political rights afforded to nationals in those host states (Takkenberg 2000).

With the collapse of the Soviet Union, and the emergence of an enlarged European Union as a global actor, the premise of using overseas development aid shifted, as did longstanding approaches to foreign policy making. Further to much advocacy by refugee rights groups, by the mid-1990s, the above Cold War practices were revised (Newland 1995). In particular, following the conflicts in the former Yugoslavia, aid was now seen as a means of complementing diplomatic pressure, rather than as direct extension of security policy. This in turn helped to forge a divide between security policy, still characterized by Western engagement with an expanding North American Treaty Organization (NATO), and foreign policy which was broadened to include a range of interventions including development and humanitarian assistance that introduced greater emphasis on rights. Humanitarian policy subsequently reflected changes in the new geopolitical order and key principles of the Truman Doctrine, with the longstanding tenets of conditionality and containment that had defined the previous four decades downgraded.

Though states still sought to use foreign assistance selectively to pursue agendas for interventionism, policy making was altogether more fluid and aid policies illustrated a growing preference for multilateralism, with the European Union, UNHCR, and World Bank playing a more prominent role especially in post-conflict assistance (Scott and Bannon 2003). The statist logic of Cold War humanitarian assistance and development planning also gave way to a greater emphasis on privatization and local decision-making which reflected new preferences and the effect of globalization on foreign affairs (Duffield 2001) — a trend which continues to attract criticism (Provost 2016). Joanna Macrae describes the refocusing of humanitarian policy as the move towards a “coherence agenda” where the concept of sovereignty was enlarged and aid seen as a central tool of conflict resolution, even if domestic and international interests appeared to diverge (Macrae and Leader 2000; Macrae, Brusset, and Tiberghien 2002). During this period aid was directly contracted to NGOs and there was greater donor coordination and an emphasis on targets (Duffield 2001), as aid agencies established an increased operational presence in previously neglected, inaccessible, or nonpriority regions in Asia, Africa, and southeastern Europe.

The refocusing of humanitarian policy could also be seen in academic and political discourse which called attention to participatory and non-statist approaches to development. Western governments also began rethinking the purpose of aid. Commenting on this trend in the context of US development policy, Joseph Nye (1999) argued that the normative tendency reflected a broader understanding of the national interest — moral values were simply “intangible interests,” he maintained. Following the wars in Croatia, Bosnia, and genocide and ethnic conflict in Rwanda and the Great Lakes region of Africa, the United Kingdom set out a plan for an “ethical foreign policy” and shifted from bilateral loans preferring instead grants and collaboration through the EU and UN systems (The Guardian 1997).

The European Union’s foreign policies were described in the language of cooperation with third countries. Although refugee policy was not immediately affected, following the 1999
Another Story: What Public Opinion Data Tell Us

Amsterdam Treaty⁶ and the conclusions of the 1999 Tampere European Council, irregular migration was refashioned along the lines of a “comprehensive approach” which later blended with key aspects of refugee protection (European Parliament 1999). The aim of this approach was to address both human rights and development issues in third countries, and in that way, provide greater consistency between the internal and external policies of the European Union. Although there was a strong development focus, central to the European Union’s ambitions were the management of irregular migration flows and the introduction of sanctions against the traffickers of “illegal immigrants.” Development concerns were channelled through different policy instruments, including regional agreements such as the 2000 Africa, the Caribbean, and the Pacific (ACP)-EU Partnership Agreement⁷ and Economic Partnership Agreements between the European Union and Africa, the Caribbean, and the Pacific, which apply to both individual states (Cote d’Ivoire, Ghana, Papua New Guinea, Fiji), regional groupings (eastern and southern Africa, the East African Community, the Caribbean), and inter-regional organizations (e.g., the Economic Community of West African States [ECOWAS] and the Southern African Development Community [SADC]) (European Commission 2014).

After the terrorist attacks of September 11, 2001 in New York, Pennsylvania, and the Pentagon, the focus on refugee policy shifted both as a result of increased securitization and further expansion of the European Union’s political dimension. This was accompanied by technological developments, including the sharing of information between EU member states and the United States, and the creation of “smart borders.” While most evident in the United States where a shift in policy led to the suspension of visas, EU states had previously agreed lists of countries and a well-established system of visa controls which similarly targeted certain nationals. These were complemented by an extensive range of return measures. Specifically, the linking of internal and external policies, which reflected the greater focus on security as noted at the 2002 Seville European Council meeting, was to be achieved by means of readmission agreements. In this way, the European Union expanded both its policy with respect to third countries and also shored up its own internal policies. These agreements require third countries to readmit their own nationals who do not have the right to remain on EU territory (European Union 2002).⁸

The use of readmission to deter long stays was laid down in the Global Approach to Migration and Mobility,⁹ first proposed for Africa and the Mediterranean in late 2005 and later extended to southern Europe, including the Balkans, and the former Soviet bloc in 2006. The policy was again revamped in 2011 as mobility partnerships, bilateral country agreements to share the responsibility and management of circular migration.¹⁰ These

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⁹ Communication from the Commission to the European Parliament, the Council, the European economic and Social Committee and the Committee of the Regions — The Global Approach to Migration and Mobility, COM (2011) 743 final (Nov. 18, 2011).
¹⁰ Id.
mobility partnerships had no basis in law but were increasingly seen as the European Union’s preferred policy tool for handling irregular migration across the European Union’s areas of interest. Others have described these partnerships as an expression of the European Union’s “extra-territorialisation,” since they function as a means of immigration control beyond the national borders of EU member states (Carrera and Sagrera 2009). Most important, the Global Approach to Migration and Mobility and the European Union’s preference for mobility partnerships would inform the eventual design of the EU-Turkey deal of 2016 that sought not only to control irregular migration but also refugee flows to the European Union (Council of the European Union 2016).

In spite of the attempt to coordinate the European Union’s external relations with third countries, immigration and refugee policy remained matters of national control, and within less than 10 years, visible cracks appeared in both foreign policy cooperation and the regional frameworks the European institutions had tried to put in place. Divisions among EU member states over the war in Iraq and following the failed interventions in Iraq and Afghanistan, were further polarized by the Syrian crisis which saw over 11 million people displaced and an estimated 13.5 million people in need of humanitarian assistance (European Commission 2017). Although the European Union and its member states have provided more than €9.2 billion to support relief inside Syria, as well as €445 million in relief allocated in 2016 (European Commission 2017), the handling of the “refugee crisis” has exposed sizeable rifts in the post-Cold War compact regarding the purpose of humanitarian assistance and the nature of refugee protection.

While European policy was defined by declarations of shared policy areas, for example, the relocation plan for some 160,000 refugees following the EU-Turkey deal in 2016 and the use of mobility partnerships, as well as by the growing restrictions on legal pathways to asylum, it also had to contend with asymmetric responses from EU member states. Some EU members, such as the United Kingdom, balanced the use of aid against the expense of granting asylum to large numbers of Syrian refugees and refused to participate in the relocation effort. Other states, above all the Visegrad countries of the Czech Republic, Hungary, Slovakia, and Poland, largely refused to admit refugees altogether in spite of shared policy positions. Their refusal to cooperate with EU policy was based on cultural grounds — Muslim refugees could not be integrated into their predominantly Christian countries (Keating 2015). Rather, Muslim refugees represented the “Trojan horse of terrorism,” claimed Hungarian Prime Minister Viktor Orban (Brunsden 2017). Most EU members closed their borders, often using razor wire fences and other repressive approaches to deter refugees seeking protection. Following terror incidents in Paris, Brussels, Cologne, and Nice, such actions were justified on the grounds that refugees from the Middle East in particular might pose a potential terror threat.

The prevailing logic of multilateralism set out in the 1990s, in particular working through actors such as the UNHCR and EU agencies, has also been challenged by competing narratives about the ways in which national humanitarian policies should be conducted, which is often in antagonism to the above partner institutions. The UNHCR has been especially critical of EU policy (Spindler and Clayton 2016), and NGOs, above all Médecins Sans

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Frontières (2016), have been even more outspoken. These organizations have contested the design of the EU-Turkey deal which introduces the prospect of returning refused asylum seekers from the European Union to Turkey, as well as the practice of holding refugees in closed detention centers on the Greek islands. The division between implementing partners and the agendas of national governments illustrates a divided trend in the management of humanitarian policy.

In addition, we note a diverging pattern where, in addition to criticism by humanitarian actors, civic groups have been mobilized in opposition to harsh refugee and asylum policies and have created safe spaces for refugees and promoted the Refugees Welcome campaign. Lundberg and Strange (2016) draw attention to a conflicting dynamic where activists engage in resistance against the state’s migration policing and collaborate with city-level state agencies to provide sanctuary to asylum seekers and others. In addition to Refugees Welcome efforts in Germany and central Europe, we note the proliferation of Cities of Sanctuary (United Kingdom) and Places of Sanctuary (Ireland) described as a movement that seeks to build a culture of hospitality. Since Sheffield became the first British City of Sanctuary in 2005, the United Kingdom and Ireland have witnessed over 90 City of Sanctuary initiatives.

What Public Opinion Data Tell Us

In addition to real-time reporting from the field and much public commentary via social media, one distinguishing aspect of the current “refugee crisis” is the steady release of public opinion datasets. Amnesty International’s Refugees Welcome Survey, the Pew Research Center’s Global Attitudes Survey, and the European Social Survey are three of the most well-cited studies conducted during this period. Although they rely on different methodologies and cover a range of countries — mostly but not exclusively overlapping states — these datasets provide a useful record of public opinion before and after the massive refugee influx began, as well as at key points in the “crisis.”

The datasets are all based on structured surveys with either closed questions or a ranking system where participants select answers according to a series of responses which range from full agreement to full disagreement. The most widely publicized dataset produced by Amnesty International and the polling company GlobeScan took the form of a global survey of more than 27,000 people polled by phone and during face-to-face interviews from across 27 countries between January and March 2016, well after the mass flows of refugees started reaching Europe.

The survey was global, covering Argentina, Australia, Brazil, Canada, Chile, China, France, Germany, Ghana, Greece, India, Indonesia, Jordan, Kenya, Lebanon, Mexico, Nigeria, Pakistan, Poland, Russia, South Africa, South Korea, Spain, Thailand, Turkey, the United Kingdom, and the United States. Since it included several host states in the Middle East and major destination states, this survey was of particular relevance to EU policy.

One unique feature of the survey was its focus on participants’ personal commitment to support refugees. Unlike other political polling and market research, the survey used rankings to explore the degree to which respondents in the selected states were “willing”
to let refugees live in their countries, towns, neighborhoods, and homes, among other welcome indicators, and asked the following questions, and required responses ranging from full agreement to full disagreement:

i) “People should be able to take refuge in other countries to escape from war or persecution;”

and

ii) “Our government should do more to help refugees fleeing war or persecution.”

According to Amnesty International, the results of the Refugees Welcome Survey showed “government refugee policies out of touch with public opinion” (Amnesty International 2016). This was most evident in EU member states, where the response to question one above was overwhelmingly in agreement and ranged from 73 percent in Poland to 94 percent in Germany as indicated in table 1 below.

Table 1. Should People Be Able to Take Refuge in Other Countries to Escape from War or Persecution?

![Refugees Welcome Survey Graph]


Yet, in response to question two above, about government responsibility towards refugees fleeing war or persecution, the findings present a more complex picture. In all EU member states, with the exception of Poland (43 percent), the majority of participants were in agreement, though less than reported in response to question one above. This result warrants clarification.
Amnesty International’s survey carried a number of further limitations, not least of which was its geographical coverage. The survey’s coverage of European Union member states was limited to a handful of multicultural, refugee-receiving states and countries of immigration, including France, Germany, Greece, Spain, and the United Kingdom. While the survey also featured Poland, a non-multicultural state and one at the margins of the Mediterranean “crisis,” we should note that Poland has received several thousand refugees from Ukraine. Thus, although Amnesty International used a representative sample, the survey may appear biased in favor of contact with refugee and immigrant populations.

Another global instrument, Pew Research Center’s Global Attitudes Survey, used similar representative sampling techniques where respondents participated in telephone and face to face surveys during fixed periods in 2016, again with a sample size of around 1,000 participants. The Pew Research Center survey also covered most of the same EU states as the Amnesty International survey, with one notable difference — Greece having been replaced by Sweden. However, unlike the Amnesty International survey, the presentation of findings indicated different patterns of dissatisfaction. Titled *Euroskepticism Beyond Brexit*, the Pew Research Center study drew out wider political conclusions regarding the integration of migrants, Muslims, and refugees in the European Union. A central conclusion of the study was that there was significant opposition in key European countries to greater political integration and that such opposition was linked to European policies regarding asylum and refugee management:

### Table 2. Should Your Government Do More to Help Refugees Fleeing War or Persecution?

[Image of a chart showing the percentage of people who agreed with helping refugees in different countries.]

*Source: Amnesty International (2016). Table courtesy of Amnesty International.*
“Much of the disaffection with the EU among Europeans can be attributed to Brussels’ handling of the refugee issue. In every country surveyed, overwhelming majorities disapprove of how Brussels has dealt with the problem. This includes 94% of Greeks, 88% of Swedes and 77% of Italians. The strongest approval of EU management of the refugee crisis is in the Netherlands, but that backing is a tepid 31%.”

(Stokes 2016)

Pew Research Center’s conclusion therefore targeted blame on the European Union institutions, above all the Brussels-based European Commission.

This finding begs further scrutiny. While the Pew Research Center study investigated attitudes towards the arrival of Muslim migrants in Europe, some of the questions asked by Pew Research Center required participants to identify where policy was made in order to inform their views of culpability.

While the survey raised questions about the degree to which states or the European Union as an institution might be held to account by participants, it also introduced some politically ambiguous questions. For example, we note that overwhelmingly, respondents disapproved of the way in which the European Union was “handling” the refugee crisis. Although the largest response was from refugee-hosting states such as Greece, which had already received over 800,000 migrants and refugees, and where there was broad support for solidarity and refugee sanctuary groups, we note that respondents in other countries such as Poland and the United Kingdom, which could not be described as refugee-hosting states, were similarly highly dissatisfied, possibly for different reasons.

Table 3. Overwhelming Majorities in Europe Unhappy with the European Union’s Handling of Refugees

<table>
<thead>
<tr>
<th>Country</th>
<th>Disapprove</th>
<th>Approve</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greece</td>
<td>94%</td>
<td>5%</td>
</tr>
<tr>
<td>Sweden</td>
<td>88%</td>
<td>10%</td>
</tr>
<tr>
<td>Italy</td>
<td>77%</td>
<td>17%</td>
</tr>
<tr>
<td>Spain</td>
<td>76%</td>
<td>21%</td>
</tr>
<tr>
<td>Hungary</td>
<td>72%</td>
<td>24%</td>
</tr>
<tr>
<td>Poland</td>
<td>71%</td>
<td>19%</td>
</tr>
<tr>
<td>UK</td>
<td>70%</td>
<td>22%</td>
</tr>
<tr>
<td>France</td>
<td>70%</td>
<td>26%</td>
</tr>
<tr>
<td>Germany</td>
<td>67%</td>
<td>26%</td>
</tr>
<tr>
<td>Netherlands</td>
<td>63%</td>
<td>31%</td>
</tr>
</tbody>
</table>

Source: Pew Research Center.

Source: Stokes (2016). Table courtesy of Pew Research Center.
Further, and related to the above, the Pew Research Center dataset asked direct questions regarding participants’ aspirations for the European Union as a global actor. In spite of much criticism reported in response to earlier questions, 55 to 90 percent of participants reported that they wanted to see the European Union taking on a greater role in global affairs. This finding, which presupposes greater unity among the European Union member states, undermines some of the wider Euroskeptic conclusions of the Pew Research Center study.

### Table 4. Broad Support for a More Active European Union

<table>
<thead>
<tr>
<th>Country</th>
<th>Less active role</th>
<th>More active role</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spain</td>
<td>9%</td>
<td>90%</td>
</tr>
<tr>
<td>France</td>
<td>16%</td>
<td>80%</td>
</tr>
<tr>
<td>Italy</td>
<td>15%</td>
<td>77%</td>
</tr>
<tr>
<td>Greece</td>
<td>15%</td>
<td>76%</td>
</tr>
<tr>
<td>Germany</td>
<td>18%</td>
<td>74%</td>
</tr>
<tr>
<td>Sweden</td>
<td>21%</td>
<td>73%</td>
</tr>
<tr>
<td>Hungary</td>
<td>21%</td>
<td>66%</td>
</tr>
<tr>
<td>Poland</td>
<td>14%</td>
<td>61%</td>
</tr>
<tr>
<td>Netherlands</td>
<td>31%</td>
<td>55%</td>
</tr>
<tr>
<td>UK</td>
<td>33%</td>
<td>58%</td>
</tr>
<tr>
<td>Median</td>
<td>17%</td>
<td>74%</td>
</tr>
</tbody>
</table>

Note: Volunteered categories “About the same” and “No role” not shown.


* Europeans Face the World Divided

Source: Stokes (2016). Table courtesy of Pew Research Center.

Again, however, the challenge of defining the purported role of the European Union introduces many possible scenarios.

In contrast to the Amnesty International and Pew Research Center surveys, the European Social Survey (ESS) is an independent and academically driven exercise that seeks to measure the attitudes, beliefs, and behavior patterns of diverse populations in EU and non-EU states, including Russia. The ESS is conducted every two years and has been in use since 2001. It thus offers longitudinal and cross-national data. Additional themes or modules are introduced in each survey round, including a recent module on immigration in the ESS7 Round (2014-2015). Also, unlike the Amnesty International and Pew Research Center surveys, the ESS dataset includes a younger range of participants (aged 15 and over), who are residents in private households of the selected countries.

Most relevant to the European refugee crisis is the dataset from the ESS7 Round, conducted between August 2014 and December 2015, with most national responses collected in the first half of 2015. The survey included 28,221 respondents and was therefore of a similar size to the Amnesty International and Pew Research Center studies; it included more EU/
European Economic Area countries, in addition to Israel. In each of the surveyed states (Austria, Belgium, Switzerland, Czech Republic, Germany, Denmark, Estonia, Finland, France, Ireland, Netherlands, Norway, Poland, Sweden, and Slovenia), the sample population was 800 to 1,500, hence again a relatively similar size to the above surveys. One question asked participants to evaluate governmental responses towards asylum.

**Figure 1. Government Should Be Generous Judging Applications for Refugee Status**

![Figure 1](image)

*Source: ESS (2016).*

Other questions in the ESS7 Round probed attitudes towards the integration of migrants. Though distinct from refugees, attitudes towards migrants are a useful proxy to interpret attitudes towards refugee reception. For example, the ESS7 included a question on third-country nationals, asking if participants agreed on allowing immigrants from poorer countries into Europe. The response, though qualified, illustrates a degree of openness with 54.5 percent of respondents recording that the state should allow many (14.3 percent) or some (40.2 percent) migrants to live in the selected states.

**Figure 2. Allow Many/Few Immigrants from Poorer Countries in Europe**

![Figure 2](image)

*Source: ESS (2016).*
In spite of the above, further data from the ESS affirms many of the views captured in the Pew Research Center survey. With respect to migration in particular, attitudes towards “poor,” nonwhite, and “non-Christian” migrants are not significantly hostile but European publics overwhelmingly prefer to admit educated populations who speak their language and are committed to “their way of life” (Stokes 2016).

In this context, the ESS recorded a slight difference in attitudes towards Muslim migrants.

**Figure 3. Allow Many or Few Muslims to Come and Live in Country**

![Chart showing attitudes towards allowing Muslims to come and live in the country.]

Source: ESS (2016).

According to the above chart, with respect to Muslims, public attitudes towards migration and refugees do not in fact appear to be that different, suggesting that integration issues may underlie participants’ responses.

**Analysis**

The above datasets offer a window into public attitudes towards refugees and migrants on the cusp of the current refugee crisis and during its peak. While each of above datasets illustrate important normative trends, not least because they question the principle of asylum, few commentators have sought to explain why a record of public sympathy for refugees and asylum seekers does not appear to bear any relation to the direction of public policy regarding the admission of asylum seekers and the use of humanitarian assistance. Here I offer some possible explanations.

**The Ambiguities of Public Opinion Surveys**

The way in which survey questions are framed does not necessarily align with rights-based arguments for specific policy interventions. In the case of Amnesty International’s survey, for example, the phrasing of some questions introduces many ambiguities that
are exacerbated when the instrument is used for a cross-national study. We note that participants’ interpretation of the nature of “help” given to refugees is understood quite differently across the European Union. This point has been repeatedly made by the UK government, which has publicized its generosity and ambitions to help refugees living in Turkey, Jordan, and Lebanon, while rejecting efforts to receive and resettle large numbers of refugees to the United Kingdom.

Moreover, public datasets assume participants have a high degree of political awareness. For example, the initial question asked by the Pew Research Center team — “Do you approve/disapprove of the way the European Union is dealing with the refugee issue?” — assumes respondents can identify a distinctly EU-level response. Yet, while the European Union has both a body of law in the form of the asylum acquis and a series of polices in place that underpin the European Agenda on Migration,\textsuperscript{12} within the European Union, immigration and asylum policies remain highly nationalized. We note that commitment of member states to the asylum acquis varies, with some states having opted out of the recast directives and others interpreting their obligations less generously. Some states, like the United Kingdom, have completely opted out of common policies including the relocation scheme, a central plank to the EU-Turkey agreement. Beyond law and policy, there are also many differences in terms of state practice. Some countries like Germany and Sweden have granted large numbers of refugees status ranging from refugee status to subsidiary protection. By contrast, several central European states have hardly welcomed any people on the move. With the suspension of the Schengen Agreement, the closure of national borders remains an area of national — not EU — control. These political realities may not be understood by those sampled in the Pew survey.

\textbf{Cultural Antagonism}

While the above data record evidence of discriminatory views on the basis of nationality, ethnicity, and religion, this finding is magnified in political discourse on the ways in which states should respond to the needs of refugees and asylum seekers in Europe. At the heart of this argument is a claim that certain refugees — Muslims, in particular — are treated with suspicion both on account of the perceived difficulty of their integration in host states and a more generalized fear of Islamist terror. While this view is most reflected in the Pew Research Center survey, it has also been sustained and amplified in the media following the terror attacks in Paris, Brussels, Nice, Egypt, and Istanbul.

While we note that even before the death of Alan Kurdi,\textsuperscript{13} many of those sampled believed their countries should be more generous towards asylum seekers and that later surveys conducted during the summer of 2015 record a similar pattern, we also find that cultural assumptions undermine the legal definition of refugee as set out in the Refugee Convention. This is most evident in the data regarding Muslim refugees and immigrants where, in spite of the nationality and religion-blind logic of international refugee law, public attitudes are

\textsuperscript{12} Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — A European Agenda on Migration, COM (2015) 240 final (May 13, 2015).

\textsuperscript{13} Alan Kurdi was a Syrian child who drowned and whose body, found face down on the beach, generated much controversy and in effect restarted the search and rescue effort.
less sympathetic toward people from certain nationalities and religions. Similarly, in some countries, particular groups are favored — for example, displaced Ukrainians in Poland and Eritreans in Italy. Hence, we can point to important cultural and political explanations for both inhospitality and generosity towards refugees that recalls some of the geopolitical traditions of refugee policy during the Cold War.

**Conflating Refugees and “Illegal” Immigrants to Undermine Asylum**

While refugees and economic migrants have traditionally been treated separately within Western legal traditions, popular discourse on immigration often conflates the two categories, which increasingly undermines the universal right to asylum. In some cases, this is particularly blatant. For example, during the 2016 referendum campaign on the United Kingdom’s membership in the European Union, the UK Independence Party (UKIP) sought to garner support from a poster depicting a mass inflow of refugees in the Balkans, charging that migration — and in particular the right to free movement for EU nationals — had created a situation where the United Kingdom was at a breaking point, and the European Union had “failed us all.” In so doing, UKIP actively sought to confuse asylum, immigration, and EU policy regarding free movement.

Such confusion, however, also works in reverse and beyond the tactics of right-wing political parties. We note that anti-immigration discourses are influencing refugee policy as more and more people question the place of refugees and asylum seekers in the cultural consensus (will they integrate) and their value or merit (potential economic contribution) to the host state. This is most evident in the differentiated levels of status afforded to new arrivals (“refugee protection” and more commonly “subsidiary protection”), often on the basis of nationality. Further, EU states are using profiling to reduce the numbers of asylum applicants. Although European legislation, including the Reception Conditions Directive, affirms international law regarding the protection of human rights of all migrants, in practice, the ways in which states have interpreted that requirement differs greatly. Such differentiated treatment is noted in national policy preferences. For example, Italy’s positive reception of Eritreans (as opposed to other nationals), stands in marked contrast to other states, including the United Kingdom, where Eritreans were erroneously denied asylum in large numbers, only to find their claims later overturned by courts (Lyons 2016). The United Kingdom’s tightening of its rules regarding the admissibility of claims from Eritreans (UK Home Office 2016), further distanced UK and Italian policies on asylum.

Writing in *The Guardian*, Diane Taylor noted that internal UK government documents revealed that the government “downplayed the risk of human rights abuses in one of the

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14 Directive 2011/95, of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, 2011 O.J. (L 337).


16 Regulation 604/13 of June 26, 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 2013 O.J. (L 39) 1.
world’s most repressive regimes in an attempt to reduce asylum seeker numbers despite doubts from its own experts” (Taylor 2017).

At the European level, we note that the European Union’s European Agenda on Migration, which includes the possibility of relocating refugees from Italy and Greece to other states, also reflects a bias in favor of certain nationalities. The introduction of a threshold for the European Union’s relocation scheme, which is based on the average percentage of refugees admitted by nationality across the European Union and which grants the possibility of relocation only to nationals from groups with a recognition rate higher than 75 percent, further undermines the approach to refugee protection on the basis of persecution and creates new hierarchies and priorities for integration (European Commission 2016). The net effect is that thousands of others are left behind (Blitz and Kofman 2017).

**Dominance of Human Capital Thinking**

The above data show that the European public believes better educated migrants are easier to integrate, though arguably these views have been exaggerated in the design of policy. In practice, those arriving from low-skilled countries with limited human capital are less desirable purportedly because they will add little to Western knowledge economies. This bias contrasts with the above explicitly racist argument but nonetheless discriminates against Africans, Afghans, and other groups whose admission has been stemmed through the use of profiling and restrictions regarding relocation and resettlement schemes.

**Foreign Policy Justifications**

Donor preferences in favor of aid and humanitarian assistance over asylum illustrate the repolitization of aid and a new preference for geopolitical buffering. Whereas in the Cold War era, containment complemented preferential refugee policies, now the aim is to keep refugees in the region as a means of containment in direct opposition to asylum and admission. Similarly, as the policies of donor states diverge, we note that such politicization may work in both directions where official development assistance (ODA) is used not only to fund humanitarian protection programs in frontier states but also in host countries, thus linking asylum and humanitarian spending. The introduction of mobility agreements in developing countries — further to the European Agenda on Migration, where states are granted aid in exchange for receiving refugees (e.g., Turkey, Ethiopia, Morocco) — explicitly reframes humanitarian policy as another facet of security policy and harkens back to a Cold War logic. As such, this approach de-emphasizes the rights-based logic underlying refugee protection and humanitarian goals, and brings donor states into contention with international law, as for example, regarding the EU-Turkey deal and recent Italy-Libya readmission initiatives.

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17 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — A European Agenda on Migration, COM (2015) 240 final (May 13, 2015).

18 Organisation for Economic Co-operation and Development’s Development Assistance Committee data, from 2010 to 2015, records that ODA spending for in-donor refugee costs rose from $3.4 billion to $12 billion. The share of total net ODA spent on refugee assistance rose from 2.7 percent in 2010 to 9.1 percent in 2015 (OECD DAC 2016).
**Normalizing Repression through Border Controls**

The extra-territorialization of border controls, as demonstrated by the use of offshore processing by Australia (e.g., Nauru, Manus Island, Papua New Guinea) and the deployment of asylum and immigration officers in third countries, has enabled states to extend their claims to jurisdiction and hence also management of asylum. The use of this type of agreement, in addition to the European Migration Agenda and mobility agreements described above, in turn informs political discourse and undermines alternatives to refugee protection, for example, the possibility of safe passage and creation of legal routes to asylum. The net effect has been the creation of a new discourse that is antagonistic towards the idea of refugee protection.

**Conclusion**

The current refugee crisis presents a distinct vantage point from which one may interpret the evolution of humanitarian and asylum policies. Above I suggest that this episode calls attention to cracks in the post-Cold War approach towards humanitarian policy and attempted harmonization of European policies regarding asylum. Rather, as in the Cold War era, we are witnessing the fusing of security and humanitarian policies and the introduction of increasingly restrictive practices on asylum, in spite of evidence of significant public support.

The above datasets record overwhelming support for the principle of asylum which are underlined by calls for greater generosity towards refugees and more active intervention by the European Union. However, support for the admission of refugees is not unqualified and most states and European populations prefer skilled populations that can be easily assimilated. Ease of assimilation on the basis of education and skills appears to be one of the most significant markers. Though the European public is on record as being less generous towards Muslims, neither religion, nor country of origin, appear particularly significant. This finding from the above data suggests that in spite of public sympathy, European governments appear out of sync by pressing ahead with policies that run counter to public demands.

Noting potential ambiguities in the above datasets, this paper offers five further explanations for the disjunction between public opinion and current policy on refugees, asylum seekers, and humanitarian assistance. It claims that reported public concerns regarding cultural antagonism and the integration of asylum seekers have been greatly magnified and identifies a Cold War-style logic where aid and humanitarian assistance are principally determined on the basis of foreign policy interests, though the containment of refugee and asylum-seeking populations in the region and the use of humanitarian assistance to create buffer zones illustrates notable discontinuities with past policies. In spite of much public sympathy, the above developments in humanitarian and refugee policies have culminated in a discourse that is undermining the universal right to seek asylum.

**Recommendations**

Public opinion data record considerable evidence of sympathy and generosity which is not reflected in current European policies. In order to press for greater refugee protection,
the premise of coupling asylum and humanitarian policies with security policies must be challenged. This can be done best by:

- Refining public opinion surveys so that questions are closely defined to avoid ambiguity and cross-cultural misunderstanding.

- Challenging the discourse on exclusion and securitization by working with human rights actors, the UNHCR, and its partners on dedicated media campaigns which affirm public support and identify how restrictive asylum policies fail to advance foreign interests.

- Challenging efforts to normalize illegal and inhumane practices, e.g., detention, offshore processing, and the separation of families through the courts; these decisions must be widely disseminated as part of a coordinated information campaign to present a counter moral argument.

- Evidencing persecution by sharing information with the press and government agencies on the nature of claims by those currently considered ineligible for refugee protection as part of a wider campaign of information and inclusion.

- Engaging with minority, and in particular Muslim, communities to redress public concerns regarding the possibility of cultural integration in the host country.

- Clarifying the rights of refugees and migrants in line with the UNHCR and IOM guidelines and European and national law in order to hold governments to account and to ensure that all — irrespective of their skills, status, nationality, or religion — are given the opportunity to seek asylum.

REFERENCES


Thrive or Survive? Explaining Variation in Economic Outcomes for Refugees

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*University of Oxford*

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*University of Oxford*

**Executive Summary**

In the context of protracted refugee situations, there has been a revival in concern among policymakers to transcend the so-called humanitarian-development divide and create greater opportunities for self-reliance. Yet, these discussions too often neglect an analytical focus on refugees’ own economic lives, and their own interactions with markets. Despite a growing literature on the economic lives of refugees, much of that work has lacked theory or data. The work that has been quantitative has generally focused on the economic impact of refugees on host countries rather than explaining variation in economic outcomes for refugees.

In order to explain variation in economic outcomes for refugees, this paper asks three questions about the economic lives of refugees: 1) what makes the economic lives of refugees distinctive from other populations; 2) what explains variation in refugees’ income levels; and 3) what role does entrepreneurship play in shaping refugees’ economic outcomes? In order to answer these questions, the paper draws upon extensive qualitative and quantitative research conducted in Uganda by the Humanitarian Innovation Project at Oxford University. The quantitative data set is based on a survey of 2,213 refugees in three types of contexts: urban (Kampala), protracted camps (Nakivale and Kyangwali settlements), and emergency camps (Rwamwanja). It supplements this with qualitative research from other parts of Africa and the Middle East.

The economic lives of refugees are argued to be distinctive not because refugees are any different *qua* human beings but because they often occupy a distinctive institutional space. Following new institutional economics, the paper argues that “refugee economies” represent a distinctive analytical space insofar as refugees face different formal and informal institutional
barriers and distortions in their economic lives compared to nationals or other migrants.

Even within the same country, refugees exhibit significant variation in their economic outcomes, most notably in their income levels. A number of variables are significant in explaining this variation. These include: regulatory context, education, occupation, social networks, gender, and the number of years spent in exile.

Entrepreneurship is an important explanation for “outliers” within the refugee community, explaining why some refugees have significantly higher incomes. However, refugees also often play a wider role within the community, creating opportunities for others. Furthermore, a significant part of refugee entrepreneurship is social rather than simply for-profit.

In order to enhance opportunities for greater refugee self-reliance, policymakers need to develop a better understanding of the transnational, national, and local markets within which refugees participate. Instead of engaging in top-down interventions, enabling environments should be created that enable autonomous, community-led initiatives to flourish.

**Introduction**

In her TED talk, United Nations High Commissioner for Refugees (UNHCR) head of communications, Melissa Fleming (2014) suggests “we should help refugees to thrive rather than merely survive.” Around the world today, most refugees are struggling to survive. However, there is nevertheless considerable variation in outcomes which, if understood, might open up opportunities for more to move away from mere survival and towards opportunities to thrive.

Today, around 54 percent of refugees — including Palestinians — are estimated to be in “protracted refugee situations” (UNHCR 2016). These are situations in which refugees have been in exile for at least five years, often in an intractable state of limbo, and sometimes remaining as refugees for decades (Loescher and Milner 2005; Loescher et al 2008). Especially problematic is the denial of the right to work and freedom of movement to refugees, sometimes leaving entire generations of people indefinitely confined to refugee camps. Yet even for the increasing numbers who move onwards to urban areas, they may also face significant limitations on their basic economic freedoms and remain in limbo for many years.

Against this backdrop, there has been a revival in attempts to bridge the so-called humanitarian-development divide in international public policy, seeking to find ways to engage development actors in responses to forced displacement. The aim is that if refugees can be reframed as a development issue, host states might be willing to offer greater opportunities for refugee self-reliance, and move beyond traditional models of encampment.

Such ideas are not new. Ever since the movement of Assyrians and others leaving the collapsed Ottoman Empire to Greece in the 1920s, development-based approaches have
been used to attempt to economically integrate refugees in host states in ways that can promote autonomy and be mutually beneficial to refugees and hosts (Easton-Calabria 2015). In the International Conferences on Assistance to Refugees in Africa (ICARA) I and II of 1981 and 1984, the International Conference on Central American Refugees (CIREFCA) of 1989, and UNHCR’s Convention Plus initiative (2003-2005), for instance, the international community has attempted to bridge this relief-to-development gap through a range of institutional initiatives on an almost cyclical basis over the last few decades (Gorman 1987; Stein 1987).

The common features of such initiatives have been the attempt by international agencies to encourage a commitment to “additional” development assistance by donor states in order to persuade host governments to consider self-reliance and local integration for refugees. These initiatives have had a mixed record, with CIREFCA being the standout success.

What these initiatives have had in common is that they have generally been top-down rather than bottom-up in approach. They have lacked a focus on understanding and building upon the market-based activities and initiative of refugees themselves. But in order to open up the opportunity for interventions that build up the skills, capacities, and agency of refugees themselves, we first need a greater understanding of the economic lives of refugees.

Pioneering research has already taken place on the economic lives of refugees, drawing attention to and describing key aspects of the economy of refugee camps and urban areas (Jacobsen 2005; Werker 2007; Ruiz and Vargas-Silva 2013). The existing work on the economics of refugees and forced migrants broadly divides into two areas, which can be categorized crudely as “livelihoods” and “impacts.”

The “refugee livelihoods” literature seeks to understand the different income-generating activities developed by refugees and to examine the success or failure of external livelihoods projects and programs (Korf 2004; De Vriese 2006; Horst 2006; Jacobsen 2006; Women’s Refugee Commission 2011). The main weakness of this stream of research has been that it has tended to look at livelihoods and livelihoods interventions in abstraction from a broader and more holistic analysis of the economic lives of refugees. The “impacts of refugees” literature, led primarily by the World Bank, seeks to understand the impact of refugees on host states and societies (Enghoff et al. 2010; Zetter et al. 2012; World Bank 2016). Its main weakness is that it is primarily concerned with hosts, rather than refugees themselves.

But what is missing is a holistic, theoretically informed and data-driven account of the economic lives of refugees themselves. This is a pity because if we can understand variation in economic outcomes for refugees, then we can build upon what already exists in order to enhance local, national, and transnational market-based opportunities for refugees.

This paper draws upon mixed methods research undertaken in order to explore variation in economic outcomes for refugees. In that research we mainly focus on one particular country: Uganda. This case study is not in intended to be representative. On the contrary, Uganda has adopted a relatively progressive refugee policy called the Self-Reliance Strategy (Hovil and Dryden-Peterson 2004; Sharpe and Namusobya 2012). Unlike many other refugee hosting countries around the world, it has given its 420,000 refugees the
Thrive or Survive?

right to work and a significant degree of freedom of movement.\(^1\) While not representative, it can therefore provide important insights and lessons into what might be possible when refugees are given basic economic freedoms.

This paper draws upon and summarizes some of those findings to answer three broad research questions: 1) what makes the economic lives of refugees distinctive from other populations; 2) what explains variation in refugees’ income levels; and 3) what role does entrepreneurship play in shaping refugees’ economic outcomes?

**What Makes Refugees’ Economic Lives Distinctive?**

In our work, we put forward the concept of “refugee economies,” which we define as the resource allocation systems relating to the lives of refugees. However, this very idea poses the question of whether we can expect refugees’ economic lives to be distinctive from other populations such as host country nationals or non-refugee migrants.

The existing literature has mainly dealt with this question by describing the economic lives of refugees and then remaining agnostic on whether their economic lives are distinctive (Jacobsen 2005; 2006). Meanwhile, Werker (2006) addresses this question by inductively identifying some of the features of refugee camp economies that appear to lead to different types of economic distortions. He identifies three: *policy distortions* (e.g., how restrictions on refugees’ mobility hinder them from participating in markets outside the camp); *isolation distortions* (e.g., how the remoteness of refugee camps from commercial centers makes transporting goods or people between the two places costly); and *distortions related to refugee status and identity* (e.g., how insecurity and discrimination by host societies gravely circumscribe refugees’ access to external markets).

These offer an important starting point but they remain undertheorized and untested in terms of whether and how far they lead to specific or generalizable differences in the economic lives of refugees. In order to build upon Werker’s insights, we might draw upon an area of economics called “new institutional economics.”

Neo-classical economics recognizes that in practice, all markets are subject to market imperfections and distortions. The nature of these distortions is shaped by regulatory environments and by institutions. Indeed, we know from new institutional economics that institutions shape how markets work (North 1990; Williamson 2000). They create particular sets of opportunities and constraints for the actors engaged in those markets. The regulatory environment, as well as the broader structure of formal and informal institutions, shapes how a particular economy works, and what opportunities and constraints are available to individuals and groups.

Consequently, the institutions that shape and make corrections for these distortions shape how markets work in practice. As North’s (1995) work recognizes, the historical centrality of regulation and property rights demonstrates that neoliberalism fails unless it is based on sound underlying institutions. New institutional economics defines institutions as the rules

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\(^1\) As of June 2015 the United Nations High Commissioner for Refugees (UNHCR) recorded 428,397 refugees in Uganda (UNHCR 2015).
of the game of a society, or human-devised constraints that structure human interactions
and behavior (North 1995, 23). They are composed of formal rules (laws and regulations),
informal constraints (conventions and codes of conduct), and enforcement mechanisms
(Williamson 1975; 2000). Institutional economists assume that a mixture of legal, political,
social, cultural, and economic institutions have crucial impacts on economic decisions and
performance (Joskow 2008, 5).

The central conceptual pillar of refugee economies is the recognition that markets are
structured by their institutional context (Byrne 2015). Markets do not function simply in a
vacuum. They are inevitably characterized by some degree of market failure. The degree
and type of market distortion is a function of the institutional context.

In order to begin to theorize “refugee economies,” we posit that there are three key
characteristics of refugeehood that collectively suggest “refugee economies” can be
thought of as having specific institutional aspects. These differences might include: 1)
the intersection of state and international regulation; 2) the intersection of the formal and
informal economy; and 3) the intersection of national and transnational economies. These
sources of market distortion create both opportunities and constraints. While sources of
market imperfection may include entry and exit controls, scarcity, abundance, illegality,
and informal institutions that shape risk and uncertainty, they create opportunities for
arbitrage, entrepreneurship, and innovation by both refugees and non-refugees (Betts et al.
2016).

To explore empirically, the hypotheses that a new institutional economics approach
generates requires exploring variation in the impact of the institutional context on
economic outcomes for refugees. This could be done in a number of ways: 1) cross-country
comparison; 2) comparison of refugees and local host populations; and 3) within-country
variation where there are different regulatory regimes in place in different locations. None
of these approaches has so far been undertaken.

In Uganda, though, we were able to adopt the third of these approaches to tentatively explore
what role institutional context has on refugees’ economic lives, holding other variables
constant. This is because in Uganda, the urban (Kampala), protracted camp (Nakivale and
Kyangwali), and emergency camp (Rwamwanja) contexts have slightly different regulatory
structures governing economic life. These vary on a spectrum: the urban context offers the
greatest level of freedom, followed by the protracted context, followed by the emergency
context.

When Do Refugees Thrive versus Merely Survive?

We used a mixed-methods approach in our data collection. We sequenced qualitative
research and quantitative research based on large-scale and representative data collection.
This approach enabled us to build a deep understanding of context, and to develop the trust
and networks required to acquire research access, before embarking on survey design.

In the three settlements (Nakivale, Kyangwali, and Rwamwanja), we were able to base
our sampling on UNHCR’s existing sample frame. In Kampala, in the absence of a sample
frame, we used an experimental approach to urban refugee profiling — respondent-driven
Thrive or Survive?

sampling (RDS). With a sample size of 2,213 refugee households, the survey represents one of the largest quantitative studies of the economic lives of refugees yet undertaken. A key part of our research methodology involved training 17 refugees as peer researchers and 22 refugees as survey enumerators, in ways that enabled us to access the communities but also adopt a participatory methodology (Betts et al. 2016).

One of the methodologically useful aspects of locating our research in Uganda has been that it has enabled comparative research across a number of contexts: urban (Kampala), protracted camp (Nakivale and Kyangwali), and emergency camp (Rwamwanja). Our theoretical contention is that there is not one, but several different and overlapping refugee economies, shaped by the different institutional context. This is borne out by our empirical research across the sites. Each of these different spaces places refugees in slightly different institutional contexts. Put simply, the urban context is the nearest to being the same institutional context as that enjoyed by citizens; the emergency camp situation is the furthest from what is usual for citizens. The protracted camp situation is somewhere in between these extremes.

In Kampala, the primary authority relevant to refugees’ economic lives is the state. International organizations are peripheral to the economic lives of most refugees, insofar as they ensure minimal legal guarantees of non-refoulement, and offer supplementary support to the most vulnerable through an implementing partner, InterAid. The geographical scope of economic life in the capital is also mainly transnational. Refugees are able to use large markets such as Owino, Nakasero, Kikubo, and Kisenyi to engage easily with transnational trade networks. There are also relatively low barriers to engaging in formal economic activity. The Refugee Act is generally interpreted as giving refugees the right to work, even though the Kampala Capital City Association (KCCA) occasionally harasses refugees to pay license fees for a work permit.

In Nakivale and Kyangwali, the situation is more mixed. Authority is divided between the state and the international community. Settlements are formally administered by the Office of the Prime Minister (OPM) and led by the Ugandan Settlement Commander. However, in practice this is carried out in close collaboration with UNHCR, which provides assistance through a number of implementing partners. The geographical scope of economic activity is limited for most refugees in these camps. The majority engages in farming activities and sell crops to middlemen. However, for a significant minority, their economic lives are embedded in much wider trade networks that transcend communities, settlements, and often also national borders. Finally, although there are some barriers to formal sector economic activity in Uganda — including some restrictions on the right to leave the settlements — the Refugee Act is generally interpreted to imply that refugees can work without a permit.

In Rwamwanja, international organizations more significantly play the role of a surrogate state, with UNHCR and the World Food Programme (WFP) providing food assistance and playing a more proactive role in the management of the settlement. While some of the Congolese refugees have brought items with them from home, the Rwamwanja economy is one of the most geographically isolated, with trade and exchange mainly confined to the surrounding areas. Meanwhile, there are significant barriers to economic activity that have been put in place by the government. Tighter restrictions have been imposed on refugee movements in this camp, and the district government has imposed an entry
tax on Ugandans who wish to engage in exchange within the settlement. In that sense, Rwamwanja is perhaps the least economically integrated of the three sites, and faces the greatest number of constraints.

One of the key findings of our survey is that, far from being economically homogenous, there is significant variation in economic outcomes for refugees, both within and across the research sites.

**Table 1. Average Income Distribution by Research Site**

<table>
<thead>
<tr>
<th>Income Bracket in Ugandan Shillings (UGX)</th>
<th>Percentage of Surveyed Population</th>
</tr>
</thead>
<tbody>
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<td>$0 - 100,000</td>
<td>0%</td>
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Collecting data across all three contexts has enabled us to explore the effects of this institutional variation on economic outcomes. What is very clear from our data is that there is a spectrum of income and dependency levels. The question that follows from this is: what explains this variation?

**Regulation**

Refugees have the highest income and lowest dependency levels in the city, followed by the protracted camp context, followed by the emergency camp context. This statistical association persists even when controlling for variation in nationality, education, and length of exile (see Appendix 1). Congolese refugees, for instance, have higher levels of mean income and are less likely to be dependent on aid in Kampala compared to Kyangwali or Nakivale and have lower mean incomes and higher levels of dependency in Rwamwanja than any of the other study sites. The average monthly income of Congolese refugees in Kampala is $120. The average income in Nakivale and Kyangwali is $39, and the average income in Rwamwanja is $17.
In terms of dependency on aid agencies, most refugees in Kampala do not receive any forms of assistance from the aid agencies, and therefore only 9.4 percent of total respondents consider their households “very dependent” on support from UNHCR and other aid agencies. Put differently, the self-settled refugees in Kampala are “doing it for themselves.” In contrast, in refugee settlements where refugees usually have better access to assistance, the percentage of households that feels dependent on institutional aid goes up considerably. In Nakivale and Kyangwali, averaged across different nationalities of refugees, 58.9 percent of respondents feel that they are “very dependent” on assistance from aid organizations. In Rwamwanja, the percentage of “very dependent” respondents goes up to 78 percent of total respondents.

The findings presented here, with results from quantitative analyses of the survey data in Appendixes 1 and 2, provide empirical evidence for the idea that institutional context influences economic outcomes for refugees. Furthermore, beyond the rather banal observation that being in a city correlates with better economic outcomes, our qualitative research tells us about why this relationship might be observed. It suggests that the greater refugees’ opportunities are for integration into the mainstream economy (or the lower the degree of institutional separation), the more positive the economic outcomes are likely to be.

In addition to institutional context, the specific characteristics and capacities of individuals and communities also matter for explaining variation in economic outcomes for refugees. Indeed, our data show that there is also considerable variation in economic outcomes between different nationality groups and between individuals with different characteristics.

**Nationality**

Survey data reveal significant variation in income levels across nationality groups, independent of institutional context (see Appendix 1, Table 1). On average, there is a clear rank ordering of Somalis as having the highest incomes, followed by Rwandans, followed by the Congolese. Controlling for the effects of context, the average Somali refugee earns 69 percent to 97 percent and the average Rwandan refugee 37 percent more than the average Congolese refugee of the same gender, age, level of education, and length of time in Uganda (Table 1, Appendix 1). In Kampala, 29 percent of Somalis, 25 percent of Rwandans, and 15 percent of Congolese primary earners earn more than 300,000 Ugandan shillings per month. In Nakivale, 21.6 percent of Somalis, 4 percent of Rwandans, and 0.9 percent of Congolese primary earners earn more than 300,000 Ugandan shillings per month. In Rwamwanja, just 0.4 percent of primary earners in Congolese households earn more than that amount.

To some extent, these differences may be explained largely through nationality or ethnicity. Indeed, it seems plausible that to some extent there is a “being Somali” variable that explains part of this variation. Our qualitative research reveals high levels of trust within clan-based networks, as indicated by the presence of informal insurance mechanisms known as *ayuto*, the existence of Islamic alms-giving such as *sadaqah* and *zakat*, and the trust-based *hawala* system for remittance transfer. Across all the sites, Somali economic life is also governed by clearly identifiable informal rule-based structures such as the Somali
Community Association — which serves as the official representative body of Somali society in Uganda. Culturally, Somalis are more likely to engage in remittance transfer.

Rwandans often do well in Uganda, likely because many have close cultural ties to Ugandans. Many Rwandans are Anglophone and therefore able to better integrate into the national education system and employment markets than other groups, such as the Congolese. Given the long history of Rwandan refugees in Uganda, going back to the late 1950s, there are also relatively well-established diasporic networks within the country. However, the Rwandan community also faces a number of nationality-specific constraints on economic outcomes. These include internal community divisions, sometimes along Hutu-Tutsi lines, and the additional levels of surveillance and risk faced by Rwandans perceived to be aligned with Rwandan opposition political parties.

Congolese have less clearly defined community-based structures for regulating and supporting their economic activity. In Kampala, despite some geographically contiguous residential pockets such as Tsambia, there are greater levels of dispersal across the city. Unlike the Somalis, there is no strong overarching authority for the Congolese community in Uganda. Consequently, there is an absence of organized structures of mutual support, and Congolese in the city tend to engage in small-scale business activities such as buying, selling, and hawking. In the settlements, they have a strong culture of agricultural activity, and hence predominantly focus on farming. This is reflected in the fact they tend to do better where higher levels of fertile farming land are available; in Kyangwali 8.4 percent of Congolese earn more than 300,000 Ugandan shillings per month compared to 0.9 percent in Nakivale.

However, for the most part, differences in outcomes both between and within nationality groups appear to be attributable to quantifiable variables: notably, education, networks, and entrepreneurship.

Education

Education shapes economic outcomes for refugees. Our dataset shows interesting variation in the returns to education, controlling for nationality and geographical location (see Appendix 1). Acquiring an additional year of education is associated with a 3 percent higher average income. The type of education matters. An additional year of primary education is associated with 1 percent higher earnings, secondary school 10 percent, and tertiary education 27 percent. Finishing primary school is associated with a 30 percent higher income.

However, these returns vary considerably by nationality (see Tables 2A, 2B, and 2C in Appendix 1). Each year of education is associated with only a 0.1 percent return for Congolese but a 2.2 percent return for Somali and 2.4 percent return for Rwandans (see Tables 2A, 2B, and 2C in Appendix 1). These differences are found even when controlling for institutional context. Differences between nationalities in returns to education may be due to differences in the livelihood opportunities to which they are exposed through the personal networks and community structures discussed previously.
The less cohesive structure of Congolese communities in Kampala means educated Congolese refugees are likely to have fewer personal connections and may therefore be less likely to locate professional positions that utilize their skills. Educated Rwandan and Somali refugees with similar levels of education, however, may be able to more successfully draw on diasporic and ethnic networks and thereby maximize the economic returns to education by finding professional positions.

Education levels also appear to have a significant influence on refugees’ choice of where to live. Each year of education is associated with a 22 percent higher chance of living in Kampala than in the settlement (see Appendix 2). Once again, there are differences across nationalities. For each year of education, a Congolese household has a 34 percent ($p<0.001$) higher chance of living in Kampala than in the settlement and a Rwandan household has a 42 percent ($p<0.001$) higher chance. This reflects that rural-urban refugee selection seems to be correlated with a household’s ability to be economically autonomous. In particular, the choice to live in Kampala is determined by a combination of level of education and the number of dependent children. Each child reduces the probability by 21 to 36 percent (see Appendix 2). In contrast, survey data reveal no statistically significant association between location and education amongst Somali households.

**Experience, Age, and Gender**

In multivariate regression analyses exploring variables predictive of refugee income, a number of other variables were found to be significant in addition to education (see Appendix 1). These include experience, employment status, and gender. When all of these variables are controlled for, age is not associated with higher income. Experience in Uganda is, however, found to matter. Each year spent in Uganda is associated with an average increase in income of between 4 and 8 percent. Primary earners who are not farmers and are self-employed earn 4 to 24 percent more, on average, than employed refugees and self-employed farmers. Female primary livelihood earners with equivalent levels of education, the same nationality, in Uganda for the same length of time, and in the same location gain an average of up to 15 percent less income than male primary livelihood earners.

**Networks**

Far from being “enclave economies,” refugees’ economic lives are embedded in complex networks, that shape their consumption, production, exchange, and access to capital. Yet, different households and communities have economic networks that exist to different degrees and scales. Such networks may be local, national, or even transnational. The extent of refugees’ networks appears to play an important role in determining economic outcomes. These socioeconomic connections exist at different levels.

Locally, refugees have important economic interactions across communities. Even in the Nakivale and Kyangwali settlements, refugees are not simply reliant upon economic interactions with refugees of their own nationality. Thirty-three percent of refugee businesses have refugees of other nationalities as their largest group of customers; 26 percent of refugee businesses have Ugandans as their largest customers. Similarly, when it
comes to purchasing daily goods, refugee households buy from a range of sources. In the long-term settlements, 69 percent of households buy goods and services from Ugandans, 93 percent from refugees of their own nationality, and 88 percent from refugees of another nationality. In Kampala, 96 percent buy from Ugandans, 78 percent from refugees of their own nationality, and 48 percent from refugees of another nationality.

Nationally, refugees’ economic lives are connected to other parts of the country. This is especially the case in the long-term settlements. Nakivale is connected to the Mbarara economy and Kyangwali to the Hoima economy, both of which have important exchange links to Kampala. However, it is actually only a minority of refugees who leave the settlements in person. Out of 621 self-employed people in the settlements, less than 10 percent regularly venture outside the settlements for income-generating activities. Instead, trade in and out of the settlements depends mainly on a small group of “middlemen,” both refugees and Ugandans, who make money from arbitrage activities of buying and selling in settlements at markup.

Transnationally, different groups of refugees have different degrees of transnational network connections. Remittances serve as a good proxy measure for transnational connections. Somalis receive a disproportionately higher level of remittances. Fifty-one percent of Somalis in Kampala received remittances, at an average level of $114 per month per household. This compares to just 18 percent of both Congolese and Rwandans in Kampala receiving any remittances. Twenty-seven percent of Somalis in Nakivale receive remittances at an average rate of $54 per month per household, while remittance receipt by other nationalities in the settlements is negligible.

Another proxy for socioeconomic networks is mobile phone use, which also varies by nationality. While mobile phone use is almost universal among urban refugees, in Nakivale, for instance, 83 percent of Somalis use mobile phones in their primary income-generating activities, compared to 32 percent of Congolese and 25 percent of Rwandans. A further variant on the role of networks is connections to host state nationals. In Kampala, many Somali refugees, for example, find employment with Somali-Ugandan enterprises such as City Oil, which employs nearly 60 Somali refugees across the greater Kampala area. The example of tuna fish found in Somali shops in Nakivale, imported from Thailand via Saudi Arabia via Mombassa, stands out as illustrative of their transnational economic ties. Yet, even though Somalis clearly have the strongest transnational networks, other nationalities still have economic lives that are embedded within the global economy. This is perhaps best illustrated by the Congolese bitenge trade, which involves importing fabric from as far afield as India and China to Kampala and then onto the settlements.

**Entrepreneurship**

As we highlighted in the conceptual framework for this book, “innovators” — outliers who develop businesses that help themselves and their communities — play an important role in refugee economies. While successful and large-scale entrepreneurship is only available to a minority, innovation represents an important and neglected driver of economic change within refugee communities. One important indication of its importance is that our research reveals that in Kampala, 21 percent of refugee business owners employ others,
and among their employees, 41 percent are Ugandan nationals. In other words, refugee entrepreneurship can create jobs for host country nationals.

However, in addition to this impact on host communities, the capacity of refugees to engage in entrepreneurial activity appears to matter for economic outcomes for refugees. This does not take place in the way one would necessarily expect, as not all entrepreneurship is of equal quality. In Kampala, there is an inverse correlation between the average income levels of a national refugee community and its levels of self-employment. Ninety-four point eight percent of Congolese are self-employed, 78.2 percent of Rwandans, and just 25.9 percent of Somalis.

However, what seems to matter is the scale and quality of the entrepreneurship. Somali entrepreneurs are more likely to scale a business to the point at which they can employ others, partly explaining why 74.1 percent of Somalis are able to find employment in the businesses of others. Our qualitative research highlights the diversity and creativity of many of these highly innovative businesses. In contrast, most Congolese businesses do not employ others but are based on petty trading of agricultural produce, fabrics, or jewelry within competitive markets with very low margins.

In the settlements, the pattern is a little different. Congolese and Rwandan refugees are most likely to engage in agricultural activity, farming their own plots or working as farm workers on the plots of other refugees. In Kyangwali, 65.8 percent of Congolese are engaged in agricultural work; in Nakivale this figure is 63.9 percent. For Rwandans in Nakivale, it is also 65.2 percent. Where Congolese and Rwandans do engage in entrepreneurship, it is mainly through small shops, hawking, or bars and restaurants, and scale is only rarely achieved. Only exceptionally, do larger-scale businesses such as Claude’s Rwandan milling business or the Congolese cinema in Nakivale’s “little Congo” emerge.

In contrast, Somalis almost entirely shun agricultural work and instead engage in a huge range of entrepreneurial activities. This diversity is best illustrated by the thriving array of businesses within Nakivale’s Base Camp 3. Our qualitative research reveals how some of these unique businesses attain significant scale. The greater likelihood of Somali businesses to attain scale is exemplified by the greater standard deviation in incomes for Somalis compared to other nationality groups. In Kampala, for example, 6.3 percent of Somalis earn over 1,000,000 Ugandan shillings per month, compared to 3.7 percent for the next highest income group, the Rwandans. In Nakivale, we found 24 Somalis with incomes over 400,000 Ugandan shillings per month compared to just one person of any other nationality.

This begs the question of what explains variation in entrepreneurship. Our qualitative interviews suggest that one of the greatest barriers to scaling businesses is lack of access to finance and capital, given restrictions on refugees’ access to access formal banking facilities. This was most significantly identified by self-employed Congolese in Kampala. For Somalis, though, high levels of remittance sending in addition to collective community-based savings and investment mechanisms provide a means to partly overcome limited formal access to credit and capital. Other reported barriers included the price of government business permits, xenophobia and discrimination, and language barriers.
How Do Refugee Entrepreneurs Help Their Communities?

Refugee entrepreneurship is a crucial explanation for variation in economic outcomes for refugees. Not all refugees are entrepreneurs. As has been recognized since the work of Joseph Schumpeter (1934), innovation has implications for an economy. It is the means through which individual agency dynamically drives economic change and growth within an economy. Following this logic, we argue that innovation similarly lies at the heart of refugee economies. In this section, we explore this relationship. First, we conceptualize the relationship between refugee economies and innovation. Second, we examine the conditions that enable particular forms of innovation, and we examine their wider economic impact. Third, we explore the kinds of enabling environments that are likely to support refugee innovation.

As Joseph Schumpeter (1934) recognized at an even earlier stage, individual “innovators” are central to any economy:

... every individual can accomplish by adapting himself to changes in his economic environment, without materially deviating from familiar lines. Therefore, too, the carrying out of new combinations is a special function, and the privilege of a type of people who are much less numerous than all those who have the “objective” possibility of doing it. Therefore, finally, entrepreneurs are a special type.

(Schumpeter 1934, 81)

Schumpeter describes an individual who is able to navigate markets and spot opportunities to exploit them as an “entrepreneur.” When an entrepreneur succeeds in exploiting opportunities, she will undercut others in the market. Schumpeter termed this “creative destruction,” since old ideas and businesses fall with the onset of others. These new profits and improvements in the market enable an economy to grow. As a consequence, innovation has come to be a trait directly associated with individuals and entrepreneurs (Drucker 1985; Bessant and Tidd 2015). The term “intrapreneur” has also emerged in the literature to identify entrepreneurial individuals who drive forward new ideas within large organizations (Antoncic and Hisrich 2003; Kolchin and Hyclak 1987).

For Schumpeter, the entrepreneur plays an essential role in preventing an economy’s stagnation by challenging the status quo. Development is therefore “defined by the carrying out of new combinations” (Schumpeter 1934, 66), and it follows that “[t]he carrying out of new combinations [is what] we call ‘enterprise’; the individuals whose function it is to carry them out we call ‘entrepreneurs’” (Schumpeter 1934, 74).

Schumpeter’s ideas have an application in the role of innovation within refugee economies. As we laid out previously, being a refugee is to occupy a distinctive institutional position. It creates particular forms of market distortions. These distortions, including the creation of artificial scarcity and abundance, lead to both constraints and opportunities. Innovation represents the process through which refugees adapt in these environments, maximizing opportunities and mitigating constraints. In this sense, innovation can be understood to represent the ways in which refugees are able apply their agency — their skills, talents and aspirations — in order to transform their structural situation into new sets of opportunities, which create value for themselves and for others.
Within refugee economies, innovation represents an analogous concept to Giddens’ (1984) notion of “structuration”: individuals’ opportunities are shaped by their structural environment; however, people also have the agency to act upon and change their structural environment. For us, “innovation” is a process through which refugees can exert the agency to dynamically transform the economies in which they participate.

Although there has been a growing debate about the role of “humanitarian innovation,” it has generally focused on ways in which innovation can be used to improve the response of humanitarian organizations. Although important, this work has tended to neglect the role of innovation by crisis affected communities themselves. Put simply, the “top-down” focus of humanitarian innovation has often neglected “bottom-up” innovation by displaced populations themselves.

Although there are a variety of ways to conceptualize innovation, we have found it useful to think of innovation as a four-stage process. This process involves 1) specifying a problem; 2) identifying a possible solution; 3) piloting and adapting the solution; 4) scaling the solution if and where appropriate. In practice this is not a linear process and necessarily involves iterative feedback across the stages. Some of the factors that enable this process include ecosystems that provide access to infrastructure, services, networks, and financing.

**Business Entrepreneurship**

In Uganda we identified a significant minority of refugee entrepreneurs who had established successful businesses, often employing others. Successful entrepreneurs are in most cases “outliers” among their communities, but their impact can stretch beyond their own households by also contributing to an improved quality of life for those around them, at times providing a stepping stone for others to embark upon new ventures. The following examples provide a glimpse into the lives of these innovators.

In a mud and daub home, much like the others on its street, we met Abdi, the owner of Nakivale settlement’s first computer games shop. Even without an obvious shop face, people know about this place from word of mouth and by the reputation Abdi has built from running the business. Abdi established his shop through personal savings, which he used to purchase his second-hand televisions and games consoles from Kampala. Abdi’s drive to be self-reliant was evident as he told us about his business.

Instead of waiting for donors I wanted to make a living . . . I talked to friends in Kampala who run similar businesses and so I decided to start one here . . . There’s one other guy here who also charges money for games, who learned from me. But I’m the pioneer. This guy sometimes comes for advice, and I occasionally give him spares.

One of the biggest challenges for the business is maintaining the games consoles and equipment in a remote rural setting where spare parts and replacements are not readily available or affordable. Abdi and his brother gained mechanical and electronics-related skills from former jobs in Somalia and do their best to help each other maintain the

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2 For example see Tidd and Bessant (2009).
equipment for as long as possible. Abdi also collects scrap electronics parts from around the settlement in order to make repairs, doing whatever is possible to extend the life of the electronics.

Although Abdi’s business stands as a positive example, and in some senses has been able to successfully scale up — attracting increasing numbers of customers and seeing its business model replicated by another person in the settlement — it also suffers from a lack of access to capital to improve its assets or reach markets beyond Nakivale.

The market demand for the shop is high, and it is often filled with children and adults of several nationalities. However, the business regularly faces other challenges. Abdi explained that the generator he owns to power the shop often breaks down or becomes overrun. Additionally, security was a concern to Abdi, since he only had a tarpaulin roof to cover his games equipment. Even if he was able to save for a more secure roof, Abdi was uncertain whether he would be allowed one as a result of restrictions placed on the construction of permanent structures within the settlement.

**Social Entrepreneurship**

Some forms of entrepreneurship are social in character. To take one example from Kampala, Young African Refugees for Integral Development (YARID) is a refugee-led community based organization creating an independent institutional space for fellow refugees to learn skills and foster their own innovative ideas.

YARID started in 2007 using the limited resources available to them, including a public football playing field in the area of Nsambya, where many young Congolese resided. YARID convened a weekly football match, which unexpectedly started to attract over 100 people each week. Many of the participants stayed to chat after the game, forming a community that often spoke together about their problems, including unemployment. The YARID founders discovered that a key challenge to accessing employment in Kampala for many refugees was a lack of English speaking skills, which led them to organize informal English lessons each morning in a local church building.

YARID’s choice of activities was determined by the community. Robert Hakiza, YARID’s Director, explained, “Without the community we couldn’t have done this. We come together, we think together, we decide what to do.” Being embedded within the community gives YARID the ability not only to understand what people are asking and need, but leads local Congolese and other refugee communities to trust YARID’s work. Rather than providing free handouts like many charities, YARID instead focuses on creating a “safe space” where refugees can gather and develop skills that are useful for the Kampala economy. YARID now runs a women’s tailoring workshop, business planning classes, computer training, and social media classes, among others. One refugee in Kampala, James, explained how he has made use of the English and computing classes provided by YARID to launch his photography business:

3 Robert Hakiza, YARID Director, presentation on “facilitating bottom-up innovation” held at the Humanitarian Innovation Conference 2015, University of Oxford.
Thrive or Survive?

English classes helped [me] to talk with customers and computer classes helped too. There are no other photo shops here. I tried at the start and didn’t know it would be successful.4

Although financing has been a challenge for YARID, Hakiza is adamant that “financial resources are not the only thing. Some people say we can’t do things because of money. But when you have an idea there are many ways you can find to start something.”5 YARID’s use of the local football pitch in its early days, and the generous donations of time by many volunteers provide ample support for this claim.

Of course, access to finance remains necessary for material activities. In many instances, the ad hoc expenditure necessary to keep the organization running often comes from the pockets of the YARID founders and volunteers. Hakiza explains that volunteers often buy or bring the chalk needed for the daily English classes, which also helps to create a sense of ownership among volunteers and participants. YARID is trying to enter the “scale-up” stage of its innovation process, but has faced challenges in finding larger sources of financing for rent and equipment. It has also struggled with negative attitudes from large organizations in the city, which are unwilling to support YARID.6 Recently Hakiza has engaged in several international conferences and, at the time of this writing, had begun to win internationally competitive funds for innovation towards growing YARID’s work.

**Facilitating Enterprise and Innovation**

These examples illustrate that refugees can be highly innovative in ways that create entrepreneurial opportunities for themselves and others. Our qualitative research highlights that refugees nevertheless face serious constraints and that more needs to be done to support refugee-led initiatives. This includes providing an auspicious regulatory environment for refugees, better business development opportunities, access to capital and banking facilities, improved local infrastructure, and access to electricity and internet connectivity. It may also involve the international community shifting its focus from being the dominant planner of refugee communities to taking on a facilitation role.

Refugee “innovators” play an important role within refugee economies. They may be thought of as the individuals and groups that transform structural constraints into opportunities that in turn benefit the wider economy. This echoes Schumpeter’s longstanding recognition of the role that innovation plays within an economy.

There is immense untapped potential to facilitate refugee innovation in ways that can contribute to empowering both individuals and communities. International organizations, nongovernmental organizations, and implementing partners are faced with the challenge of ensuring that such facilitation is participatory and works in a representative way with pre-existing community structures. Too often “humanitarian innovation” has been approached in top-down ways that risk marginalizing the creativity, entrepreneurship, and resilience of refugees and displaced populations themselves.

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4 Interview with James, Congolese refugee in Kampala, personal communication, June 27, 2013.
5 Ibid.
6 Ibid.
Conclusion

There is a long history of attempting to bridge the relief-to-development gap in order to promote refugee self-reliance. However, many of these past attempts have been limited by their state-centric approach. Today, there are new opportunities to adopt more market-based approaches. Recognizing and understanding the economic lives of refugees themselves — and the ways in which they interact with markets as consumers, producers, buyers, sellers, borrowers, lenders, employers, employees, and entrepreneurs — offers the chance to build on what exists. Supporting refugees’ capacities rather than just their vulnerabilities offers an opportunity to rethink assistance in ways that are more sustainable for refugees, host states, and donors.

Such an approach requires recognition that the relevant relationship for refugee protection and assistance is no longer understood as being between “states and refugees” but between “states, markets, and refugees.” Durable solutions are not just about integration in the state system, but must involve integration in the global economy. While states must play a crucial role in ensuring the minimum conditions of protection, creating opportunities for refugee integration in markets will ultimately allow them to achieve autonomy and self-reliance. A number of specific implications for policy and practice follow from our analysis.

First, support market-based interventions. Too often, attempts to support refugees’ own income-generating activities are conceived in abstraction from a clear understanding of context, including of market conditions. A market-based approach would attempt to “build on what already exists.” This is in contrast to many existing livelihood programs that are too often developed without an understanding of the market context. This would represent a significant departure for existing approaches, requiring sound analytical tools for understanding the existing markets within which refugees are often already making a living. Crucially, such interventions can begin as early as the emergency phase.

Second, rethink the role of the private sector. Within refugee policy debates, the private sector is too often assumed to be synonymous with multinational corporations or large foundations motivated by corporate social responsibility. In reality, the role of the private sector is more nuanced. The private sector has a range of modes of engagement and motives for involvement with refugees, including philanthropy, corporate social responsibility, and core business interests. Refugees and displaced populations can themselves be conceived as part of that private sector.

Third, create an enabling environment. Refugees and displaced populations are not just passive victims. They have skills, talents, and aspirations. While many are in need of assistance, they have capacities as well as vulnerabilities. Rather than assuming a need for indefinite care and maintenance, interventions should nurture such capacities through improved opportunities for education, skills development, access to microcredit and financial markets, business incubation, better transportation links and infrastructure, and internet access and connectivity.

Fourth, invest in research and data. Governments and international organizations have traditionally invested too little in applied research. Yet, we know surprisingly little about the economic lives of displaced populations. There is a need to develop an ongoing and systematic research agenda on the relationship between forced displacement and development. In particular, comparative case studies are needed a) in different regulatory
environments (restrictive versus open), b) at different phases of a displacement crisis (e.g., emergency, protracted, and return), and c) for different categories of displacement (e.g., refugees, internally displaced persons, and people displaced in the context of natural disaster).

Fifth, analyze the political context and create more favorable state policies. Markets function in the context of state policies. Restrictive refugee policies limit the capacity of refugees to engage with markets in ways that can lead to sustainable opportunities. When refugees are given the right to work and freedom of movement, they can contribute to the national economy. Importantly, however, government policy choices are the result of national politics. In order to enhance market-based opportunities for displaced populations, it is important to better understand and engage the political context and incentive structures within which national refugee policies are crafted.

Appendix I. Regressions on Income

The following analyses regress key variables on the income of refugee households’ primary livelihood earners. The first set of regressions is conducted on the entire survey sample from all four sites (one emergency settlement, two protracted settlements, and Kampala).

Regression on Income across Locations and Nationalities

Table 1 presents results of results of six regression models of alternative education measures on income (in USD), using data from all surveyed households across three settlements and in Kampala ($n = 2128$). All variables pertain to households’ primary livelihood earners. These models control for geographical location, contrasting households in emergency or long-term (protracted) settlements with those in urban environments. Rwandan, Somali, and South Sudanese households are compared to Congolese households. All survey data from Rwamwanja, Nakivale, Kyangwali, and Kampala are included. Sampling weights are used to adjust for survey design effects and respondent-driven sampling II (RDS-II) weights are used to accommodate data collected using respondent-driven sampling in Kampala.

Regression on Income by Nationality

The section for Table 2 present results from the five models in Appendix I, Regressions on Income.

Table 2 runs separately on Congolese, Somali, and Rwandan households. Data collected from Rwamwanja, Kyangwali and South Sudanese households are excluded. This is because South Sudanese households were only sampled from Kyangwali; and because Nakivale and Kampala are the only sites from which the three remaining nationalities were all sampled. Using data from the same two settlements in each regression model allows for comparison across models run on data from different nationalities. The models below regress alternative education measures on income (log income in USD). Sampling weights are used to adjust for survey design effects and RDS-II weights are used to accommodate data collected using respondent-driven sampling in Kampala.
Table 1. Regression on Income across Locations and Nationalities

<table>
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<tr>
<th>Variables in the model</th>
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<td>(0.002)**</td>
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*p<0.05, **p<0.001
Table 2A. Congolese Households in Nakivale (protracted settlement) and Kampala (urban)

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<th>Variables in the model</th>
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<th>4</th>
<th>5</th>
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</tr>
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<td>(0.000)</td>
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<tr>
<td>Years in primary education</td>
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<td>0.029</td>
<td>(0.003)**</td>
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</tr>
<tr>
<td>Years in secondary education</td>
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<td></td>
<td></td>
<td>0.006</td>
<td>(0.004)**</td>
</tr>
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<td>Receive remittances</td>
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<td>(0.013)**</td>
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*p<0.05, **p<0.001
Table 2B. Somali Households in Nakivale (protracted settlement) and Kampala (urban)

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<td>-0.266 (0.017)**</td>
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<tr>
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<tr>
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<td>0.002 (0)**</td>
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<td>Years in education (squared)</td>
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</tr>
<tr>
<td>Years in primary education</td>
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<td></td>
<td></td>
<td>0.053 (0.004)**</td>
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</tr>
<tr>
<td>Years in secondary education</td>
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<td>0.005 (0.001)**</td>
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<td>-0.014 (0.012)</td>
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<td>-0.064 (0.029)*</td>
<td>0.062 (0.016)**</td>
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<tr>
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<td>0.004 (0)**</td>
<td>0.004 (0)**</td>
<td>0.064 (0.001)**</td>
<td>0.005 (0.001)**</td>
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<td>Years in Uganda</td>
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<td>0.004 (0.002)*</td>
<td>0.002 (0.002)</td>
<td>0.044 (0.003)**</td>
<td>0.006 (0.002)*</td>
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<td>-0.308 (0.014)**</td>
<td>-0.093 (0.027)*</td>
<td>-0.3 (0.016)**</td>
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R-squared 0.784 0.40 0.168 0.561 0.156

*p<0.05, **p<0.001
### Table 2C. Rwandan Households in Nakivale (protracted settlement) and Kampala (urban)

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<td>(0.033)**</td>
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<td>(0.035)**</td>
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<td>(0.035)**</td>
<td>(0.044)**</td>
<td>(0.04)**</td>
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<td>(0.049)</td>
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<tr>
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<td>(0.001)**</td>
<td>(0.001)**</td>
<td>(0.001)**</td>
<td>(0.001)**</td>
<td>(0.001)**</td>
</tr>
<tr>
<td>Years in Uganda</td>
<td>0.023</td>
<td>0.004</td>
<td>0.004</td>
<td>0.021</td>
<td>0.03</td>
</tr>
<tr>
<td></td>
<td>(0.002)**</td>
<td>(0.002)</td>
<td>(0.002)**</td>
<td>(0.002)**</td>
<td>(0.002)**</td>
</tr>
<tr>
<td>Female</td>
<td>0.096</td>
<td>0.045</td>
<td>0.039</td>
<td>0.296</td>
<td>-0.07</td>
</tr>
<tr>
<td></td>
<td>(0.016)**</td>
<td>(0.014)**</td>
<td>(0.014)**</td>
<td>(0.016)**</td>
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</tr>
<tr>
<td>R-squared</td>
<td>0.516</td>
<td>0.23</td>
<td>0.048</td>
<td>0.456</td>
<td>0.078</td>
</tr>
</tbody>
</table>

*p<0.05, **p<0.001
Appendix II. Regressions on Urban-Rural Selection

The table below shows regression analyses of the association between years of education and location for each nationality and for all nationalities together, controlling for the gender of the primary livelihood earner and the number of children in the household. The results show that years of education are statistically significant and positively associated with living in Kampala rather than in a settlement across the sample as a whole and for Congolese and Rwandan refugees in particular. The results also suggest that the more children there are in a household, the less likely it is that the household is in Kampala and the more likely it is to be in a settlement. This association is statistically significant across nationality groups. Finally, the results suggest that households with female primary livelihood earners are slightly more likely to be in Kampala than in a settlement. The association with gender is statistically significant and largest for Congolese followed by Rwandan households and not statistically significant for Somali households.

<table>
<thead>
<tr>
<th>Variables in the Equation</th>
<th>Congolese</th>
<th>Somali</th>
<th>Rwandan</th>
<th>All</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-.315 (0.42)**</td>
<td>0.18 (0.3)</td>
<td>-.285 (0.4)**</td>
<td>-.168 (0.18)**</td>
</tr>
<tr>
<td>Years of education</td>
<td>0.34 (0.03)**</td>
<td>0.01 (0.02)</td>
<td>0.42 (0.04)**</td>
<td>0.22 (0.02)**</td>
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<tr>
<td>Female primary earner</td>
<td>1.34 (0.29)**</td>
<td>0.16 (0.26)</td>
<td>1.04 (0.23)*</td>
<td>1.06 (0.15)**</td>
</tr>
<tr>
<td>Number of children</td>
<td>-.21 (0.07)*</td>
<td>-.28 (0.06)**</td>
<td>-.36 (0.09)**</td>
<td>-.27 (0.4)**</td>
</tr>
</tbody>
</table>

REFERENCES


Executive Summary

There is a consensus among global policymakers that the challenges facing refugees today arise, in no small part, from the treatment of forced displacement as predominately a short-term humanitarian problem and the consequent exclusion of refugees from long-term development assistance. This paper agrees that refugees — a majority of whom spend years, a large number decades, some lifetimes in exile — constitute a development challenge, not only a humanitarian one. But it departs from the prevailing consensus which has tended to underemphasize the historical role of certain development policies in contributing to the status quo of refugee poverty in the first place. The paper places particular emphasis in that regard on policies of austerity and of laissez-faire. In their stead, it argues in favor of approaches to development that are proactively egalitarian and redistributive.

Introduction

There is a consensus among global policymakers that the challenges facing refugees today arise, in no small part, from the treatment of forced displacement as predominately a short-term humanitarian problem and the consequent exclusion of refugees from long-term development assistance. This paper agrees that refugees constitute a development challenge, not only a humanitarian one. But it departs from the prevailing consensus which has tended to underemphasize the historical role of certain development policies in contributing to the status quo of refugee poverty in the first place. The paper particularly examines the policies of austerity and of laissez-faire.

That is by no means to deny the vital importance of development assistance. Nearly 85 percent of refugees live in the Global South; most reside in just a handful of developing countries. Among its other recommendations, this paper calls for a massive increase in the amount of aid provided to those countries, precisely because such aid is essential (and because it is owed to host countries due to the global public good they provide). But, as the paper also underscores, issues surrounding development assistance are more than just quantitative. Despite commitments to combat poverty and inequality, the policies and
preferences of the major donor countries\textsuperscript{2} have often privileged the global market instead of the global poor, and have conditioned aid on reforms that promote (big) business first and foremost.

To demonstrate as much, this paper surveys certain strands of the political economy of development and refugee assistance that policy discussions have tended to overlook. It begins by tracing the bifurcation of the modern aid regime along North-South lines. In postwar Europe, it shows, both development and refugee policy took as their starting points the centrality of the role of the modern welfare state. Where laissez-faire liberalism had ended in a Great Depression, the Marshall Plan ushered in a new development paradigm — one premised on progressive taxation, universal public benefits, full employment, robust labor rights, controls on foreign capital flows, and state-led industrialization. The 1951 Convention relating to the Status of Refugees ("the Refugee Convention") pushed in the same direction. It sought to protect refugees from the harsher effects of the market by vesting them with economic and social rights — not only rights to work but to public benefits, housing, education, and more.

By contrast, when the focus of the international aid system shifted from Europe to the South beginning in the 1950s, the meaning of "development" changed. To be sure, Southern countries faced distinct and varied challenges that differed from those afflicting postwar Europe. But the nature and extent of the shift is difficult to explain with reference only to endogenous problems on the ground. As this paper argues, good intentions and vested interests on the part of donor countries combined to produce a kind of ersatz developmentalism.\textsuperscript{3} Suddenly, the focus was less on aiding developing countries to intervene in or protect against global market forces, than on encouraging policy changes that aimed to liberate global capital from local political restraints. Refugee settlements provided both an entry point and a testing ground for this new development orthodoxy.

The paper then explores efforts by host governments to adopt a more robust, welfarist approach to refugees and development, and the resistance to those efforts on the part of certain donor countries. That resistance reached a zenith in the 1980s, when twin refugee and development crises engulfed the South. These crises owed to events and policies internal to Southern host countries. But they also had external roots: refugees were displaced by liberation struggles and by proxy wars between Cold War powers; and the sovereign debt crisis was precipitated in no small part by excessive lending by private Northern banks, coupled with an unprecedented hike in interest rates on the part of the US Federal Reserve.

\textsuperscript{2} Although the United Nations has a number of development organizations, the vast majority of development aid (roughly 90 percent) is provided bilaterally or through multilateral lending institutions such as the World Bank. (See below, Section III, noting the decision taken by the United States in the 1960s to minimize the United Nations’ role in development financing and oversight.) For that reason, this paper focuses mainly on the Northern donor countries (especially the United States) and the international financial institutions.

\textsuperscript{3} The term "ersatz development" also appears in Chang (2010). There it refers to the diminution of development from a project of structural transformation (particularly in the productive sphere) to one focused on satisfying "basic needs" within a broader strategy of status quo maintenance. In using this term, the paper means something similar: a paradigm that favors unregulated markets and trickle-down policies at the macro-level, and targeted, temporary safety nets at the micro-level, rather than the sorts of proactive regulations and protections — labor laws, progressive taxes, capital controls, welfare entitlements — that proved so successful in reducing poverty and inequality during the "golden age" of capitalism after World War II.
Those crises — and particularly the debt crisis — gave the gatekeepers of international trade and finance the leverage to take ersatz development to new extremes. In exchange for access to liquidity, Southern countries — including those experiencing major refugee situations — were encouraged or obliged to lift capital controls, unilaterally eliminate tariffs, privatize public lands and resources, deregulate industry and banking, export instead of process raw materials, slash public benefits, eliminate food and other subsidies, levy consumption instead of corporate taxes, impose user fees, suppress wages, and loosen labor protections. In exchange for enacting these reforms, Southern states received a considerable amount of aid and a far greater amount of additional debt.

Proponents of these “structural adjustments” believed that transferring economic power from governments to markets so as to “get prices right” would spur investment and growth. But global markets proved uncooperative. In addition to the debt crisis, the early 1980s saw a worldwide recession, an unprecedented fall in commodity prices, skyrocketing interest rates, reverse private capital flows, and growing financial volatility. For much of the global poor, including refugees, increased exposure to these elements proved “calamitous” (UNECA 1988, para. 6). Poverty increased, in some cases precipitously, while inequality began to skyrocket. As economic conditions worsened, UN agencies and others campaigned vigorously for “adjustment with a human face” (UNICEF 1987). But the Reagan-Thatcher revolution had begun to give rise to a perception that there was “no alternative” to adjustment and austerity.

In addition to its direct toll, the advent of austerity helped put an end to the solidarity with which many Southern countries had greeted refugees in the past. Forced to cut the services they provided to their own citizens, and obliged to spend upwards of 40 percent of their budgets on debt servicing alone, host governments came to see refugees as one burden too many. Borders began to close. Encampment policies became a default response to influxes. Restrictions on access to labor markets and to public services became routine. Meanwhile, rather than provide host states with macroeconomic relief as inducement to reverse course, the international community tended to shift the costs of international protection further onto refugees: by containing them in a handful of struggling states; by underfunding humanitarian programs; by defining the goal of refugee development as independence from aid rather than freedom from want.

The final section welcomes the growing (re)emphasis on equality, welfare, and redistribution that has emerged in recent years. Policymakers have increasingly affirmed the need to strengthen and expand the welfare systems in host countries, not only for the good of refugees but also of host communities. Policies to end encampment and to foster mobility have returned economic rights to the front and center. Calls for macroeconomic relief to be provided to host states are mounting. National ownership has become a sine qua non of development aid, leading to a relaxation of economic conditionality among some lenders. More broadly, both the global refugee crisis and the Great Recession have refocused attention on the external causes of hardship and poverty. Together, these and other shifts could well prove transformative. But, the paper concludes, progress on the ground remains ad hoc and far from assured.

4 Notably, this was not true in countries such as China and India that continued to embrace state-led development strategies. Global poverty and growth trends in the 1980s and 1990s look quite different depending on whether one controls for these countries. See e.g., World Bank (2000a, 3).
The paper ends with, among others, the following recommendations:

- Development assistance to host states should be seen chiefly as compensation for a global public good and as a step toward global economic justice. Such assistance should not be a secret subsidy for donor countries or private banks. It should come chiefly in the form of grants, not loans. It should not come with harsh or excessive conditions, especially austerity, privatization, and deregulation requirements.

- No effort should be spared to staunch and reverse net outflows of public and private resources from host states. Debt relief — including, in the near-term, a moratorium on repayments to official creditors — should be pursued, as should efforts to minimize capital flight and to return evaded taxes to host states.

- Approaches to development that were crucial to the development of donor countries (such as capital controls, progressive taxes, and universal public entitlements) should not be regarded as heterodox when employed by host countries.

- The privatization of essential public services, or the imposition of user fees on those services, should be discouraged.

- Efforts to enable self-reliance should not be used as a pretext to shift the costs of international protection onto refugees and host communities. Refugees should not be made to subsidize economic production via poverty wages or other forms of deprivation. Economic and social rights — not just the right to work but also refugees’ labor and welfare rights — should form the basis of all development programming.

- When it comes to the private sector, the focus should be on supporting host countries’ small- and medium-sized enterprises, including by raising rather than lowering taxes on multinationals.

- The overwhelming majority of refugees should not be confined to a handful of struggling countries in the first place.

I. The Postwar Development Approach to Refugees

It has long been conventional wisdom within policy circles that, while “[t]he international community has not ignored the twin problems of refugee aid and development assistance . . . it has tended in the past to treat them as largely separate and distinct activities” (Gorman 1987, 10).

It is not difficult to find evidence for that proposition. By the time governments created the UN High Commissioner for Refugees (UNHCR) in 1950, they considered the postwar refugees remaining in Europe to be a temporary problem. Thus they gave UNHCR an initial mandate of just three years and a budget of only $300,000 (in contrast to the $150 million budget of UNHCR’s predecessor, the International Refugee Organization).\(^5\) They further discouraged UNHCR from engaging in development work, even if it could raise the funds

\(^5\) For overviews of the creation of the postwar refugee regime, see e.g., Holborn (1975), UNHCR (2000), and Loescher (2001).
to do so. Instead, the international system divided refugee protection and development assistance between separate entities, entrusting the former to UNHCR and the latter to the International Bank for Reconstruction and Development (part of the World Bank) and the Expanded Programme of Technical Assistance (a precursor to the UN Development Programme [UNDP]).

But the restrictions placed on UNHCR, and the divisions of labor those restrictions sought to maintain, quickly gave way to a broader understanding of refugee assistance. In a series of remarks to the General Assembly, UNHCR’s inaugural High Commissioner, Gerrit J. Goedhart, challenged the exclusion of refugees from broader reconstruction efforts. Referring to refugees in Austria, he reported: “There is, in my opinion, something very radically wrong in a situation in which so much money . . . has been expended . . . to revive the economic capacity of the country, while so little attention has been paid to the needs of refugees” (UNHCR 1953, para. 59). He further noted: “I have already drawn the attention of . . . the International Bank for Reconstruction and Development to this problem. International [development] agencies can certainly contribute towards the solution” (ibid.).

The General Assembly concurred. In a resolution issued in February, 1952, it urged all States directly affected by the refugee problem, as well as the appropriate specialized agencies and other inter-governmental agencies concerned, to pay special attention to this problem when drawing up and executing programmes of economic reconstruction and development.

It further “request[ed] the High Commissioner to contribute to the promotion of activities in this field.”

Two years later, the Convention relating to the Status of Refugees entered into force. The text of the Convention was notably silent as to the role of international development assistance in refugee response. But it was — and is — unmistakably development-friendly. Instead of camps, it demanded freedom of movement. More than a regime of short-term aid, its provisions called for the productive inclusion of refugees into host economies and societies.

The decision to begin incorporating refugees into postwar development efforts benefitted more than just the displaced themselves. Reconstruction in Europe had created a substantial demand for workers (Gorman and Kibreab 1997, 40). In addition to their labor, refugees in Germany,

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6 Germany, Japan, the United Kingdom, the United States, and other governments made similar administrative distinctions within their donor agencies (Gorman 1987, 11; see also Crisp 2001).
7 See e.g., UNHCR (1952, paras 24-25).
9 Id. The link between refugees and development was affirmed in other resolutions as well. For instance, in December 1952, the UN General Assembly invited UNHCR to collaborate with the World Bank to explore the role of “international funds” in the “successful execution of long-term projects for the assimilation of refugees.” See G.A. Res. 638 (VII), at preamble (Dec. 20, 1952).
although arriving penniless to the Bund, still brought invaluable assets with them from their old homelands. Among these were their enterprising spirit, their individual imaginations, their special skills and their vocational backgrounds.

(Paikert 1962, 36, quoted in Gorman and Kibreab 1997, 40)

Similarly, refugees in Austria represented “one of the most valuable potential economic assets of the country” (UNHCR 1953, para. 59).

Those economic advantages only increased as the Cold War ignited. With the Iron Curtain in place, the difficulties of escaping the Soviet Union ensured that those who did so tended to be not only enterprising but educated and skilled (Toft 2007, 143). As symbols of Soviet aggression, moreover, they were welcome for political, as well as economic, reasons.

Indeed, in addition to its economic advantages, the inclusion of refugees in development made sound ideological sense. Development initiatives such as the Marshall Plan aimed not only to reconstruct Western Europe but to stop the spread of communism. Nor were their chief architects coy about this fact. The subtitle to Walt Rostow’s (1960) seminal treatise, *The Stages of Economic Growth*, made the connection especially clear: *A Non-Communist Manifesto*.

II. The Origins of Ersatz Developmentalism

Despite such anti-communist origins, both refugee and development policy in the postwar West took as their starting points the centrality of the role of the modern welfare state. Thus, the Refugee Convention aimed to *protect* refugees from the harsher effects of the market by entrusting them with economic and social rights. It granted them access not only to private labor markets but to an ensemble of public welfare entitlements. Indeed, Chapter IV of the Convention is entitled, simply, “Welfare.” It covers such topics as housing (Article 21); public education (Article 22); public relief (Article 23); and labor legislation and social security (Article 24). This welfarist orientation is further underscored by the Convention’s construal of asylum as almost exclusively the prerogative of national governments, in contrast to the private, “charitable” humanitarianism of the interwar period.11

Prevailing theories of “modernization” likewise defined development in terms of state intervention *into* the economy. As Mark Mazower (2000, 298) puts it: the “‘unexpectedly dazzling’ revival of capitalism [in postwar Europe] took place, of course, in a world where the extension of state power was accepted not only in the economic sphere itself, but also in the area of social welfare.” Where laissez-faire liberalism had ended in a worldwide depression, the Marshall Plan, in particular, ushered in a new development paradigm — one premised on state-led industrial policy, progressive taxation, strong labor rights, and greater provision of public services.12 For refugees and citizens alike, it was Western Europe’s “New Deal.”

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11 For an exploration of the transformation of assistance from charity- to welfare-based, see e.g., Bortgwardt (2005) and Cohen (2008).

12 For an overview of the Marshall Plan, including its progressive and statist orientation, see e.g., Judt (2006).
Tellingly, both the Refugee Convention and the Marshall Plan were limited to Europe(Ans). As US President Harry Truman announced in January 1949, a “bold new program” would be created to spur the development of the Global South. As in Western Europe, a primary motivation for the program was ideological. But communism was not the only threat that it sought to contain. The anticolonial struggle was rapidly giving rise to calls for a “third way” premised on non-alignment, self-determination, and local control over natural resources. Facing shortages of raw materials and surpluses of processed goods, the United States saw development as a means not only to win allies or to improve living standards, but also as a tool to preempt such “third way” proposals and thereby to ensure its access to the resources and markets of existing and soon-to-be former colonies (see e.g., Hagen and Ruttan 1987, 21-22; UNCTAD 2006, 11).

Hence the ambitions and modalities of development assistance, including to refugees, changed markedly when the focus of US aid shifted from Europe to the South. Where economic and social policies among Marshall Plan recipients sought (however imperfectly) to manage and temper global market forces, the goal of the “bold new program,” and of the development paradigm to which it gave rise, was to liberate global capitalism from local political restraints. As former US Undersecretary of State George Ball put it to Congress in 1967: “We will never be able to put the world’s resources to use with full efficiency so long as business decisions are frustrated by a multiplicity of different restrictions by relatively small nation states that are based on parochial considerations” (Congressional Record, quoted in Ellis 2014).

Casting restrictions on Western access to Southern resources as “parochial” and anti-developmental helped both to obscure the external causes of Southern poverty and to frame (continued) foreign intervention as the only solution to it. As the logic went, underdevelopment in the South resulted not from centuries of imperialism and foreign domination. The problem was endogenous. People in developing countries were “backward and tradition bound”; “despite many years of contact with more advanced societies, [they

13 The full text of Truman’s famous address — including Point IV — can be found at: https://www.trumanlibrary.org/whistlestop/50yr_archive/inagural20jan1949.htm_.
14 For a review of official Executive and Congressional statements and rationales concerning US foreign aid programs in the 1950s and 1960s, see Hagen and Ruttan (1987).
16 This was not equally true of all donors. Sweden, for instance, advocated for “balanced modernization” (see Sluga 2016). Indeed, the Swedish economist and diplomat Gunnar Myrdal remained a forceful advocate of state-led development in developing and developed countries, much to the chagrin of others (see Bauer (1966).
17 He continued: “to fulfill its full potential the multinational corporation must be able to operate with little regard for national boundaries — or, in other words, for restrictions imposed by individual national governments” (Congressional Record quoted in Ellis 2014).
had] not developed within themselves the skills which make economic development feasible” (Axilrod 1953, 3).

Far from being excluded from such logic, refugees in developing countries became test cases and entry points for this new development orthodoxy. This was especially true in Africa, where donor governments and international agencies began implementing refugee development schemes beginning in the 1960s.

III. Refugees and Development in the Global South

By 1963, refugees from Rwanda posed the “most critical problem” facing a rapidly expanding refugee regime (UNHCR 1964, para. 132). Roughly 150,000 Rwandans had fled to Burundi, Tanganyika (now Tanzania), Uganda, and Zaire (now the Democratic Republic of the Congo). More than half were receiving humanitarian assistance from UNHCR. But the refugee agency constituted only one player in what it described as a “joint operation” that “represented a truly international effort” (ibid., para. 149).

That effort, like those in postwar Europe, belies the notion that refugees became a development concern only recently. To the contrary, the initiatives undertaken on behalf of Rwandans in the 1960s placed development at the heart of refugee assistance. As but one example, in Burundi, refugees were incorporated into “integrated zonal development” programs. According to UNHCR, the goal was “not only to enable these refugees to support themselves on a subsistence level, but [to] give them a chance to improve their living conditions within the development of the country of asylum” (quoted in Goetz 2003, 4-5). Encouraged by events in Burundi and elsewhere, UNHCR and its partners convened a conference in Addis Ababa in October 1967 to consider “the role of refugees in economic and social development and their utilization as human resources” (UNHCR 1969, para. 8). Soon enough, the zonal development model became a regular response to refugees in Africa, with more than 100 settlements being established between 1966 and 1982 (Stein and Clark 1990; Easton-Calabria 2015).

Crucially, though, the zeal to create new settlements took hold just as the original settlements had begun to unravel (Goetz 2003, 2). While the latter’s decline owed to political and environmental conditions within host countries, it also reflected deep problems within the ersatz-development ethos itself. The assumption that Southern governments and peoples lacked the capacity to manage development effectively, for instance, ensured that decisions regarding development often rested with those unaccustomed to the contexts, aspirations,

18 Or as Bauer put it, “comprehensive and detailed control over the economy . . . [was] more likely to retard than to promote material advance” because “[t]he peoples of underdeveloped countries . . . [lack] the human qualities, attitudes and motivations which have made these material living standards [in the West] possible. It is the differences in these qualities and motivations which largely explain differences in economic performance and in living standards” (Bauer 1966, 746-47).

19 As a World Bank official put it at the time:

> technical ministries, departments and aid agencies in most [Southern] countries do not have the staffs qualified to (a) identify, evaluate and prepare good projects, (b) fix project priorities in accordance with well devised time tables, and (c) operate completed projects efficiently.

(quoted in Rondinelli 2013, 53-54)
and traditions of local populations. Thus, at the global level, responsibility for coordinating development programs was entrusted first and foremost to the World Bank, where Southern governments had much less of a voice than at the United Nations.  

When it came to refugees specifically, decision-making frequently rested with foreign officials unfamiliar with local political, social, and economic conditions or with the skills, backgrounds, “felt needs and actual living conditions of the people” (Betts 1984, 11; see also, Easton-Calabria 2015, 425). That social distance had consequences. For instance, the locations of at least some settlements were chosen “[w]ithout any adequate investigation of the potentiality of the site” (Betts 1984, 11). Only too late would it be discovered that the land was not fertile enough to sustain long-term farming activities.

The settlements may have fallen short in meeting the needs of refugees and host populations. But they succeeded, at least in part, in serving ulterior purposes. The issue of food is especially illustrative in this regard.

Rather than purchase food locally, thereby contributing to indigenous development while dramatically reducing the costs of procurement, host states and aid agencies frequently found their funding conditional on the purchase and shipment of food from the North. Indeed, the US government regarded food aid as a “surplus disposal program” (Hagen and Ruttan 1987, 22). As early as 1953, the US Mutual Security Act mandated that foreign aid funds be used to purchase US farm goods and that at least 50 percent of aid (by tonnage) be transported by the US shipping industry (ibid., 21, 25). Not only did such requirements divert much-needed funds away from refugees toward American agribusiness, they also sapped demand for developing-country produce, leaving farmers in developing countries to watch as foreign food was shipped in, at great expense, while their harvests went spoiled and unsold.

Nor was it only donors’ preference for “tied aid” and surplus disposal — both of which remain prevalent features of development financing to this day (see e.g., Oxfam 2016) — that undermined the efficacy of foreign assistance. In contrast to the Marshall Plan, transfers to developing countries mostly took the form of loans (see e.g., Hughes 1979). Because they had to be repaid in foreign currencies, the loans exposed host countries to the risk of hard currency appreciation. They also put enormous pressure on Southern countries to orient more and more of their economies towards exports so as to earn foreign exchange, including by producing cash crops for sale abroad instead of food for local consumption (Khatkhate 1966, 224).

20 Just as European recipients of the Marshall Plan helped administer those funds through the Organization for European Economic Cooperation (the precursor to the Organisation for Economic Co-operation and Development [OECD]), Southern governments had called for development aid to be coordinated by the United Nations — specifically, the Special United Nations Fund for Economic Development (SUNFED) — where their ranks and influence were growing (Benjamin 2015, 41-42). Instead, the United States insisted that a new agency — the International Development Agency (IDA) — be established within the World Bank. As Burke Knapp, a senior official at the Bank at the time, explained: the United States “decided to go for an agency under the management of the World Bank rather than one under the management of the United Nations” because “an agency administered under the United Nations would presumably be dominated by underdeveloped countries” (quoted in Benjamin 2015, 42).

21 For an interesting geostrategic discussion of this dynamic, see CIA (1974).
Not coincidentally, development initiatives aimed at refugees often pushed in the same direction: that is, they “reflected the demands more of the resource-extraction economy, and were aimed primarily at deepening commoditization” (Daley 1989, 63). The earliest refugee settlements proved a case in point. “Self-sufficient” refugee settlements were to be fostered through viable refugee livelihoods — mainly the strictly regulated cultivation of cash crops for national exportation. This was primarily achieved through block, monoculture farming, which created both social and practical problems” (Easton-Calabria 2015, 424). Indeed, even after it became clear that the land was unsuitable, and that refugees were going hungry, development officials in some settlements continued to promote cash crops such as tobacco (ibid., 425).

Compounding these problems was a growing preoccupation with weaning refugees off of direct assistance. That preoccupation arose within a context where expatriate staff themselves often consumed a lion’s share of available funding in the form of salaries and lodging.22 But scarcities of funding do not fully explain the drive to withhold rations. That drive also reflected the view among at least some officials that — unlike in Northern countries, where welfare benefits and labor laws were cornerstones of economic and refugee policy, not to mention guarantors of human rights — the provision of aid to Southern refugees was “dependency-inducing” (see Waldron 1987). Thus, in the early settlements in Burundi, a proposal emerged that food rations should be denied to refugees except as compensation for the cultivation of unused (and in many cases unusable) land (Goetz 2003, 6-7). Although, as the International Labour Organization (ILO) pointed out, the proposal likely violated the International Convention on Payment of Wages, the idea soon went into effect (ibid., 7). Nor was the withdrawal of food aid the only punishment meted out against refugees who pursued “uneconomic” livelihoods strategies such as fishing. In at least one settlement, “refugees [were] put into prison if they fail[ed] to provide expected labour requirements for projects such as the establishment . . . of 400 acres of block farms to grow more rice, beans and cassava” (Trappe 1971, 10, quoted in Easton-Calabria 2015, 427; emphasis in original).

No amount of refugee labor could force poor soil to grow crops. By the late 1970s, all but a few of the 100 settlements had failed (Stein and Clark 1990; Easton-Calabria 2015, 427). But several dangerous ideas had taken root. Among them: that development aid could be used to induce host countries to purchase and produce what foreign markets wanted rather than what host communities and refugees needed; and that refugees themselves could be utilized as suppliers of labor to whom international refugee, labor, and human rights standards evidently did not need to apply.

22 According to a study conducted in 1971:

In retrospect, it does appear that a large amount of the settlements’ infrastructure and therefore the “cost” of settling the refugees, can be primarily explained in terms of the capital support needed to maintain project staff. Their limited expertise and their limited access to technical information available locally has meant that there have been few long term benefits from such expenditures.

(quoted in Easton-Calabria 2015, 425)
IV. The Rise and Fall of an Alternative Vision

Throughout the 1960s and 1970s, host countries in the developing world treated refugees with a marked degree of solidarity — though not, perhaps, as much as is sometimes suggested (see Kibreab 1986). Most refugees had fled nearby struggles for liberation from foreign colonial domination. They sought, and found, refuge in neighboring, newly decolonized states until such time as their own countries gained independence, if not permanently (Stein 1986, 265). Before long, more than 40 new states had claimed their place on the world stage. Along with decolonization, the era witnessed the emergence of pan-Africanism and Third Worldism, opening up space for fresh thinking about refugees and their role in postcolonial development.

Among host states, Tanzania supplied much of the intellectual basis for such thinking (see Chaulia 2003; Milner 2013). Responsible for tens of thousands of refugees from throughout Africa, the Tanzanian government saw promise in incorporating refugees into broader projects of national development, which it understood in terms of *ujamaa na kujitegema* (“socialism and self-reliance”). Together with pan-Africanism and Third Worldism, these concepts guided Tanzania’s approach to refugees. As Yefime Zarjevski, a UNHCR staff member, explained, *ujamaa* reflected “[t]he belief that the main wealth of a country is in its people” and this “led to the acceptance of refugees” and to “the determination to devote the same efforts to them as to nationals” (quoted in Mahiga 1997). From that starting point, the Tanzanian government played a proactive role in refugee settlement. It endeavored to provide refugees not only with safety but with land, employment opportunities, free education and health care, and even, ultimately, citizenship.

In certain ways, *ujamaa* did not differ markedly from the postwar European ideal of progress: the construction of a national welfare state through government-led development planning. A major component of the national development policy involved forcibly, violently, replacing traditional social systems with “modern” ones. Yet what eventually caused consternation among donors was not so much the vigor with which Tanzania set about to transform its economy. Instead, it was its intention to redistribute the surpluses generated thereby via “uneconomic” subsidies, welfare, and social services. Thus, while Tanzania set about creating a free, universal education system for citizens and refugees alike, donors came to “believe[] that there was a surplus of literary and general skills” in

24 In recognition of his influence, UNHCR awarded Tanzania’s president, Julius Nyerere, the Nansen medal in 1983.
25 The government’s platform was formally articulated in the Arusha Declaration of 1967, excerpts of which can be read in Minogue and Molloy (1974).
26 At the time, most refugees in Africa were “self-settled” rather than being part of one of the formal zonal development settlements (Stein 1986).
27 For a discussion of “villagerization” and its impact on refugees, see Chaulia (2003).
28 On that score, Tanzania received a significant amount of support from donors — at least for a time. As Michael Cernea and Chris McDowell (2000, 71) have noted: “As implemented by the World Bank and other donors who were determined to modernize Africa, the main method was the introduction of integrated rural agricultural capital-intensive development projects. The underlying assumption behind this approach to the promotion of planned settlements adopted by the World Bank was that uprooting, whether forced or not, is actually good for people: displacement makes people more susceptible to new change.”
the developing world (Heynemen 2003, 318), and began conditioning their lending on promises to make education “more practical and relevant by re-orienting the content away from academic and toward vocational purposes” (World Bank quoted in Heynemen 2003, 318).

Soon enough, development came to be seen as a process requiring host countries not only to orient their productive systems toward foreign rather than domestic markets, but also to insulate their social spending from welfarist and redistributive concerns. In a preview of what would soon be known as “neoliberalism,” a mission sent by the World Bank to Kenya, for instance, recommended that the government eliminate external tariff, “which encourages the uneconomic use of resources”; and abolish “the political constraints to foreign use of land” as well as “the increasing range of controls and regulations which irritate businessmen” (World Bank 1974, 39, 40, 43). The mission further made clear that such policies would need to be accompanied by de-investments in welfare and efforts to address “the dangers of rising urban wages” (ibid., 39). According to this model, development required the creation not only of an open export economy but of a “cheap labour export economy” (Chossudovsky 1991, 2527): “increasing wage rates . . . would be likely to make matters worse” (World Bank 1974, 32).

Of these two visions, many developing countries opted for Tanzania’s approach. When it came to refugees, host governments in Sierra Leone and elsewhere even began refusing international assistance altogether, opting instead to assist refugees directly (Voutira and Harrell-Bond 2000, 69). A similar stance soon extended to development aid more broadly. In 1970, in Lusaka, a conference of the Non-Aligned countries formally committed to a strategy of “collective self-reliance.”29 The strategy sought both to foster sustainable, indigenous development and strong domestic markets at the national level and to bring about an economically autonomous Global South internationally. The latter objective culminated in 1974 with the adoption by the General Assembly of a Declaration on the Establishment of a New International Economic Order (NIEO), which took as its point of departure that genuine development could not occur within a system that overwhelmingly privileged the major Northern countries and their multinational corporations.30 Only an economically independent South could see all of its inhabitants, including its refugees, prosper.

V. The Advent of Adjustment and Austerity

Rather than prosperity, the late 1970s ushered in an era of profound deprivation. Internal mismanagement combined with external shocks — worldwide recession, energy crises, the collapse of non-oil commodity prices, drought — to wreak havoc across the South. Non-alignment declined as a potent geopolitical force. The “Third World” all but disappeared as a united front with a shared vision of the future.31 Its demand for greater equality

30 G.A. Res. 3201 (S-VI) (May 1, 1974).
31 For instance a division opened up between the Organization of the Petroleum Exporting Countries (OPEC) and “NOPEC” (i.e., countries with and without oil). Such fragmentation suited the Northern donor countries, “which had every interest in separate negotiations rather than having to face the collective strength of a united bloc” (Rist 2009, 153).
and independence in world economic affairs went unanswered. Instead, a powerful new development discourse emerged. The neoliberal era had arrived.

At the same time, conflicts and proxy wars in the developing world produced new refugee movements from Afghanistan to Zaire. Despite their roles as belligerents, the major Northern countries decided that these “new waves” of refugees should continue to remain in their regions of origin (see e.g., Stein 1986; Zolberg, Suhrke, and Aguayo 1989). The decade saw the emergence of a remarkable array of policies designed to keep refugees from traveling north: visa restrictions; carrier sanctions; imprisonment at the border; deportation to “safe” third countries; interdiction; and so on. Nor did the developed countries compensate Southern host countries for the burden-shifting results of such containment policies. To the contrary, “donors offered very limited ‘additionality’” (Betts 2009, 7).

When it came to the economic crises roiling the South, host countries did receive additional aid. But it came with conditions. Donors regarded such crises as primarily the result of domestic policies and problems. In particular, they identified Southern states’ restrictions on the free movement of capital and goods — though not people — as the main culprit. In exchange for international financing, they began to require that Southern countries undertake a series of “structural adjustments”: deregulation, privatization, retrenchment, currency devaluation, unilateral trade and investment liberalization, raw material exportation, and corporate tax concessions. On the social policy side, they required the elimination of subsidies on food and other essentials, the introduction of user fees and cost-recovery programs, wage suppression, loosening of labor protections, and sweeping cuts to welfare and social services.

Although intended to be applied “judiciously, not mechanistically,” these adjustments coalesced into a policy consensus — known as the “Washington Consensus” — that “quickly took on a life of its own” (World Bank 2005a, xi). Together with changes in international trade, monetary, and investment frameworks, adjustment helped usher in what Mark Mazower (2013) has aptly called the “real new international economic order.” To be sure, countries that could afford to maintain their state-led development strategies,

32 These and other policies — including the externalization of borders, interdiction, and so on — would come to be known as the “non-entrée regime” (see e.g., Frelick, Kysel, and Podkul 2016; Gammeltoft-Hansen and Tan 2017).

33 As Alfredo Saad-Filho (2010, 3) puts it: “In development economics, concerns about rent-seeking and corruption became increasingly prominent, and the responsibility for persistent poverty was placed on the poor countries themselves, in particular their unwillingness to follow the ‘correct’ economic theory and polices prescribed from the West.”

34 The World Bank’s “Berg report” provided a basis for this diagnosis and the prescriptions that followed, known as “structural adjustment” (see World Bank 1981).

35 In addition to these economic prescriptions:

Neoliberalism also brought about socio-cultural changes of a more diffuse, but equally important character [including] devaluation of organized labor and protected industry as ‘rental havens’ inimical to economic efficiency . . . support of foreign investment as necessary for sustained growth . . . renewed faith in the market, via trickle-down effects, for the reduction of social inequality . . . and reorientation of the sources of national pride away from resistance to foreign hegemony and toward skilled reinsertion into the circles of global trade.

(Portes 1997, 238)
such as the East Asian “tigers,” did so — with historic success. Those that could not — over 100 countries in all, including most of the countries in which refugees struggle to survive — were subjected, in the name of development and stability, to years or decades of “shock treatment” (World Bank 2005a, 7).

As the International Monetary Fund’s (IMF) (2003, 43) Independent Evaluation Office would later allow, utilizing a series of worldwide crises to privatize and deregulate Southern economies was “ill-advised”: “crisis should not be used as an opportunity to seek a long agenda of reforms just because leverage is high.”

VI. Reverse Aid in the Countries and Regions that Host the World’s Refugees

Following a dramatic increase in lending to developing countries in the 1970s, Wall Street banks had by the early 1980s become dangerously overexposed (see e.g., Sachs 1989, 1; World Bank 1989, 16-17; Ferraro and Rosser 1994). When the US Federal Reserve hiked interest rates to unprecedented levels, countries in sub-Saharan Africa and Latin America, especially, could no longer afford to repay their loans. Fearing a financial meltdown within the banking sector, the US government poured money into multilateral lending institutions, which in turn lent to debtor governments, on the condition that the latter prioritize debt servicing and austerity above all other goals (see e.g., Godlee 1993, 1369). Indeed, as Karin Lissakers (1983), who would become the US representative to the IMF Executive Board during the 1990s, wrote in 1983, the IMF became an “enforcer of the banks’ loan contracts,” urging austerity in debtor countries so as to “free foreign exchange in order to service debts.”

The combination of that enforcement with skyrocketing interest bills saw developing countries repay $700 billion to foreign creditors from 1982 to 1987, only to see their debt liabilities more than double, from $568 billion to $1,190 billion (Singer and Sharma 1989, xix). Host countries were by no means spared. Zambia’s interest bill alone reached 40 percent of the government’s revenue in 1986, up from 15 percent in 1980 (Clark and Allison 1989, 12). By the end of the decade, the World Bank reported: “[b]efore 1982, the highly indebted countries received about two percent of GNP a year in resources from abroad; since then they have transferred roughly three percent of GNP a year in the opposite direction”

36 As quoted in Human Rights Council (2015, 7).
37 Or as Walden Bello (1989, 139) noted, “debt repayment replaced development as the raison d’etre of economic growth.” Southern governments were even compelled to repay nonguaranteed debt incurred privately. In Latin America, for instance, the socialization of private liabilities raised public sector debt burdens by between 15 and 20 percent (UNCTAD 1989, 88). See also, SAPRIN (2002, 183-184), noting that “foreign debt has provided a mechanism by which the international financial institutions have applied external pressure” and that “public resources have been used not just to service public debt, but also to rescue private corporations and banks that have not been able to meet their obligations.”
38 An ILO report on the situation in Somalia is also revealing: the IMF “is helping to finance an adjustment programme one of whose major goals is to repay the IMF itself . . . [S]hould the structural adjustment programme prove unsuccessful in correcting the balance of payments situation (not a remote possibility), the Somali government would be left with little to show for its efforts other than an increase in debt on ‘hard’ terms . . . It is possible for the IMF to relieve the Somali government’s debt servicing burden in a dramatic way, for nothing in the IMF charter precludes a re-scheduling agreement” (ILO 1989, 16).
(World Bank 1989, 17). According to the World Bank’s chief economist, “heavily indebted developing countries have been transferring real resources of close to 5 percent of their income to the developed creditor countries” (Fischer 1989, 359-60; see also Ferraro and Rosser 1994). That financial hemorrhage increased in the 1990s, when “the burden of debt repayment and servicing [became] so great for many countries that it cripple[d] their ability to make advances in human development or inroads in eradicating poverty” (UNDP 1998, 37). Across Africa, debt service consumed, on average, four times more revenue than did health and education combined (Speth 1999, 14).

Nor was debt repayment the only source of development-in-reverse to exacerbate poverty and inequality in host countries. However well intentioned, the singular and simultaneous emphasis on export-led growth precipitated such a glut of commodities on the world market that prices — already depressed due to recession in the North — plummeted to their lowest point since 1932 (Bush and Szeftel 2007). For developing countries, “[t]he cumulative cost of the decline in terms of trade (and hence in the volume of resources available for domestic distribution and use) was, on average, about six percent of GDP, and over 10 percent in many countries” (UNCTAD 1989, 77). In Malawi, which saw an influx of roughly one million refugees from Mozambique in the 1980s, the commodity shock cost the equivalent of 65 percent of the country’s 1979 GDP (IMF 1998, 73).

Other central features of the real new international economic order tended in the same direction. Privatization enabled foreign corporations to buy up, often at fire-sale prices, huge portions of developing countries’ lands and assets. Tax competition and financial liberalization permitted those same corporations to repatriate rather than reinvest (or pay taxes on) the profits they earned. Statutory tax rates fell precipitously. The advent of “special economic zones” and other schemes saw effective rates fall even further. The idea behind such reductions was to boost capital inflows by creating a more “foreign investor friendly” environment in developing countries. Yet between 1982 and 1989, multinationals remitted roughly $280 billion in profits and interest payments from Latin America alone (Petras and Vieux 1992, 26). Countries in the region experienced net outflows of $25 billion per year during that period, in contrast to a net inflow of roughly $13 billion at the beginning of the decade (UN DESA 2017b, 62).

Nor was the problem limited to outflows. The deregulation of capital became “a key source of fragility” and “helps to explain many of the crises in the 1990s,” with countries that maintained controls, such as China and India, “far[ing] much better than those that opened themselves to external liquidity surges” (World Bank 2005a, 17). Financial crises became

39 Other host countries saw enormous losses as well. For instance, by 1990, Ecuador had to export five times the value of its 1980 exports simply to cover the same volume of imports (SAPRIN 2002, 41). And while Thailand boosted rice exports by 31 percent in 1985, the combined value of those exports fell by eight percent (Roodman 2001, 145).
40 As the Harvard Business Review put it, “host countries are often granting concessions [to foreign investors] that would have been unthinkable even five years earlier” (quoted in Bello 1989, 141).
41 By 1994, foreign multinationals had acquired access to, e.g., “86 percent of the world’s land that is cultivated for export crops” (Kolodner 1994, 1). Meanwhile, “the anticipated creation of a strong property-owning middle class through privatization has not occurred. Overall, wealth has become more concentrated” (SAPRIN 2002, 108). As the World Bank (2005a, 10) later allowed, “State enterprises were privatized without much attention to the operation of the markets in which they would function.”
endemic, with more than 100 occurring since the 1980s (Stiglitz 2013). The real economy and the public sector bore the costs. As one example: after Ecuador liberalized its financial sector, “the amount of funds transferred from productive enterprises to the financial system . . . plus the amount of public funds used to bail out the banking system” approximated “the country’s total foreign-debt burden” (SAPRIN 2002, 62).

Meanwhile, liberalization in the South met with strategic protectionism in the North. Rather than “free” trade, global markets became “most hostile to the products the world’s poor produce — agricultural products, textiles, and labor-intensive manufactures” and global trade rules “systematically den[ied] the poor market access and skew[ed] incentives against adding value in poor countries” (World Bank 2005a, 19). Heavy agricultural subsidies in the North, in particular, discouraged private investment just as adjustment programs were requiring Southern governments to eliminate their own agricultural subsidies and price controls (De Schutter 2014). Small-scale farming — the main development solution offered to refugees — became unviable in large swaths of the South, precipitating a great migration from the countryside to the city (ibid.). Formerly food self-sufficient countries and communities became dependent on imports and food aid. Over the course of two decades, poor countries went from boasting net agricultural surpluses ranging from $1-2 billion to net deficits of $4.4 billion (ibid., note 83).

Asymmetric burdens occurred at the domestic level as well. As one contemporaneous analysis found, “the single most consistent effect the IMF seems to have is the redistribution of income away from workers” (Pastor 1987, 89, quoted in Vreeland 2000, 5). IMF economists themselves have noted that the era of austerity and adjustment has not precipitated an increase in the labor share. Instead, “the share of national income paid to workers has been falling since the 1980s” (Dao et al. 2017). The pressure to attract foreign investment, in particular, compelled Southern countries to suppress wages, as well as loosen or eliminate worker protections, which served to reduce corporations’ wage bills at the expense of workers’ rights. Once again, the countries to which refugees fled — and in which so many continue to struggle — were at the forefront of these trends. Nor did lower wages and more precarious working conditions translate into higher employment. To the

42 Far from a free market, that is, “[r]eal wages, in almost every case, were kept low and generally below productivity increases” (Stein 1995, 11).
43 See e.g., Human Rights Council (2016, para. 32), describing an examination of 131 developing countries that covered a period from 1981 to 2003, which found that the longer a country was subjected to an adjustment program, the less it protected labor rights in its territory; and a separate analysis of 123 countries that identified an inverse relationship between adjustment and respect for collective labor rights.
44 For instance, in Tanzania, which began adjusting in 1986, the real minimum wage plummeted by 33 percent by 1988 (Stein 1995, 25). Similarly, in Turkey, the purchasing power of workers’ wages declined by 45 percent from 1979-1985 (Roodman 2001, 148). Mexico’s minimum wage declined by 75 percent from 1982 to 2000 (SAPRIN 2001, 10). Meanwhile, across the South, temporary and hourly contracts became widespread; firing practices were deregulated; minimum hour laws were overturned; and restrictions were imposed on collective bargaining and direct action (SAPRIN 2001, 9).
contrary, according to a study of several “adjusting” countries, unemployment increased “across the board” (SAPRIN 2001, 11).45

Each of these trends occurred alongside sweeping cuts to the social services and subsidies central to the realization of refugees’ and host communities’ welfare rights. Thus, in Jordan, which began adjusting in 1989, unemployment reached 28 percent by 1997 (Baylouny 2008, 296). Meanwhile, the requisite withdrawal of state subsidies pushed food prices up by 80 percent between 1989 and 1992; by 1997, the price of food, education, rent, and health care had doubled (ibid.). In Zambia, the removal of food subsidies in the 1980s saw the price of maize, the staple food, increase by 500 percent (Logie and Woodroffe 1993, 43). In Tanzania, a country that had put free, universal education at the forefront of its development strategy, adjustment after 1986 coincided with a 73 percent decline in spending on education (Stein 1995, 157). Among sub-Saharan African countries as a whole, real per capita healthcare spending fell by 42 percent between 1980 and 1987, while education spending per student fell from $32 to $15 (Stein 1995, 7). So complete was this “rolling back” of the developmental state that, according to one estimate, the only portion of sub-Saharan African government expenditure that cumulatively rose during the 1980s was expenditures on interest payments (ibid., 157).46

Far from temporary departures on the road to growth and prosperity, these trends saw growth stagnate or turn negative for two “lost decades” in many host countries (see e.g., UNECA 1988; UNDP 1998; World Bank 2000b, 1; SAPRIN 2001; Weisbrot et al. 2001; Chang 2003; World Bank 2005; UNCTAD 2006). Poverty and inequality increased, in many cases precipitously.47 Incomes in sub-Saharan African countries cratered to such an extent that by 2000 they were still 10 percent lower than the level achieved in 1980 (UNCTAD 2002, 3). In fact, according to the World Bank (2000b, 1, emphasis added), “[a]verage income per capita [in sub-Saharan Africa in 2000] is lower than at the end of the 1960s.” Similarly, in Latin America, annual incomes grew just 0.6 percent from 1980 to 1999, compared to 3.1 percent in the prior two decades (Chang 2003, 6). In the Middle East and North Africa, per capita income growth averaged minus 0.2 percent from 1980 to 1999, down from +2.5 percent from 1960 to 1980 (ibid.). As one example, among Jordanians, per capita income fell from $1,500 in the mid-1980s to $850 in 1998 (Baylouny 2008, 296). “Estimated in the mid-1980s by the World Bank to have been effectively eliminated, poverty reached 20% in 1991, and 30% in 2000” (ibid., 295).

45 Aid conditionalities called for dramatic reductions in the size of the public sector workforce, leading to mass layoffs of workers at a time when local private firms, facing sudden competition from imports and foreign companies, were themselves struggling. The subsequent loss of local and public employment exceeded growth in the export sector, “which tended to be concentrated in a few hands, often benefitting transnational companies” (SAPRIN 2001, 6; UNCTAD 2006).

46 On the other hand, a welfare state of a different sort emerged, as “powerful economic groups . . . continued to receive de facto subsidies in the form of financial bailouts, currency devaluations, credit guarantees, tax incentives, and other such measures” (SAPRIN 2002, 168).

47 As Ha-Joon Chang (2003, 6), among others, has noted, the notion that global poverty stayed flat or decreased from 1980-2000 depends on the inclusion of high-growth countries like China — i.e., “countries that ha[d] definitely not followed the neoliberal recipe.” See also, World Bank (2000a, 3; 2005a, 17).
VII. Adjustment with a Human Face

It is not a coincidence that the adjustment era saw an end to the solidarity with which host governments had treated refugees in the past. Struggling to provide for their own citizens, and obliged to spend enormous portions of their revenues on unending debt service, governments across the developing world came to see the presence of refugees on their territories as a burden.\footnote{48} Borders began to close (see e.g., Kilgour 1990, 641). Encampment policies became a default response to influxes.\footnote{49} Restrictions on refugees’ access to labor markets and state services became commonplace (see e.g., UNHCR 1987). Endless humanitarian “care and maintenance” became necessary as a result.

The causes of this restrictionist turn were by no means lost on the aid world. Aid agencies voiced their concern for the social dimension of adjustment programs, and advocated for “adjustment with a human face,” a term coined by the UN Children’s Fund (UNICEF) in a landmark 1987 report (UNICEF 1987). UNHCR (1983, para. 41) began to sound the alarm regarding the increasing lack of respect for refugees’ economic and social rights, noting that “[w]idespread recessionary trends have exacerbated these difficulties.” But UN agencies lacked the resources to make up for cuts in state spending or to address the other underlying causes of refugee poverty. They also depended for funding on the same donors that prescribed austerity and adjustment to host countries in the first place.\footnote{50}

Adjustment with a human face, in other words, did not precipitate a radical departure from the prevailing neoliberal ethos.\footnote{51} To the contrary, replacing Walt Rostow’s \textit{A Non-Communist Manifesto}, Charles Peters’ (1983, 9) \textit{A Neoliberal’s Manifesto} incorporated a human face into the doctrine itself: “We still believe in liberty and justice and a fair chance for all, in mercy for the afflicted and help for the down and out. But we no longer automatically favor unions and big government or oppose the military and big business.” Instead of the traditional ways of empowering the “down and out” — labor protections, minimum wage laws, universal welfare schemes, environmental protections — the poor would be invited to support themselves, through wage labor if possible or, better yet, by becoming “risk-taking entrepreneurs” (ibid. 10).

In the refugee context, stimulating entrepreneurial self-reliance appeared to offer an alternative — seemingly the only alternative — to the growing scandal of refugee encampment and endless emergency relief, on the one hand, and rising formal-sector and

\footnote{48} As the Organization for African Unity (1994, para. 13) put it in 1994: “the system of refugee protection [is] under tremendous stress . . . The large number of refugees seeking asylum in countries already themselves experiencing tremendous social and economic hardships, has brought into question the very capacity of nations to cope with refugees.”

\footnote{49} Whereas in the 1960s and 1970s most refugees were self-settled, in the 1980s, “the lot of many refugees is temporary asylum in camps with care and maintenance assistance and no durable solution in sight” (Stein 1986, 274). For instance, “Tanzania, pioneer of a compassionate and long-term solution to African refugee problems, hence reverted after 1985 to geographically isolated and socially segregated makeshift camps” (Chaulia 2003, 161).

\footnote{50} For the aid industry as a whole, meanwhile, ersatz development proved good business, since it entailed more funding as donors bypassed state structures and forced host governments to cut or privatize service provision (see e.g., UNCTAD 2006, 47).

\footnote{51} That is not to say that radical departures were not called for. In addition to UNICEF (1987), see e.g., UNECA (1990).
agricultural unemployment, on the other. Thus, under the auspices of a new neologism—
“refugee aid and development” (RAD)—the aid community provided vocational training,
microcredit, and livelihoods support to refugee workers and would-be entrepreneurs in
China, Ethiopia, Iran, Malawi, Mexico, Nepal, Pakistan, Somalia, Sudan, Tanzania,
Uganda, Zaire, and elsewhere (UNHCR 1997, para. 19). Of these, the most ambitious
involved a three-phase income-generating project undertaken in Pakistan over the course
of 12 years and at a total cost of nearly $87 million. By the end of the 1980s, the RAD
project had generated tens of millions of work-days of employment for refugees and local
residents alike (UNHCR 1997, para. 21; Gorman 1987, 17; UNHCR 1987, paras. 104-06;
Crisp 2001, 3).

But just as the aid community was supporting livelihoods for refugees and residents at the
local level, donors were engineering a major retrenchment of the national public sector
in Pakistan. Even the most generously-resourced RAD project could not compensate for
the privations wrought by that adjustment. “[N]ot only the absolute poverty incidence but
also the intensity and severity of poverty increased significantly by all poverty lines and
poverty measures over the period of adjustment” (Anwar 1996, 911). Despite the rhetoric
of development discourse, entrepreneurialism proved no antidote: “Poverty also increased
unambiguously among self-employed (smallholders in the informal sector)” (ibid.).

This dynamic was not unique to Pakistan. In country after country, refugee development
projects sought to foster self-reliance at the local level just as national economies and social
systems were coming undone.52 In Cote d’Ivoire, for instance, which received 300,000
Liberian refugees between 1990-1991 alone, UNHCR and its partners engaged in a variety
of livelihoods and self-reliance activities (see e.g., UNHCR 1993). Meanwhile, by the
mid-1990s, per capita GDP had declined by 15 percent, both the incidence and intensity of
poverty had doubled, and the number of people earning less than $1 per day had ballooned
from 18 percent of the population to 37 percent (Naiman and Watkins 1999). As for public
services, “adjusting” entailed a 35 percent reduction in per capita spending on education
between 1990 and 1995; and the introduction of user fees into the public healthcare system,
which coincided with an increase in the prevalence of stunted growth among children from
20 to 35 percent by 1995 (ibid.).

Again, the direness of the situation hardly escaped notice. As UNHCR (1987, para.
32) noted with reference to education: “Many asylum countries do not have enough
educational institutions to meet the needs of their own nationals and therefore cannot
offer educational opportunities to refugees.” Similarly: “The fact that the majority of the
world’s refugee population remains concentrated in poorer countries with extremely high
levels of underemployment or unemployment is a major impediment to efforts by refugees
to become economically self-supporting” (UNHCR 1985, para. 46). Nevertheless, the
response to refugee poverty remained focused on the local level, obscuring the extent
to which the problem was structural53; and on “self-support,” as if the goal of refugee

52 See Section VI.
53 Mention of “structural adjustment” remained noticeably limited within the refugee discourse. One
exception is a UNHCR (1998, para. 9) Executive Committee Conclusion stating “[t]he financial costs
[of hosting large refugee populations] should be seen in the context of structural adjustment programmes
simultaneously being implemented in some developing countries, and against the backdrop of recession,
inflation and unemployment in many of the industrialized countries.”
development was independence from aid rather than freedom from want. Indeed, as in the 1960s, development interventions sought to “reduce[] the dependency syndrome often associated with refugee situations by encouraging refugees to assume responsibility over as much of their daily lives as possible” (UNHCR 1983, para. 82).

While individuals will continue to receive relief based on specific needs, the local community (refugees and the host population) must be helped to take care of these persons with a minimum of outside assistance. Such assistance must therefore be tailored to assessed needs and will be limited in time.

(UNHCR 1994, 2)

Even such targeted, time-bound assistance could prove too much for some donors. Despite mass impoverishment in Cote d’Ivoire, noted above, “[d]onors believed that many refugees, particularly those who arrived in Cote d’Ivoire prior to mid-1994, were self-sufficient or would rapidly become self-sufficient if forced to fend for themselves” (US Committee for Refugees and Immigrants 1997). They instructed UNHCR to offer aid only to the most needy (ibid.). As the Structural Adjustment Participatory Review International Network (SAPRIN) (2002, 167) put it about targeting more broadly, “the policy of targeting is rendered unviable when the majority of the population is poor and becoming poorer.”

Given the sheer scale of the economic obstacles facing refugees, it is not altogether surprising that, by the mid-1990s, “the refugee aid and development approach was in many ways moribund” (UNHCR 1997, para. 24). But the basic pattern persisted even as the rhetoric changed: lenders continued to impose macro-austerity, while aid agencies endeavored to alleviate the plight of the worst off through a succession of micro-solutions that, while vital, had little macro-effect. Thus, when the new Rwandan government requested assistance to help resettle three million returning refugees and internally displaced persons (IDPs) in 1995, UNHCR and UNDP endeavored to ease the latter’s return through a range of “quick impact” projects (see UNHCR and UNDP 1997). Donors, meanwhile, held Rwanda to the debts incurred by its ousted predecessor, such that one-fourth of the revenue — and 10 times the national health budget — of a country emerging from genocide went to debt service (Allen 1999; Oxfam 1999, 3). Donors further conditioned their support for refugee returnee programs on Rwanda’s “adoption of a comprehensive and transparent privatization policy; a private sector freed of unnecessary regulations . . . ; and a liberal trade and exchange rate regime” (Gasarasi 1996, 10).

54 Similarly, in Tanzania, as elsewhere, a 1986 IMF agreement obliged the government to eliminate price controls, withdraw support to family farmers, raise energy prices, among other adjustments (Daley 1989, 69). Despite those conditions, the international assistance budget for refugees in Tanzania was cut in 1986 (see UNHCR 1986), while a UNHCR consultant report concluded that “refugees should no longer rely on the state or foreign donors” for basic services (quoted in Chaulia 2003, 160). At the time, workers earning the minimum wage “could only purchase 1.3 kilogrammes of maize meal/day while totally exhausting their monthly income” (Daley 1989, 69).

55 The SAPRIN study, also cited several times above, was based on the results of a three-year review conducted in a range of “adjusting” countries (including major refugee host countries like Bangladesh, Ecuador, Mexico, and Uganda) in collaboration with the World Bank, NGOs, and governments.

56 Both the IMF and the World Bank stopped using the term “structural adjustment” in the late 1990s and spoke increasingly of “poverty reduction strategies,” “good governance,” and the importance of the social sector. Observers began to speak of a “post-Washington Consensus.”
As the SAPRIN (2001, 24) study concluded more broadly, the effects of such austerity 
and laissez-faire policies, “particularly on the poor, are so profound and pervasive that no 
amount of targeted social investments can begin to address the social crises that they have 
engendered.”

Conclusion

In a June 2016 issue of the IMF’s quarterly magazine Finance & Development, economists 
at the IMF conceded that the “benefits of some policies that are an important part of the 
neoliberal agenda appear to have been somewhat overplayed” (Ostry, Loungani, and 
Furceri 2016). In examining two aspects of that agenda (capital account liberalization and 
austerity), the researchers came to several “disquieting conclusions”: neoliberal policies 
produce “little benefit in growth”; such policies increase inequality; and this “increased 
inequality in turn hurts the level of sustainability of growth” (ibid.). In addition, the study 
concluded that “austerity policies not only generate substantial welfare costs . . . they also 
hurt demand — and thus worsen employment and unemployment” (ibid.). As for policy 
solutions, the researchers suggested that the “evidence of economic damage from inequality 
suggests that policymakers should be more open to redistribution than they are” (ibid.). In 
addition, “[c]apital controls are a viable, and sometimes the only, option” (ibid.).

These conclusions represent a real departure from the notion that development requires 
the unfettered flow of global capital. They reflect the growing emphasis on equity, social 
protection, redistribution, and re-regulation that has emerged since the 2008 financial crisis 
put global capitalism on the defensive. Social protection floors, the decent work agenda, 
universal healthcare — these and other centerpieces of development have returned from 
the margins of the global discourse closer to its center. A similar reorientation has emerged 
within the refugee regime: alternatives to camps, cash assistance, rights to work, freedom 
of movement, and more. Indeed, there is by now a common understanding that the parallel 
provision of services to refugees, and the exclusion of refugees from national and local 
systems and development plans, traps refugees into situations of protracted deprivation.

But, for now, the broader global context remains an impoverishing one. Poor countries 
continue to host the overwhelming majority of refugees. Poor countries continue to 
subsidize rich ones — to the tune of (-)500 billion in 2016 (UN DESA 2017a). Pressure 
on host governments to lower corporate taxes and to reduce social spending persists.58

57 Similarly, in 2011, developing countries received $340 billion in new loans but paid $500 billion in 
capital and interest on their debts that year. They also lost $630 billion in illicit financial flows. The equivalent 
of nine out of every 10 dollars they received in foreign direct investment left as profit repatriations (Griffiths 
et al. 2014). For an overview of capital flight, another crucial source of net outflows, in sub-Saharan Africa, 
see, Boyce and Ndikumana (2012).

58 For instance: “[income] transfer schemes cannot be an answer in the long term” (Ianchovichina and Gable 
Business Report praises, inter alia, Jordan for reducing corporate tax burdens while lamenting that Tanzania 
introduced a workers’ compensation tariff paid by employers.
Global trade rules continue to privilege the powerful.\textsuperscript{59} Conditionalities and instruments such as tied aid and surplus disposal remain commonplace.\textsuperscript{60} The confusion of privatization with development continues.\textsuperscript{61} The imposition of user fees remains a major impediment to refugee rights.\textsuperscript{62} Debt and austerity remain routine.\textsuperscript{63}

Indeed, just as some of the IMF’s own economists were concluding that “austerity policies not only generate substantial welfare costs,” but they also “worsen employment” (Ostry, Loungani, and Furceri 2016; see also Ball, Leigh, and Loungani 2011), the IMF itself began negotiating a financial agreement with the government of Jordan. Under the program, the IMF will provide more than $700 million to the Jordanian Central Bank. But rather than enable Jordan to engage in counter-cyclical policymaking or to expand its public services to accommodate refugees, the agreement requires that Jordan implement a series of “fiscal consolidations,” such as spending cuts and increases on value-added taxes (VATs), so that it can pay down its debt by 17 percent by 2021 (Ghazal 2016).

Conditions such as these have proved calamitous in the past. Nor are today’s refugees better equipped to withstand the onslaught of austerity. In Jordan, despite years of refugee development interventions, more than 80 percent of Syrian refugees are living below the poverty line; nine out of 10 refugee households are in debt; daily expenses \textit{already} exceed 25 percent of average income (CARE 2017). On the other hand, “[t]he [Jordanian] government has found, what it believes, to be the answer: put Syrians to work” (Luck 2016). To that end, Jordan has agreed to incorporate refugees into “special economic

\begin{itemize}
\item \textsuperscript{59} As but one example: 100-billion-dollar subsidies to American agribusiness remain permissible but much smaller subsidies for poor Indian farmers are at risk of being deemed an unfair trade practice.
\item \textsuperscript{60} In 2014, the Managing Director of the IMF, Christine Lagarde, stated: “Structural adjustments? That was before my time. I have no idea what it is. We do not do that anymore.” Yet a study of the 55,465 policy conditions included in all IMF programs from 1985-2014 found that little had changed beyond rhetoric since the 1980s and 1990s (see Kentikelenis, Stubbs, and King 2016). As an example of surplus disposal, Oxfam America (2016) recently noted that while the World Food Programme has been procuring peanuts from Haitian farmers to provide to malnourished Haitian children, the United States “is planning to dump 500 metric tons of packaged, dry-roasted peanuts on Haiti as part of its ‘Stocks for Food’ program.”
\item \textsuperscript{61} Meanwhile, a new scramble for Africa has begun: foreign investors and speculators bought some 29 million hectares (roughly two-thirds the size of California) of African farmland within just the first year after the 2008 food price spike reminded the world of impending scarcity (Deininger et al. 2010, xxxii).
\item \textsuperscript{62} Recent studies of Syrian refugees in Jordan and Lebanon indicate that many are foregoing medical treatment because they cannot afford the fees. See e.g., UNHCR, UNICEF, WFP (2016).
\item \textsuperscript{63} As one example: Moody’s (2016, 8-11) credit analysis of Lebanon reports: “Historically, public resources have primarily been deployed towards servicing the cost of debt. . . . [P]ayments consumed around 47\% of the government's total revenues in 2015, higher than the 41\% recorded on average in 2010-14 . . . and crowded out more productive forms of public expenditures.”
\end{itemize}
zones.”64 Such zones exist to exempt corporations from tax laws while giving them access to cheap, precarious labor (see e.g., ILO 2008).65

On this last score, then, a final set of figures bears noting. Over the last several decades, the incomes of humanity’s poorest populations have grown at an average rate of just 1.29 percent per year (Woodward 2015; Hickel 2015). At that rate, and only using the wildly unrealistic assumption that no more economic crises or external shocks occur, it will take more than a century for the global poor to earn their way out of $1.25/day poverty and more than two centuries to eradicate poverty at the $5/day line; global per capita income will have to exceed $1.3 million just so the poorest two-thirds of the world can subsist on $5 per day; and a world already facing ecological devastation will need to mine, produce, and consume 175 times more commodities than it currently does (ibid.). Again, that is in the absence of any crisis or shock. And even then, 90 million people will remain in poverty (ibid.). Refugees will surely be among them.

As Wolfgang Sachs (1992, 3) said, perhaps “[i]t is not the failure of development which has to be feared, but its success.” At the very least, any approach designed to further tether refugees to an inequitable, unsustainable economic model is a troubling one.

**Recommendations**

*There is an urgent need for macroeconomic relief, including budget support, to be provided to host countries. Current levels of assistance are dangerously insufficient.*

*Approaches to development that were crucial to the development of donor countries should not be regarded as heterodox when employed by host countries.* Much of the logic undergirding development assistance to refugees in the Global South has reflected a kind of ersatz developmentalism in which state retrenchment and a self-regulating private sector, from which wealth is assumed to trickle down, are the keys to development. Such theories are the source of intense political contestation within donor countries and should not be treated as unproblematic when it comes to developing countries.

*Additional support to host countries should be “untied” and should come in the form of grants, not loans.* Just a handful of host governments are home to a majority of the world’s refugees. Support for them should therefore be seen chiefly as compensation for a global public good and as a step toward global economic justice. It should not be a secret

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64 In search of foreign investment, Jordan established a series of special economic zones in the 1990s. “In addition to poor working conditions and no job security, the [workers] were paid below minimum wage, only 50-60 JD per month. The zones were effectively exempt from labor laws and social insurance payments” (Baylouny 2008, 300). Even then, they produced few jobs (ibid.).

65 As for the benefits they bring: as Kenya’s Parliamentary Budget Office (2010) concluded of its special economic zones in 2010, “the [tax] scheme appears to be more costly to revenue performance compared to the overall economic gains accruing from the EPZs [export processing zones].” Or as the IMF (2014, 21) itself has noted, “a race to the bottom has become evident among special regimes — most notably in Africa where tax burdens under these regimes have fallen to almost zero.” These regimes deprive host countries of billions every year (see e.g., ActionAid 2016b). Even then, they create few jobs. While they make up an enormous proportion of global trade, special economic zones account for a tiny percentage — perhaps as little as 0.2 percent — of global employment, and even where they account for a higher percentage, evidence that such employment is additional is wanting (see e.g., ILO 2008, 10).
Refugees, Development, Debt, Austerity

subsidy for donors or their banks. It should not leave host countries more indebted than they already are.

*International support should focus on lifting global economic constraints on host country development.* As the World Bank (2005b, 68) has noted, “developing countries face massive challenges in influencing the global rules and processes that determine outcomes.” Far from being unrelated to displacement, those challenges — including unsustainable debt, unequal trade regimes, structural adjustment, tax avoidance, and inequality between North and South — help to create the conditions within which refugees and host communities too often struggle to survive.

*Internally, the focus of the aid community should be on strengthening the economies and welfare systems in which refugees live in ways that reduce inequality and stimulate demand,* including by assisting host governments to expand national and local services and social protection programs, to eliminate user fees, to strengthen labor and environmental laws, to redistribute wealth toward the poor, and to create quality employment and livelihoods opportunities the primary benefits of which accrue locally.

*Development interventions should always be designed to ensure that refugees enjoy the rights to which all human beings are entitled,* including rights to work and to free movement but also “welfare” rights to education and healthcare, social protection, and more. Enshrined in the Refugee Convention (among many other international instruments), these rights constitute the central pillars of international protection. For good reason: development interventions that do not prioritize welfare and labor rights too often see refugees and host communities subsidizing economic production through poverty wages and other forms of exploitation.

*Respect for rights and inclusion in national development plans should constitute the main policy conditionalities attached to refugee assistance to host countries.* Host governments cannot be said to “own” their plans to develop refugee-hosting areas if they are compelled via conditionalities to adopt the policy preferences of their lenders. Moreover, those policy preferences, while more nuanced than in prior decades, still reflect an approach to growth and the private sector that is often anti-developmental, as leading IMF economists recently conceded (Ostry, Loungani, and Furceri 2016).

*Debt cancellation should be extended to host governments that agree to include refugees in the economic and social life of their countries.* Many poorer countries have paid far more servicing external debts than they have received in foreign aid. That reverse-subsidization not only denies host governments the resources they need to incorporate refugees into the economic and social life of their countries. It also reinforces some of the basic asymmetries of world order that help produce the status quo of refugee poverty in the first place.

*Tax treaties between donors and host governments should be revised.* Host governments lose hundreds of millions and sometimes billions of dollars in revenue each year due to treaties that restrict their right to tax corporate earnings. As but one example: in Uganda, a treaty signed with the Netherlands removes the government’s right to tax certain earnings of Dutch-based owners of Ugandan corporations. Not coincidentally, “as much as half of
Uganda’s foreign investment is owned from the Netherlands, at least on paper” (ActionAid 2016a, 3).

Donors, aid agencies, and host governments should refrain from partnering with corporations that engage in aggressive tax avoidance or other harmful business practices. Instead, the former should commit to assisting host governments to improve tax collection and to prevent capital flight. They should also develop common criteria for assessing corporate track records in achieving pro-poor development outcomes and in meeting human rights standards. When it comes to providing support to the private sector, the focus should be on host countries’ small and medium-sized enterprises, which account for the bulk of employment.

Stopping illicit financial outflows from host governments should be a top priority. A recent study has found that, “for every dollar of development assistance received by developing countries, more than ten dollars disappear from those countries” (Global Financial Integrity 2015, 3).

The vast majority of refugees should not be confined indefinitely to a handful of struggling countries in the first place.

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Refugees, Development, Debt, Austerity


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Strengthening the Global Refugee Protection System: Recommendations for the Global Compact on Refugees

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Executive Summary

On September 19, 2016, the United Nations (UN) General Assembly adopted the New York Declaration for Refugees and Migrants. This document launched a two-year process to develop a Global Compact on Responsibility Sharing on Refugees (“Global Compact on Refugees”) and a Global Compact for Safe, Orderly, and Regular Migration. With a record 65 million displaced persons in the world, the global community must come together to fashion a stronger protection regime for persons on the move. This paper outlines broad themes and specific recommendations that the Global Compact on Refugees should adopt on how to strengthen the global refugee protection system. The recommendations fall into several categories: (1) responsibility sharing for the protection of refugees; (2) filling in protection gaps; (3) balancing and replacing deterrence strategies with protection solutions; (4) refugee resettlement; and (5) building refugee self-sufficiency. Some of the key recommendations include:

• the development of a responsibility-sharing formula to respond to large movements of refugees;
• the development of an early warning system to identify and respond to nations in crisis;
• the adoption of principles included in the Nansen and Migrants in Countries of Crisis initiatives;
• the use of temporary protection measures to protect populations that flee natural disaster;
• the adoption of model processes that ensure safe and voluntary return;
• cooperation between destination and transit countries to expand refugee protections;
• the provision of asylum and due process protections at borders;
the use of development assistance to ensure the self-sufficiency of refugees;

- the adoption of a goal to resettle 10 percent of the global refugee population each year;

- the establishment of a refugee matching system between refugees and resettlement countries; and

- the adoption of coherent strategies, involving all sectors, to address large movements of refugees.

This paper draws heavily, albeit not exclusively, from a series of papers published as a special collection in the *Journal on Migration and Human Security* on strengthening the global system of refugee protection.

**Responsibility Sharing**

Responsibility sharing was a main theme of the United Nations (UN) Summit on Large Movements of Refugees and Migrants, held September 19, 2016 in New York. A road map toward a global agreement on responsibility sharing for refugees was included as an annex to the New York Declaration for Refugees and Migrants, adopted at the summit, which is intended to lead to a Global Compact on Refugees in 2018 (UN 2016). An agreement to develop a Global Compact on the Safe, Regular, and Orderly Migration (“Global Compact on Migration”) was also part of the declaration. The United Nations High Commissioner for Refugees (UNHCR) has been designated to assist with the process of developing a Global Compact on Refugees.

The first task is to define “responsibility sharing” and what it means in a global context. In theory, the nations that have signed onto the 1951 UN Convention relating to the Status of Refugees (“1951 Convention” or “Refugee Convention”) and the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”) have pledged not to expel or return refugees to the frontiers of territories where their lives or freedom would be threatened. However, they are not required to protect refugees who reside in other countries.

In fact, the responsibility to care for refugees has historically been met by nations in proximity to conflict and other refugee-producing conditions, such as parts of Africa, Asia, and the Middle East. According to the UNHCR, 10 of the world’s countries host 60 percent of the world’s refugees (UNHCR 2016, 2).

In order to relieve countries of first asylum of a disproportionate share of caretaking responsibilities, a system must be established that spreads the responsibility for refugees, wherever they reside, to the entire global community. Developed nations, such as the United States, European nations, Australia, and South American countries accept modest numbers of refugees for resettlement. They also contribute financial and other types of assistance to

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refugee receiving countries. Despite these efforts, refugees languish in protracted situations for years, even decades.

A responsibility-sharing framework would require nations to contribute to alleviate refugee crises in real time, either through financial assistance, resettlement, or other interventions. A comprehensive refugee response framework, as defined in the Annex of the New York Declaration, would include criteria that would “trigger” these responses, based on a nation’s capacity to contribute.

In his paper, “Prospects for Responsibility Sharing in the Refugee Context,” Volker Turk, Deputy High Commissioner for Protection at UNHCR, offers a framework for responsibility sharing. Citing the need for international cooperation, Turk does not propose new binding legal instruments, but argues for using the current instruments — the 1951 Convention and the 1967 Protocol — to their fullest capacity (Turk 2016, 46-49).

He proposes responsibility-sharing arrangements that include triggering mechanisms and proportional contributions in line with state capacity, which would be agreed upon in advance of large movements of refugees and migrants (ibid., 48-49). Such an agreement would alleviate pressure on host countries by equitably spreading the responsibility for refugees. Civil society would also play a central role in a responsibility-sharing framework. Father Leonir Chiarello, c.s., has argued that civil society and the private sector can assist with basic needs, job training, and advocacy for refugee populations.3

Such an agreement should be a main feature of the Global Compact on Refugees (Turk 2016, 49). Ambassador John Donoghue, permanent representative to the United Nations from Ireland and co-facilitator of the New York Declaration process has stated that responsibility sharing needs to be “operationalized.” While the New York Declaration failed to reach this goal, the global compacts represent another opportunity to achieve it.

Questions about how responsibilities would be divided and how implementation would be carried out remain to be addressed. Turk argues that, in order for the new system to work, nations must find new ways to uphold their obligations to refugees. These might include the use of new forms of group refugee status determinations to ensure that all persons in a targeted group have legal status at the same time individual protection needs are identified.

In addition, nations should enhance the use of protection mechanisms in responding to large movements of refugees. While acknowledging the national security concerns of many nations, Turk recommends the use of “protection-sensitive” border procedures. He also urges more consistent application of refugee principles globally, including the relaxation of reservations4 to the 1951 Convention and 1967 Protocol (Turk 2016, 51-53).

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2 The United Nations High Commissioner for Refugees (UNHCR) is currently piloting regional comprehensive refugee response frameworks as models for the Global Compact.
3 Fr. Leonir Chiarello, c.s., executive director, Scalabrini International Migration Network, comments before the Rethinking the Global Refugee Protection System Conference, July 6, 2016.
4 Signatories to treaties or other international agreements use reservations to place a condition on the implementation of a provision of the agreement. The United States placed reservations on Article 24 and Article 29 of the 1951 Convention, relating to taxation and public benefits for refugees on its territory. See http://www.unhcr.org/en-us/protection/convention/3d9abe177/reservations-declarations-1951-refugee-convention.html.
he makes the case that providing effective social support — health, education, and social assistance — to refugee groups and enhancing their self-reliance through job training would promote their successful integration in first countries of asylum or in resettlement countries (ibid., 53).

The Global Compact on Refugees also should include an early warning system to alert the world community to a potential large movement of refugees. In “Rethinking the Assumptions of Refugee Policy: Beyond Individualism to the Challenge of Inclusive Communities,” George Rupp (2016, 81) makes the case that nations must intervene earlier in situations of potential or actual conflict in order to prevent mass migrations.

He points out, for example, that the Syrian crisis did not become visible in the West until the bodies of dead children began to wash up on beaches and when hundreds of thousands of Syrians migrated to Europe. He suggests the early deployment of peacekeeping operations and development aid to nations experiencing armed conflict as a way to stave off instability. He also argues that internally displaced persons and refugees should receive equal treatment in the disbursement of support and that they should not be legally distinct in the international protection regime (ibid., 77-80).

In order to more equitably share responsibility for the world’s refugees, the Global Compact on Refugees must include mechanisms for preventing large movements before they happen, and, when they do occur, ensuring an appropriate regional or global response to them.

Filling Gaps in the Global Refugee Protection System

The world is more complex today than it was in 1951, when the UN Refugee Convention was adopted. Instead of a bipolar world, we now live in a world in which regional and civil conflicts are predominant and nonstate actors are combatants and persecutors. Moreover, the onset of climate change, marked by natural disasters and extreme temperature variations, has caused large groups to migrate to other, more viable areas of the world, and has consigned those without the resources to remain in increasingly dangerous, even life-threatening, situations. In addition, migrant workers in countries hit by crisis, either environmental or due to conflict, often do not meet the narrow 1951 Convention definition of refugees.

In “New Models of International Agreement for Refugee Protection,” Susan Martin argues that there are nonbinding instruments which nations can honor that would help address gaps in international protection. She identifies principles developed through the Nansen

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5 It is unclear as of this writing whether populations who do not meet the refugee definition but are fleeing some forms of generalized violence or natural disaster will be addressed in the Global Compact on Migration or the Global Compact on Refugees, if at all.
Strengthening the Global Refugee Protection System

The Nansen Initiative seeks to protect persons displaced across international borders because of natural disaster or the effects of climate change. Its 10 principles, born out of the Nansen Conference in Oslo, Norway, in 2011, include: 1) enhancing knowledge about cross-border disaster displacement, i.e., predicting displacement and recognizing when it occurs; 2) implementing legal protection mechanisms, both temporary and permanent, to protect large groups displaced by natural disasters; and 3) strengthening the management of disaster displacement risk in countries of origin, so that populations do not have to migrate (Kalin 2012).

Haiti provides a recent example of how natural disaster impacts refugee movement. Hit by a devastating earthquake in 2010, followed by the destruction caused by Hurricane Matthew in 2016, Haitians have attempted to reach the United States by land and sea in order to survive. In 2016, Haitians began arriving at the US border, with some coming from Brazil but others directly from Haiti. While the United States allowed a certain number to enter the country, most others were not admitted and some were later pushed back into Mexico.

Applying Nansen Principles would have helped stabilize Haiti and allowed Haitians to receive protection. While the United States designated Haiti for temporary protected status (TPS) following the earthquake in 2010, it did not redesignate it (update the point of entry for qualifying) after Matthew struck. It also resumed deportations to Haiti. Yet Haiti was in no position to handle the destruction caused by the hurricane, which displaced 800,000 persons. Hurricanes Irma and Maria, which impacted Haiti’s northern coast in September 2017, also set back the nation’s recovery. Nevertheless, the Trump administration announced a termination of TPS for Haiti on November 20, 2017.

The Global Compact on Refugees should adopt the principles promoted by the Nansen Initiative to protect persons displaced by environmental disasters. As stated, the response to such situations should be addressed through a responsibility-sharing framework.

MICIC focuses on the large-scale displacement of migrant workers in a host country, due to conflict or natural disaster, such as in Libya, Thailand, or the United States. MCIC principles speak to safeguarding these populations, including saving lives in a nondiscriminatory manner. A prohibition on discrimination based on immigration status is a central MCIC principle, ensuring that undocumented workers are protected in life and death situations. Central to this principle is an obligation on the part of the host government to reach out to

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6 The Nansen Initiative, launched in October 2012, is a state-led consultative process aimed at building consensus among states as how best to address cross-border displacement from climate change and natural disasters. See Kalin (2012).

7 The Migrants in Countries in Crisis (MICIC) initiative is a multi-stakeholder, state-led consultative process to develop nonbinding voluntary principles, guidelines, and effective practices for states to address the longer-term consequences of migrants caught in countries experiencing conflicts or natural disasters. See http://gcmigration.org/micic/.

8 See the Nansen Principles at https://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/nansen_prinsipper.pdf.
migrant workers in irregular status, encourage them to come forward for assistance, and ensure their protection (MICIC 2016).

In “On the Margins: Noncitizens Caught in Countries Experiencing Violence, Conflict, and Disaster,” Sanjula Weerasinghe and Abbie Taylor underscore the importance of noncitizens being able to access, understand, and navigate information regarding emergency and relief assistance and to access services. Giving several examples, Weerasinghe and Taylor detail the hardship of undocumented noncitizens who are fearful of seeking help in natural disaster situations.

While undocumented immigrants were eligible for emergency relief following Hurricane Sandy in 2015, they were confused and fearful about whether they or their families would be subject to deportation if they made themselves known to authorities. Weerasinghe and Taylor (2015, 33-37) propose, consistent with MICIC recommendations, that national authorities provide better information to undocumented persons during crises, particularly informing them that they can seek assistance without fear of deportation.

Martin argues that the reluctance of nations to renegotiate the Refugee Convention or to ratify binding instruments, such as the UN Convention on the Rights of All Migrant Workers and Members of their Families, make nonbinding, ad hoc agreements like Nansen and MICIC, more important and attractive. The nations that help craft such agreements and endorse them will also be more committed to their implementation. She also posits that advocates can use the agreements to pressure governments to act in these situations (Martin 2016, 70-72).

Despite these advantages, Martin concludes that the effectiveness of these nonbinding instruments lies in whether nations are committed to implementing them in a timely manner. Nearly 90 percent of refugees are hosted in the developing world. Absent a responsibility-sharing arrangement, the responsibility for persons who do not meet the strict refugee definition will continue to fall upon developing states in proximity to crises. The Global Compact on Refugees should adopt the principles contained in MICIC, and encourage all nations to recognize and adhere to them.

**Safe Repatriation**

Another gap in protection is when a host country decides to return refugees to their country of origin, either through individual deportations or as a group. In some cases, the repatriation of refugees is neither safe nor voluntary. Both global compacts should ensure that any returns are safe and voluntary, and should only be to nations not experiencing conflict or recovery from a natural disaster, as certified by the United Nations.

In “Safe and Voluntary Refugee Repatriation: From Principle to Practice,” Jeff Crisp and Katy Long examine refugee repatriation and how the principles of safety and voluntariness should be honored in all repatriation situations. Crisp and Long lay out best practices for repatriating large refugee populations, so that their return is safe, not coerced, and serves the best interests of the refugees and their home countries.
The authors aver that UNHCR should not participate in any returns where voluntariness is questionable (Crisp and Long 2016, 142-43). They press for alternative solutions — like local integration, third-country resettlement, labor mobility, and cross-border mobility arrangements for refugees — in cases where repatriation would not be voluntary or safe (Crisp and Long 2016, 146).

They also argue that cessation should not be invoked, or return promoted, when countries of origin have not met a basic threshold of safety. Moreover, when refugees have established strong social, economic, and personal links to the country of first asylum, they should not automatically be forced to return to their home country. Second- and third generation refugees, part of protracted situations, should be given special consideration to remain, as they have never lived in or seen their “home” country (ibid.).

Once it is determined that repatriation is safe and voluntary, refugees should be allowed to participate in the process of determining conditions for the return, such as the timing, mode of transportation, and location of settlement. The safety and voluntariness of the returns should be closely monitored. Finally, refugees should be allowed to visit their home countries in advance of making a final decision to return, so that they have full information about conditions and safety (ibid.).

One example of a successful reintegration and repatriation process was the return of Guatemalans following the end of their civil war in the 1990s. Michel Gaubaudan (2016), formerly with UNHCR and involved in the repatriation process at the time, has cited several important factors which contributed to the successful reintegration in Guatemala, including the following:

- an agreement among all actors, including guerilla groups, that return would be safe and populations would not be threatened;
- the use of international monitors to oversee the repatriation process to ensure the safety of returnees and the proper use of funding for the effort;
- the involvement of the private sector and NGOs to support the returning population;
- the ability of refugees to decide, within limits, the timing and conditions of their return; and
- assurances by the government and other actors that returning refugees would not be criticized for leaving, but would be treated with dignity.

These practices should be included in the Global Compact on Refugees. The return of refugees is an issue of growing importance to many host nations. Thus, it is vital that the global compact include safeguards that ensure that return is safe, voluntary, and structured, and that returning refugees can reintegrate into their home countries.

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9 The 1951 Convention relating to the Status of Refugees gives UNHCR the authority to declare that, because of changing country conditions, refugees no longer require protection in a host country and should avail themselves of protection in their own countries. See http://www.unhcr.org/excom/standcom/3ae68cfc610/note-cessation- clauses.html.
Mitigating Deterrence Strategies and the Externalization of Borders

Both compacts should acknowledge that the deterrence of large movements of refugees and migrants is a common practice to which states should offer protection alternatives. The New York Declaration did not direct the use of deterrence policies, but it encouraged “border cooperation” and the sharing of “best practices” in border enforcement.\(^1\) This language could be interpreted as promoting the extension of borders to halt large movements of refugees and migrants from reaching developed nations through cooperation from destination and transit countries. Both the Global Compact on Migration and the Global Compact on Refugees should clarify these terms, opposing deterrence schemes and promoting the use of protection policies and resources both at a nation’s borders and regionally.

The use of deterrence strategies to discourage large movements of refugees and migrants has become a widespread practice in developed nations. Australia has interdicted boats at sea and used offshore detention sites, where refugees have languished. The United States has deployed a deterrence strategy against Central American refugees marked by detention and interdiction. Finally, the European Union entered an agreement with Turkey to return Syrian refugees in 2015, causing refugees to take more dangerous routes to Europe. European nations are pressuring African nations to prevent their citizens from leaving their countries. These arrangements have been marked by incentives, both financial and otherwise, from powerful nations to origin and transit nations to prevent, halt, or otherwise lessen large movements of persons.\(^1\)

These strategies should not be deployed. However, if they are, they should be accompanied by protection measures to ensure that persons are not returned to their persecutors. If enforcement is externalized, then protection should be externalized as well.

In “The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants,” Bill Frelick, Ian M. Kysel and Jennifer Podkul examine how the human rights of asylum seekers are impacted under these arrangements. The authors define externalization of migration controls as arrangements between a destination country and a transit country to stem large movements of migrants. These arrangements involve interception by the transit country, the detention of would-be asylum seekers, and their return to their home country, often without proper screening of their protection claims.

The externalization of migration controls is rights-threatening when it blocks access to safe territory, including by frustrating a person’s ability to leave his or her country or to reach another country. The authors recommend that 1) externalization policies should include rights protections by increasing the protective capacity of authorities involved in migration control in transit countries; 2) developed states should condition funding to transit countries based on their implementation of human rights protections in law and practice; 3) greater support should be provided to regional and international organizations that protect the rights.

\(^1\) G.A. Res. 71/1 (Sept. 19, 2016).
\(^1\) Under the EU-Turkey deal, Turkey has asked for a loosening of visa restrictions for Turkish citizens to travel to Europe and for consideration for the admission of Turkey into the European Union. See Kingsley and Rankin (2016).
of refugees and asylum seekers, including the UNHCR; 4) border personnel should receive robust training in human rights law, and 5) expert civil society actors should be allowed to provide support to asylum seekers, including legal representation (Frelick, Kysel, and Podkul 2016, 209-10).

In “The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy,” Thomas Gammeltoft-Hansen and Nikolas F. Tan examine the broader tactics used by nations to stem refugee and migrant flows, including policies pursued within their borders. They argue that deterrence not only causes harm and offends international norms, but is also unsustainable and does not work. They cite successful legal challenges to deterrence policies in both domestic and international courts; the growing pressure from refugee-hosting states for more responsibility sharing, accompanied by the threat that they will move refugee populations forward to destination countries; and the mounting evidence that deterrence is not effective in blocking secondary movements. They also reference increasing direct and indirect costs to the states in question (Gammeltoft-Hansen and Tan 2017, 40-45).

The refugee crisis worldwide is, in reality, a crisis in institutionalized responses, as nations are physically blocking access to asylum, in direct opposition to refugee and human rights law. The authors make the case that there needs to be a “paradigm” shift that leads to a broader conception of refugee protection, and that this change should be memorialized in a binding instrument (ibid., 50-56).

Karen Musalo and Eunice Lee examine US enforcement tactics in response to the “surge” of Central American unaccompanied children and families into the United States in the summer of 2014 and how these strategies both failed to stem their migration and violated their rights.

Despite efforts by the United States and Mexico to stem the flow, the number of US border arrivals in 2016 matched or exceeded 2014 numbers, with the number of family units jumping 8,000 while the number of unaccompanied children fell 8,000 short of 2014 numbers (DHS 2016). Since late 2016, the number of Central American asylum seekers arriving at the US border has dropped, due in part to harsh rhetoric from the Trump administration and an uptick in asylum requests in Mexico and other countries in the region.

Musalo and Lee argue that these youth and young families have fled the endemic violence in the Northern Triangle by organized criminal networks which governments in the region have failed to control. They characterize the US policy of deterrence as constructive refoulement, and a violation of international law (Musalo and Lee 2017, 137-50).

The authors offer several recommendations, including:

• shifting US funding from interdiction to protection efforts in Mexico and Central America;

• ending the use of policies that undermine due process for children and families, including the use of detention, raids, expedited removal, and “rocket” dockets for unaccompanied children;
establishing protection programs in the region, such as in-country processing; and

• extending TPS to nationals of El Salvador, Guatemala, and Honduras residing in the United States (ibid., 172-79).

Tragically, the Trump administration is heading in the opposite direction in Central America, dismantling protection programs, such as the Central American Minors (CAM) program,\(^\text{12}\) and slashing the number of refugees resettled from the region. The administration has also terminated TPS for Honduras and may be poised to do so for El Salvador, which would affect close to 260,000 long-term residents of the United States from those two countries.\(^\text{13}\)

According to a study by the Center for Migration Studies of New York, at least 88 percent of these TPS recipients are employed, and they have 246,000 US-citizen children (Warren and Kerwin, 2017). The loss of status for these populations would eviscerate the TPS program and substantially weaken a pillar of the US refugee protection system. While temporary protection programs should not be used as a substitute for refugee protection, they can be effectively used to safeguard imperiled persons, many of whom will not meet the refugee standard, while states pursue durable solutions for them (Kerwin 2014, 46-47).

In a success story, Ninette Kelley, head of the New York office for UNHCR, points to Lebanon as an example of a response to a large refugee flow which has worked, based upon responsibility sharing and the use of protection policies, not deterrence. Lebanon, a country of 4.5 million persons, received over one million Syrian refugees from 2011-2015. The period was marked by economic pressures, sectarian tensions, funding shortfalls, and overburdened institutions, but also by the protection of hundreds of thousands of Syrians (Kelley 2017, 82-84).

Among the lessons outlined by Kelley are the need to engage local and national authorities from the beginning of the crisis; the need for better political analysis to inform contingency planning; the benefits of streamlined coordination; the advantages of linking humanitarian and development funding early on in a crisis; and the importance of predictable and multi-year funding. Kelley (ibid., 96-100) concludes that the cooperation between government actors at all levels, humanitarian organizations, and the world community seen in Lebanon should be the norm in responding to refugee crises.

For both global compacts, then, addressing the reality of deterrence strategies is vital. In the New York declaration, terms such as “border cooperation” and the sharing of “best practices” in border control can be interpreted to allow nations to move forward with agreements based on deterrence and enforcement. At a minimum, the global compacts must emphasize that protection measures must be included in any such arrangements, while at the same time discouraging deterrence practices altogether.

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\(^\text{12}\) The Central American Minors (CAM) refugee/parole program, established by the Obama administration in 2016, was a family reunification program which allowed minors from the Northern Triangle of Central America to join lawfully present family members in the United States, either with refugee or parole status. Both the refugee and humanitarian parole portions of the program have been terminated by the Trump administration. See https://www.uscis.gov/CAM.

\(^\text{13}\) The United States extended temporary protected status (TPS) for Honduras on November 6, 2017, for six months. A decision on El Salvador is scheduled for January 8, 2018.
Resettlement of Refugee Populations

A key component of the international refugee protection system is the ability of refugees to live in another country because of the likelihood they would be harmed if returned to their home country. Three traditional durable solutions exist: safe repatriation, integration into a country of first asylum, and resettlement to a third country. For the resettlement option to be triggered, a refugee or refugee family must be vulnerable, unsafe, or endangered in their country of first asylum.

In an era of rising xenophobia, it is important to identify new ways to protect and to integrate refugees in a safe and effective manner. To start, the Global Compact on Refugees should provide for increased refugee resettlement. Nations without refugee resettlement programs should establish them.

Less than one percent of the world’s refugees are resettled each year, but, according to UNHCR, 10 percent should be resettled to meet the global need. In 2015, for example, UNHCR projected that 960,000 refugees would need resettlement, but only 107,000 were accepted for resettlement to a third country — 90 percent to the United States, Australia, and Canada (UNHCR 2016, 26).

The Global Compact on Refugees must lay out a formula for reaching the 10 percent target within a certain time period, and establish an accountability mechanism to ensure that nations increase their resettlement slots accordingly. In order to encourage nations to meet this goal, new models of resettlement must be developed and brought to scale so that refugees can become fast contributors to their host countries’ social and economic lives.

In “Matching Systems for Refugees,” Will Jones and Alex Teytelboym propose a new framework for refugee resettlement, a matching system. This would entail the creation of a clearinghouse to which both refugees and the hosting agencies or communities would submit information about a refugee’s preferences and needs and match them with the capacities and priorities of the host countries and their local communities.

The matching criteria would be governed by 1) comprehensiveness, or the capacity of the agency or community to host refugees; 2) stability, as it would honor the priorities of host communities and the preferences of the refugees; 3) efficiency, such that one refugee family could not benefit at the expense of another; and 4) safety, giving refugees the ability to submit their preference as to where they want to go (Jones and Teytelboym 2017, 668-70).

The refugee matching system would be fairly applied. It would not determine which refugees were resettled, nor would it involve money changing hands, the use of tradeable quotas, or reliance on morally repugnant criteria, such as hosts trying to prioritize the admission of refugees of a given race, ethnicity, or religion. It could be applied locally (i.e., matching refugees to particular voluntary agencies, local areas, or even properties) or internationally (i.e., between states in a responsibility-sharing scheme).

Jones and Teytelboym maintain that the refugee matching system would have numerous benefits. In particularly, it could: 1) result in better matches between refugee families and particular resettlement locations, thus minimizing local resistance to resettlement; 2)
provide a refugee matching model that states could use; 3) allow matching systems across different states, like the European Union, that would make international relocation and resettlement more rapid, humane, and effective; and 4) coordinate, speed up, and optimize refugee matching around the world (ibid., 675-81).

**Addressing Xenophobia and National Security Concerns**

Even with a matching system that benefits resettlement nations, xenophobic trends and refugee-related security concerns need to be addressed. In “Another Story: What Public Opinion Data Tell Us About Refugee and Humanitarian Policy,” Brad Blitz looks at how public opinion in support of refugee protection can be used to hold governments more accountable for the protection of refugees and asylum seekers.

Blitz points out that governments in the United States and Europe, in painting refugee and asylum seekers as security threats, have pursued restrictive asylum policies since 9/11 which are at odds with the generally positive views by their citizenry on asylum and protection. His paper seeks to identify why this has happened and how this trend can be halted and reversed.

Blitz blames several factors for the emergence of a security-refugee linkage in a post-Cold War context, most notably cultural antagonism against refugees from majority Muslim countries, abetted by the responsibility of extremist groups in terrorist attacks. He also cites the association of refugees with concerns about economic migrants, such as their intention to integrate and whether they contribute economically to the nation; a focus on policies that prioritize human capital, encouraging high-skilled migration and discouraging those with low skills like many refugees; the use of conditional economic aid to control migration and as a replacement for receiving and integrating refugees; and the normalization of the externalization of border controls as an alternative to refugee protection and safe passage (Blitz 2017, 380-83).

Blitz offers several recommendations to reverse these misconceptions: court challenges to detention, the externalization of border controls, off-shore processing, and the separation of families; a public information campaign to document how restrictive asylum policies are contrary to foreign policy interests; and the education of public and government officials on the rights of refugees and asylum seekers under international and national laws (ibid., 390-94).

Given that national security concerns are rising in Europe and the United States, refugee resettlement programs are coming under increased scrutiny, even in situations in which refugees are thoroughly vetted before entering a country. The Paris and Brussels attacks in 2016, although not perpetrated by refugees, heightened this concern. As such, proposals to restrict the admission of refugees have surfaced in national debates, often as a way to gain political support through fearmongering.

For example, the United States has set a historically low ceiling of 45,000 admissions for fiscal year (FY) 2018 (White House 2017), while Europe has cut off the number of Syrian refugees arriving via Turkey. In both cases, national security concerns have been cited to justify the reduction in admissions, despite the lack of evidence that resettled refugees have
perpetrated attacks in host countries. In order to counter such arguments, advocates must make the case that resettlement programs are secure and offer the best model for protecting refugees in a safe manner.

In “How Robust Refugee Protection Policies Can Strengthen Human and National Security,” Donald Kerwin makes the case that every act of refugee protection — from prevention and mitigation of refugee-producing conditions, to investment in host communities, to full integration, third-country resettlement, and safe and voluntary return — promote security. Moreover, he argues that refugees have contributed substantially to the economic, diplomatic, and military strength of the United States.

Kerwin (2016a) points out that blocking admission or denying resettlement to refugees based on race, religion, ethnicity or national origin plays into the narrative and recruiting strategies of terrorists, who argue that nations in the West are at war with Islam and that Muslims should remain in the “caliphate” and fight against the West. Rhetoric which conflates Islam with terror not only creates xenophobia but also alienates the Muslim world (ibid.).

By contrast, nondiscriminatory, rights-respecting refugee protection programs can be an important component of a sound US foreign policy, as they relieve the burden on allied states and generate goodwill and a positive public image for the United States. If the US program is reduced and discriminates by national origin or religion, other nations would likely follow suit, resulting in even less protection for the large number of refugees and asylum seekers in the world. And it would do nothing to make the United States safer (Kerwin 2016b, 119-21).

Resettlement is used for particularly vulnerable refugees such as survivors of torture, those with medical conditions, and women and children. Syrian refugees resettled in the United States fit into this category (ibid., 111-16). Kerwin points out that refugees brought to the United States are the most exhaustively vetted persons that enter the country and that the radicalization of US citizens and noncitizens presents a greater threat. The US Department of State has reported that only one dozen of the nearly 785,000 refugees admitted to the United States since 9/11 have been arrested or removed due to terrorist concerns. Ensuring that refugees are integrated into American society and culture, Kerwin (ibid., 116-19) argues, would help prevent their potential radicalization.

Finally, reducing or eliminating America’s commitment to refugees would flaunt US values and undermine the nation’s reputation and commitment as a safe haven to the persecuted, thus limiting the “soft” power of the United States to influence foreign governments. (ibid., 121-24). For these reasons, the United States and other states should recognize the need to strengthen the global system of refugee protection, not to weaken it.

**Building Self-sufficiency for Refugees**

Part of providing durable solutions to refugees is enabling them to become self-sufficient, so they can contribute their talents to host countries and can support themselves and their families. Given the opportunity, refugees are able to bring distinct talents to a nation’s
economy, which provides refugees with stability and relieves the international community of the responsibility of supporting them in camps for long periods.

Studies show that, generally, refugees attain self-sufficiency over time. According to a study by the University of Notre Dame, within eight years of arrival refugees to the United States contribute more in taxes than they receive in benefits, while individually contributing up to $21,000 more after 20 years (Evans and Fitzgerald 2017, 1-2).

Facilitating economic self-sufficiency among refugees helps end the dependency of refugee populations and positively impacts local economies. Alexander Betts, Naohiko Omata, and Louise Bloom begin with the premise that all refugees are economic actors, but suggest that more study must be conducted as to why there are variations in the economic success of refugees.

In “Thrive or Survive: Explaining Variations in Economic Outcomes for Refugees,” Betts, Omata, and Bloom argue that supporting refugees’ capacity to become economic actors and entrepreneurs is crucial to their economic integration into local and global markets and in creating self-reliance. In terms of development, the traditional top-down or state-centric model is insufficient, as it focuses upon refugees’ vulnerabilities rather than their strengths. A better understanding of transnational, national, and local markets in which refugees participate is needed, and development aid should be adjusted accordingly (Betts, Omata, and Bloom 2017).

Betts, Omata, and Bloom conclude that market-based interventions, which are tailored to the markets in which refugees operate, are needed to support refugees’ income-generating activities, so that they can become self-sufficient more expeditiously. In furtherance of this goal, refugees and the internally displaced should be permitted to interact with private sector groups on the local, national, and international levels.

In addition, interventions and development aid should focus on improving the skills and education of refugees — growing their capacity and building their human capital — as a way to foster economic growth. Skills development, access to microcredit, and improved internet accessibility are needed to allow refugees to become entrepreneurs, which in turn will elevate their incomes. The adoption of these measures would benefit both refugees and their host communities. They would allow refugees to be important contributors to local and regional development (Betts, Omata, and Bloom 2017).

Refugees can also become self-sufficient if they receive sufficient training to pursue livelihoods, either in countries of first asylum or when they return to their home countries. In a yet unpublished paper, Leah Zamore analyzes attempts to meld development aid with refugee assistance, a recurrent theme in development and refugee protection circles. Zamore outlines the history of development aid as applied to refugees, explains how global politics have changed how aid is used over time, and argues for a less self-interested approach by donor states and multilateral institutions.

Zamore maintains that respect for refugee rights and the inclusion of refugees in national development plans should constitute the main condition for refugee assistance to host countries. Because development efforts on behalf of refugees are most effective when they
are aligned with development strategies owned and devised by host countries, it is vital to view refugees as part of, not separate from, the local population.

The focus of the aid community should be to strengthen the economies in which refugees live in ways that reduce inequality and facilitate equitable growth. Moreover, the developing countries that host the bulk of the world’s refugees should receive additional, long-term aid through grants, not loans, and not be subject to austerity policies.

In order to foster growth, development assistance should also include debt forgiveness for governments that agree to include refugees in the economic and social life of their countries. Corporations that use bad business practices and exercise tax avoidance should be excluded from these development strategies.

Additionally, host governments and donors must affirm the rights to which refugees are entitled, including the right to work, freedom of movement, and access to education, health care, and other benefits. Finally, Zamore asserts that development assistance targeted toward refugees should not replace a nation’s responsibility to resettle refugees in their own countries (Zamore forthcoming).

**Recommendations**

In order for the Global Compact on Refugees to be successful and make a difference on the ground, new initiatives must be advanced and new commitments made. UN member states should incorporate the follow recommendations in the Global Compact on Refugees.

**Responsibility Sharing**

UN member states should agree to a specific responsibility-sharing formula, based on a comprehensive refugee response framework, defining when a mass migration occurs and how nations can share their resources in protecting large groups of refugees and migrants. The Global Compact on Refugees should be the instrument for forging a responsibility-sharing agreement.

Refugee protection measures should be front and center in any response to the large movement of refugees and migrants. These include the use of group determinations and the provision of legal protection as part of the screening process; “protection-sensitive” border policies to ensure that persons receive due process; and the removal of reservations from the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees.

Social, education, and healthcare support should be provided to large populations in countries of first asylum or refugee resettlement nations.

The global community should develop an early warning system to identify nations in crisis and use peacekeeping operations and development to stabilize nations in crisis.
**Filling the Gaps in Protection**

Nations should implement the principles of the Nansen Initiative, which outline steps nations should take to protect persons displaced by natural disasters and climate change, and the principles of the MICIC initiative, which offers guidelines to protect migrant workers in cases of conflict or natural disaster. Such principles should be incorporated in the Global Compact on Refugees and the Global Compact for Safe, Orderly, and Regular Migration.

Temporary protection measures should be used by host states to protect populations which may not meet the refugee definition but are in need of protection until a conflict or natural disaster has ended and the danger is gone. These measures should be based on the principle of *non-refoulement* and include an option for long-term residents to remain permanently in the host nation.

Nations that have not ratified binding instruments, such as the UN Convention on the Rights of All Migrant Workers and Members of their Families, or signed onto the UN Convention relating to the Status of Refugees, should do so.

Nations should adopt policies that ensure that immigrant populations, particularly those without legal status, have access to services and are not subject to enforcement actions during a natural disaster or armed conflict.

The repatriation of refugee populations should be truly safe and voluntary. If not possible, alternative solutions should be provided, such as labor mobility, local integration, and third-country resettlement. UNHCR should re-examine the requirements for invoking cessation clauses and not participate in repatriations which are not truly voluntary. Once it is established that repatriation is an option that is safe and voluntary, refugees should be allowed to participate in the process of determining the conditions of return, including “go and see” visits to their home country before making a final decision to return. These steps should be outlined in the Global Compact on Refugees.

**Reducing the Use of Deterrence Strategies**

Nations should adopt a refugee protection model that replaces interdiction and return practices with protection policies, including regional comprehensive refugee response frameworks. The externalization of borders in the name of “border cooperation” should be replaced with an emphasis on the externalization of protection.

Destination states should assist transit countries to increase their capacity to protect refugees, and both destination and transit states should allow the admission of refugees at their borders and for resettlement. Assistance to host nations should be conditioned upon the implementation of human rights standards in addressing large flows of refugees and migrants.

International organizations should be provided access to large populations of refugees and should be funded to assess their needs and provide protections. Destination and transit countries should partner with civil society to provide assistance and protection to refugees, and to accept referrals from civil society of cases that warrant asylum protection.
Nations should not use deterrence tactics at their borders, including limiting access to asylum procedures and due process; detention; pushbacks; or the closing of borders. In addition, the externalization of borders must be replaced with the externalization of protection.

In responding to large refugee inflows, nations, in conjunction with international humanitarian and refugee agencies, must form a coherent strategy that invests in contingency planning and includes local and national authorities in such planning; coordinates service delivery in conjunction with communities who are served; and links humanitarian and development funding. Stable, multiyear funding must be committed to support this strategy.

**The Resettlement and Self-sufficiency of Refugees**

The global community should commit to resettling 10 percent of the world’s refugees per year by 2030.

A refugee matching system which synchronizes the needs of refugees and host communities — on international, national, and local levels — could be effective in maintaining refugee relocation systems, particularly in a time of increased security concerns and growing xenophobia.

Nations should commit to launching public information campaigns that highlight the benefits of refugee resettlement and to de-linking refugee resettlement from national security issues.

Refugee populations should be integrated into local communities in order to benefit refugees and host communities, and to prevent radicalization.

Refugee resettlement programs — with rigorous screening — are needed to save lives, expand protection opportunities, and uphold principles of security for all persons. Developed nations without refugee resettlement programs should commit to establishing them and those with resettlement programs should expand their programs.

Development assistance should be directed to build the capacity of refugees to work and become entrepreneurs, and host nations should accommodate this goal by providing work authorization and labor mobility.

Investment in education, skills-building, and infrastructure should be increased in host countries in ways that both benefit host communities and allow refugees to become self-sufficient, including as entrepreneurs. Better data, research, and analysis are needed to understand the economic and political markets in which refugees operate and to eliminate barriers to their independence.

The development plans of nations, and thus the aid they provide, should include refugee populations and facilitate their economic integration into their country. Aid to host countries should be increased and should not be in the form of loans or conditioned on the implementation of austerity measures.

The rights of refugees in a host country should be protected as a condition of development assistance. Refugees in a host country should be entitled to work, freedom of movement, and access to education, health care, and other benefits.
Conclusion

The Global Compact on Refugees represents an unprecedented opportunity to enhance and strengthen the international refugee protection system. The current refugee situation—which can seem insurmountable and intractable—calls for new thinking and new models for action. Current international instruments governing refugee protection, including the 1951 Refugee Convention and the 1967 Protocol, should be generously interpreted and implemented.

UNHCR and UN member states also need to be bold in introducing new ideas and models of protection into the Global Compact on Refugees. Responsibility sharing must characterize refugee protection efforts, or the situation will only grow worse.

In addition, international legal instruments cover far too few forced migrants. The principles of other international agreements which respond to nontraditional push factors—such as the Nansen and MCIC initiatives—must be honored. Nations should consider increasing legal avenues for forced migrants who may not fit into the traditional refugee definition but still have valid protection concerns.

In order to facilitate responsibility sharing, nations must refrain from using deterrence policies to manage large movements of refugees and, at a minimum, deploy protection measures into regions of large movements. As a result, more nations must commit to resettlement programs, which enhance national security and help to spread the responsibility to protect refugees.

Finally, protracted refugee situations call for the empowerment of refugees, both economically and as participants in the life of the local community. This can be achieved by how aid is delivered with the goal of facilitating the self-reliance and self-sufficiency of refugees where they are located.

The Global Compact on Refugees and the Global Compact for Safe, Orderly, and Regular Migration, which are currently being considered by the United Nations, are opportunities for the world to reconsider old approaches to refugee protection. The global community should not miss the opportunity to strengthen refugee protection in an era of increased migration.

REFERENCES


The Journal on Migration and Human Security (JMHS) is a peer-reviewed, public policy publication of the Center for Migration Studies of New York devoted to the US and international policy debates on migration. The journal draws upon the knowledge, expertise, and perspectives of scholars, public officials, faith communities, community-based organizations, nongovernmental organizations, corporate leaders, and others. The journal’s theme of “human security” is meant to evoke the widely shared goals of creating secure and sustaining conditions in migrant sending communities; promoting safe, legal migration options; and developing immigration and integration policies that benefit sending and receiving communities and allow newcomers to lead productive, secure lives.

The Center for Migration Studies of New York (CMS) is an educational institute/think tank devoted to the study of international migration, to the promotion of understanding between immigrants and receiving communities, and to public policies that safeguard the dignity and rights of migrants, refugees, and newcomers (www.cmsny.org). CMS was established in 1964 and formally incorporated in 1969 by the Congregation of the Missionaries of St. Charles, Scalabrinians, an international community of Catholic priests, nuns, and lay people dedicated to serving migrants and refugees. CMS is a member of the Scalabrini International Migration Network (SIMN), a global network of more than 270 entities that provide services to migrants, including shelters along migrant corridors and welcoming (integration) centers in receiving communities. In fulfillment of its mission, CMS publishes journals, including the International Migration Review and the Journal on Migration and Human Security, books, conference proceedings, and other papers; sponsors conferences, meetings, briefings, symposia, and dialogues; produces evidence-based, policy-relevant research; provides expert support to local, national, and international institutions, particularly faith-based institutions; and maintains extensive archives on the history of immigration in the United States.