EXPERTS INITIATIVE ON THE GLOBAL COMPACT ON REFUGEES

On October 2-3, 2017, the Zolberg Institute on Migration and Mobility of The New School convened a meeting of experts on refugee law and policy to deliberate on, and to make concrete recommendations for, the Global Compact on Refugees (GCR). The meeting was convened with support from the Open Society Policy Center and held at the offices of the Open Society Foundations in New York City.

The following is a working paper prepared for the Experts Group.

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Extending the Scope of International Protection: Categories for Protected Forced Migrants


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This paper addresses the current refugee definition and discusses how categories of protected persons might be expanded. I begin by outlining the reasons for formally extending the scope of international protection, including the diverse drivers of contemporary displacement as well as the challenges raised by inconsistent state practices and the lack of globally shared standards. From here I provide a survey of existing approaches and proposals by first turning to the work of scholars who have put forward various alternatives to the Convention definition. I then outline existing regional instruments, such as the 1969 OAU Convention and Cartagena Declaration, as well as the EU framework, all of which provide acknowledgment of the need for more inclusive coverage. Against this backdrop of scholarly debate and existing practices, I turn to the Model International Mobility Convention’s approach to expanding the scope of protection, to offer a starting point for further discussion. The paper assumes at the onset that what is required is the recognition of new globally shared categories of protection, to account for the many people not covered by the traditional refugee definition, while accepting the premise that there are compelling pragmatic reasons not to reopen the Convention itself. At the same time my discussion takes the New York Declaration’s proposed Global Compact on Refugees as signaling an important moment for the progressive reform of international protection. I thus conclude by briefly outlining potential pathways for implementation and how these might align with the development of the Global Compact on Refugees.

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2 The “Model International Mobility Convention” proposes a framework for mobility with the goals of reaffirming the existing rights afforded to mobile people as well as expanding those basic rights when warranted.
Background

If non-refoulement is the cornerstone of international protection, the current refugee definition might be appropriately imagined as the arch. This definition formally articulates the scope of those entitled to (and excluded from) the status and rights enshrined in the 1951 Refugee Convention, while providing the basis for the UNHCR's protection mandate. Despite suffering long-running criticism as anachronistic and overly narrow, the refugee definition—as given in Article 1 of the 1951 Convention and largely mirrored in the UNHCR Statute—has proved key to the development and consolidation of a protection regime that can claim to be truly global in reach.³ By providing a generalized definition of the refugee the 1951 Convention (in hindsight) offered a conception of refugeehood that could eventually travel, providing a pathway for the designation to evolve and function internationally, rather than remaining linked to specific locations and particular events.⁴

Although the 1951 Convention (and 1967 Protocol) represents the core of the international protection regime, there is increasingly widespread recognition that the contemporary realities of forced displacement often exceed the 1951 Convention’s refugee concept.⁵ Examples of such drivers that fall outside the explicit Convention grounds include generalized violence and state failure, as well as famine, environmental disaster and climate-change induced displacement.⁶ Indeed, at present vast numbers of persons who are assisted by

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³ The correspondence is not perfect. The UNHCR statute emphasizes (with some apparent tension) a mandate applying to groups and categories of refugees, while simultaneously affirming the individualistic definition reflected in the 1951 Convention. Goodwin-Gill, G. The Refugee in International Law (1996), p. 8.

⁴ This innovation was not without its significant costs, premised as it was on a move away from a group-based model toward a more individualistic and legalistic approach (ibid., p. 6). See discussion below, as well as Hathaway on the interwar transformation of refugeehood; Hathaway, J. “The evolution of refugee status in international law: 1920-1950.” Int'l & Comp. L.Q. (1984); as McAdam also notes of the earlier interwar approach, “[e]ven when notions of social and political upheaval subsequently came to inform refugee definitions, these remained circumscribed by particular crises and linked to ethnic or national origin.” McAdam, J. Complementary Protection in International Refugee Law (2007), p. 25.

⁵ This concept of refugeehood (as complemented by the 1967 Protocol) encompasses any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence […], is unable or, owing to such fear, is unwilling to return to it.” UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, Article 1.

⁶ This lack of coverage under international law for persons displaced by the latter causes is made explicit by the UNHCR Handbook, which indicates that the 1951 Convention “rules out such persons as victims of famine or natural disaster”. UNHCR. Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, ¶ 39. Perhaps more strikingly, no international legal instrument exists that governs the protection of internally displaced persons the largest group of ‘persons of concern’ to the UNCHR.
the UNHCR may not, from a legal standpoint, qualify as refugees under the current definition. This in turn has highlighted the need to develop a more normatively coherent and unified approach to the provision of international protection, one that is more broadly grounded in addressing vulnerabilities that may fall beyond Convention grounds. This is because the protection needs of a person fleeing civil war or mass human rights violations can prove equally urgent to those escaping persecution and thus may frequently justify an equivalently robust response.

The institutional evolution of the refugee regime proved capable of expanding its temporal and geographic boundaries, a process initiated by the pragmatic post-war expansions of UNHCR’s mandate and culminating in the 1967 Protocol. Yet the preservation of an individualistic model and formally narrow grounds for refugeehood—one rooted in and deeply shaped by the historical context of its formation—remains a pressing issue for the refugee definition. While the 1967 Protocol accomplished the formal universalization of the Convention’s reach, it did little to transform the categories of protected persons entitled to claim international protection in a manner that reflected the changing realities of forced migration that were already apparent at the time. Moreover, subsequent attempts to further revise the legal scope of persons entitled to international protection have been far less global in reach. Such developments have largely emerged in the form of regional instruments, most notably, the OAU Convention and Cartagena Declaration. This has also played out in the often, more or less, ad-hoc decisions of particular states to incorporate different populations into their domestic refugee and asylum policy, while creating various alternative forms of subsidiary protection status to be extended to other groups. The latter trend has arguably produced inconsistencies in access to protection and arbitrary variations in standards of treatment. Moreover, the larger global terrain of international protection reveal a larger dynamic of vastly uneven treatment and protections gaps, with asylum and expansive rights for recognized refugees in the global north and policies of humanitarian relief (and often encampment) for refugees in the global south. These problematic outcomes suggest the need for a more harmonized, formal and global approach.

**Past Proposal and Approaches**

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7 Arboleda goes so far as to suggest that the “general definitions of refugee status contained in the Statute of the UNHCR and the 1951 Convention have been rendered obsolete by evolving realities in the third world.” Arboleda, E. “Refugee definition in Africa and Latin America: The lessons of pragmatism.” *IJRL* 3.2 (1991), p. 188.


Scholarly debate (with some simplification) ranges from defending the traditional refugee concept, reconceptualizing refugeehood, or advocating for the introduction of explicitly novel protection categories. Price\textsuperscript{10} and Martin\textsuperscript{11} respectively support maintaining the current refugee definition, emphasizing the necessity of its focus on persecution as a ground for political asylum, while also conceding that a narrow approach remains fundamental to the continued integrity of the practice of asylum. Among the second group, Shacknove has argued for an expansive view of refugees as persons “whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible.”\textsuperscript{12} More recently, Owen has offered an expansive political re-definition of the refugee, as “one whose basic rights are unprotected by their state and can only be protected through recourse to the international society of states” by another state or international organization “acting in loco civitatis, where it can so act without breaching the constitutive norms of the regime of governance”\textsuperscript{13} Zolberg et al. offer a sociological approach to refugeehood, defining such persons “as those whose presence abroad is attributable to a well-founded fear of violence” understood regardless of the motivations underlying this threat or source of violence—ranging from the incidental consequence of conflict or the imposition of “conditions that make normal life impossible.”\textsuperscript{14} Finally, other scholars such as Betts, have suggested that the changing nature of cross-border displacement demands an entirely new category that moves beyond the traditional refugee definition. For Betts, what is needed is a coherent protection framework for “survival migrants” to fill existing gaps in protection by more directly responding to the diverse drivers of displacement, such as environmental change, food insecurity, and generalized violence.\textsuperscript{15}

Regional efforts to address the protection gaps that exist in the current refugee definition can be broadly broken down into two approaches: widening the grounds for claiming status or introducing additional subsidiary categories for international protection, with the former emerging in the global south and the latter in the global north. Within the first group, the 1969 OAU Convention proceeds by explicitly expanding the reach of refugeehood. In addition to serving a similar function as the 1967 Protocol (by eliminating the geographic-temporal limits of the 1951 Convention) it provides an extended definition that includes:

\begin{enumerate}
\item Price, M. Rethinking asylum: history, purpose, and limits (2009).
\item Shacknove, A. “Who is a Refugee?.” Ethics 95.2 (1985), p. 277.
\end{enumerate}
“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”

As a binding legal instrument, the OAU Convention’s definition offers a substantive complement to the current refugee definition by including persons who face generalized and indiscriminate threats that need not be related to the persecution grounds articulated in the 1951 Convention. Importantly, the definition includes events that may occur “in either part or the whole” of a country, further broadening the grounds of coverage. The 1984 Cartagena Declaration takes a largely similar approach, extending the scope of those recognized as refugees 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”

While a non-binding instrument, the Cartagena Declaration nonetheless has created a regional framework of customary norms for recognizing refugees on a broader basis. Although not identical, there are important parallels between these approaches that are worth highlighting. Both the OAU Convention and Cartagena Declaration build upon the 1951 Convention by expanding on its refugee definition. They do so by generally moving beyond a ‘subjective’ and ‘individualistic’ focus to cover ‘objective’ events that may affect indefinite classes of people. These broadened conditions for requiring international protection need not be related to the five grounds of persecution given in the 1951 Convention; moreover, the respective definitions make clear that such threats are not confined to those resulting from the actions of a state or its agents. In doing so, these instruments provide a framework that is more easily adaptable to contexts of group-displacement (especially those related to ‘war-like’ situations), while also allowing refuge

16 Whether or not the 1951 Convention covers generalized threats is arguable; see Holzer, “The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence,” *UNHCR, Division of International Protection*, 2012. However Kälin notes that even when interpreted in this expansive manner, the 1951 Convention would still seem to demand “a showing of a well-founded fear of persecution on the part of every applicant.” Kälin, W. “Refugees and Civil Wars: Only a Matter of Interpretation?,” *IJRL* (1991), p. 451.

17 The convergence is notable, with the Cartagena Declaration largely mirroring the conditions articulated in the OAU Convention; indeed, UNCHR advises that the “types of situations or circumstances” covered can be “largely assimilated.” *UNHCR, Guidelines on International Protection No. 12*, (“Armed Conflict and Violence”) 2016, ¶8.
to be granted across a range of circumstances and without necessarily implying that the state of origin is responsible for flight. These instruments thus introduced a qualitatively different concept of the refugee, one that does not require the conditions of deliberateness or discrimination.\(^\text{18}\)

In the second group of multilateral frameworks, the EU approach—as developed in EU Directive 2011/95/EU—proceeds by primarily preserving the current refugee definition, with some further elaboration, while introducing formal subsidiary protection groups to cover persons who fall outside the formal scope of the 1951 Convention.\(^\text{19}\) Significantly for this discussion, the EU Qualification Directive does expand the relevant agents of persecution to include non-State actors; it also specifies sexual orientation as constituting a persecution ground on the basis of belonging to a particular social group.\(^\text{20}\) However, the main innovation of the EU approach is the introduction of ‘subsidiary protection status’ as a mechanism for extending protection to persons who do not meet the 1951 Convention definition, but nonetheless are at risk of serious harm, either because of the threat of torture, inhuman or degrading treatment or “by reason of indiscriminate violence in situations of international or internal armed conflict.”\(^\text{21}\)

The explicit purpose of EU Directive 2011/95/EU was to harmonize the otherwise disparate complementary protection categories that had been developed domestically by member states. However, in contrast the regional instruments discussed earlier, the EU framework not only employs a markedly divergent approach, based on the creation of additional and distinct protection categories, but also applies a comparatively narrow ground for international protection. Moreover, the differential (and hierarchal) structure of these categories has raised concerns regarding the normative coherence of this framework that parallel those of similar domestic approaches. In particular, it formalizes a ‘two-tier’ protection structure that unjustifiably differentiates between the rights and status accorded to persons with recognized international protection needs and Convention refugees.\(^\text{22}\) More striking, and worrying for the integrity of this approach, are instances of states “downgrading” groups of persons from refugee status to other forms of protection in the context of situations of “mass influx” – suggesting that


\(^{20}\) Directive 2011/95/EU, Article 6 includes parties or organizations with effective control of either the whole or substantial parts of the country, as well as non-State actors in situations where the state or international organizations are unable or unwilling to provide protection; additionally, beyond explicitly including sexual orientation, Article 7 further fleshes out the reasons for persecution articulated in the Convention grounds.

\(^{21}\) Directive 2011/95/EU, Article 15.

\(^{22}\) See McAdam, J. “The European Union Qualification Directive” *IJRL* (2005). Notably, the recent EU Council mandate for negotiations on the new [*Qualification Directive proposes to align the content of protection for persons entitled to refugee and subsidiary protection status*]; see also [*EU Procedure 2016/0223/COD*].
this explicit protection hierarchy provides problematic opportunities for politicizing the application of full Convention status.\textsuperscript{23}

\textbf{Forced Migration in the Model International Mobility Convention}

While affirming the historical achievement of the 1951 Convention in securing a universal status for refugees, the Model Convention also acknowledges the need to introduce a novel common protection category to reflect the broader complex of causes that produce displacement. The Model Convention advances a new category of protection called “forced migrants”—a group that includes any individual who, owing to the risk of serious harm, is compelled to leave or unable to return to her or his country of origin. This includes persons subject to,

\begin{quote}
“serious threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order” as well as those at risk of suffering serious harm, understood as a “threat to an individual’s physical survival, which is external to her or him, or threats of torture or inhuman or degrading treatment or punishment or arbitrary incarceration, such as may arise during indiscriminate violence, severe international or internal armed conflict, environmental disaster, enduring food insecurity, acute climate change, or events seriously disturbing public order.”\textsuperscript{24}
\end{quote}

In creating this category the Model Convention non-exhaustively frames “harm” to include ‘factual circumstances’ enumerated in earlier regional approaches, but also includes threats resulting from environmental disasters, enduring food insecurity, acute climate change, or other events seriously disturbing public order.\textsuperscript{25} This group thus represents a broader class of which refugees are a subset.

In articulating these proposals the Model Convention incorporates many key components of the existing regional instruments while also drawing on elements from alternative sources to significantly modify and build on these past approaches.\textsuperscript{26} It departs from the OAU Convention and Cartagena Declaration by largely preserving the 1951 Convention definition, only expanding

\textsuperscript{23} e.g. the German government’s 2016 announcement to only grant subsidiary status to Syrians—one increasingly questioned in German courts; “17000 Flüchtlinge klagen auf höheren Schutzstatus in Deutschland,” \textit{Süddeutsche Zeitung}. 18.10.2016.
\textsuperscript{24} Model International Mobility Convention, Article 124, §1. a, d.
\textsuperscript{25} Model International Mobility Convention, Article 125.
\textsuperscript{26} Directive 2011/95/EU of the European Parliament and of the Council of Europe.
the original persecution grounds to include gender. However, it also diverges from the EU approach in not merely complementing the refugee definition by way of introducing a form of subsidiary status. Rather, it integrates features from earlier regional definitions, as well as other additional root causes of forced displacement, into a broader category that encompasses both Convention refugees and these groups.

As framed, all forced migrants are uniformly entitled to international protection, in order to avoid creating unjustified hierarchies in protection status. In doing so the Model Convention departs from many existing forms of subsidiary or complementary protection. In this manner, the Model Convention reflects the view that a normatively coherent and rights-based approach to the provision of international protection must begin by addressing vulnerability, whether caused by persecution, generalized violence, or rooted in forms of state breakdown and insecurity that expose individuals to serious harm. It therefore advances a uniform and universal category, with a broader scope than that given by the 1951 Convention, to encompass and grant status to all persons in need of international protection.

Pathways and Challenges to Implementation

The Global Compact on Refugees promises to support the development of a framework for “comprehensive and people-centred” responses to refugee situations.\textsuperscript{27} Although it will not be a legally binding document, the Compact nonetheless provides an important opportunity to potentially re-assess, update, and harmonize approaches to international protection in a manner that more fully recognizes and addresses the contemporary causes of displacement.

Additional Protocol to the 1951 Convention: While a long-term prospect, the creation of a novel international instrument offers a basis for introducing binding forms of protection for forced migrants not covered by the refugee definition. This proposal could complement the call of Türk et al. to “translate States’ ongoing commitments and international obligations into a predictable response” to large scale refugee situations via an additional Protocol that would formalize a Comprehensive Refugee Response Framework.\textsuperscript{28} This might be accomplished by further incorporating an expanded refugee definition (as in earlier regional instruments) or by providing for additional protection categories in the instrument.

\textsuperscript{27} UN High Commissioner for Refugees (UNHCR), \textit{Towards a global compact on refugees: a roadmap}, 4 April 2017, ¶3.

Amendment to UNCHR Statute: Another approach lies in amending the UNHCR Statute to formally expand the scope of protection and assistance provided by the organization. At present UNCHR practice already extends to “persons of concern” not explicitly covered by the current refugee definition. Revising the UNHCR statute could further harmonize the legal basis for offering protection to individuals whose situation cannot be causally linked to Convention grounds, as well as further expanded to address displacement resulting from natural disasters or climate-change. To this end, the UNHCR Statute could explicitly state that UNHCR’s functions shall extend to all displaced persons in need of international protection.

GA Resolution adopting recent UNHCHR Guidelines: An additional pathway to broadening global recognition for expanded international protection could be implemented by way of a GA resolution affirming and adopting the 2016 UNCHR Guidelines on persons fleeing armed conflict and violence.\(^{29}\) Moreover, existing gaps in protection for internally displaced persons might similarly be addressed by a GA resolution affirming and adopting existing UNHCR guidelines for IDP’s and providing greater assistance for maintaining the organization’s role in providing surrogate protection in such contexts. While the UNHCR guidelines already shape state practice, such formal affirmations could provide further support for domestic legal incorporation and interpretation.

Many serious obstacles lie in the way of the above proposals. As evidenced by the New York Declaration, States remain resistant to the introduction of new legally binding international instruments. Formal amendment of the UNCHR Statute has also proved historically challenging. Moreover, the successive expansions in the organization’s mandate by way of GA resolutions has not continued to proved sufficient to address the current realities of forced displacement. This is in part because the architecture of the current refugee regime, which reserves the final prerogative to determine refugee status to States, structurally limits much of the operational resources of UNHCR to discretionary funding, and provides UNHCR with no enforcement powers to complement its supervisory capacity.\(^{30}\) The latter considerations suggest that even a GA resolution affirming the already organizationally operative UNHCR guidelines may lack more than rhetorical effect. Indeed, as with many past advances in international protection, substantive state ‘buy-in’ remains essential. However, placing the expansion of existing categories of protected persons in the broader context of the development of the Refugee Compact provides possible avenues for surmounting these challenges. As indicated by the zero-draft of the New York Declaration’s emphasis on responsibility sharing and as (still) reflected in the final framing


\(^{30}\) On this last point, see Simeon, ed. *The UNHCR and the supervision of international refugee law* (2013).
of objectives for the Refugee Compact,\textsuperscript{31} this ongoing process for strengthening international protection rests on the recognition that such reforms must be pursued collectively by states. One may therefore hope that the importance and value of expanding, reforming, and harmonizing existing protection categories shall be recognized as a crucial component of developing a durable and comprehensive response framework for globally addressing contemporary forced migration.

\textsuperscript{31} UNHCR, “\textit{Zero Draft Global Compact on Responsibility Sharing for Refugees},” 2016.